

SCHOOLS LEGAL SERVICE

Certificated Layoffs: Rights of Persons on the Preferred Rehire List

Topic	Probationary	Permanent
Education Code section	44957	44956
Reemployment preference period (commencing July 1)	24 months	39 months
Rehire priority based on seniority?	Yes	Yes
Can employees improve their chances of rehire by attaining additional credentials/authorizations?	Yes, depending on the requirements of the posted opening	Same as for probationary
Criteria available for deviation from seniority?	Yes, if based on credential required for an opening. In some cases, may also bring back out of order based on other factors. See #1 below.	Same criteria as for probationary
Priority over outside applicants	Yes, whether for sub, temp, categorical or tenure track openings	Same as for probationary
Sub pay rate	Established sub rate	First 20 days = established sub rate Starting with 21 st day in any 60 day period = reverts to the employee's contract rate for current year as though never laid off
Medical plan reinstatement for sub work?	No	Not clear from the statute. Depends on definition of "compensation." See note #2 below
Temp pay rate	Applies	Applies
Categorical pay rate	Applies	Applies
Collective bargaining implications	Yes. So-called "effects of layoff" must be discussed if requested by the exclusive representative. See Note #3 below.	Same as for probationary

Notes:

- #1 Both statutes say that an employee may (but need not) be brought back for a position without the requisite credential if he/she has an applicable college major or minor, or can pass a district-prescribed competency test. In the present era, statutes and regulations for site waivers ignore majors, minors or masters degrees. The emphasis is on upper division or graduate school units. Another significant problem: this language has not been revisited by the Legislature to recognize compliance issues under NCLB, CLAD or the *Williams* settlement.
- #2 For permanent teachers, "compensation" is adjusted after 20 days of substitute work in any 60 day period. There is no definition of compensation, and an argument might arise as to whether this adjustment extends to restoration of group medical plan eligibility. We express no opinion here on that issue.
- #3 "Effects of layoff" bargaining usually refers to topics arising during the time frame between May 15 and June 30 as noticed employees prepare to move to the preferred rehire list. Any such agreement could also cover the process and sequencing of callbacks for daily substitute work, the deadline for accepting a rehire offer, and the further obligations of the employer if someone turns down a rehire offer.

The Education Code Sections

44957. Probationary Employees: [*Editorial note:* this preferred rights code section covers those who received a layoff notice while still probationary.]

44957. Any probationary employee whose services have been terminated as provided in Section 44955 shall have the following rights:

[Basic preferred rights to return for 24 months for various types of work]

(a) For the period of 24 months from the date of such termination, any employee *who in the meantime has not attained the age of 65 years*¹ shall have the preferred right to reappointment, subject to the prior rights to reappointment by all permanent employees as set forth in Section 44956,² in the order of original employment as determined by the governing board in accordance with the provisions of Sections 44831 to 44855, inclusive, if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service. Except as otherwise provided, no probationary or temporary employee with less seniority shall be employed to render a service which such employee is certificated and competent to render and provided that such an employee shall be given a priority over employees whose right to a position is derived pursuant to Section 44918. However, prior to reappointing any employee to teach a subject

¹ This age limit language long ago became unenforceable in California.

² This reaffirms that permanent (tenured) staff have priority over probationary persons on a rehire list.

which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require³ the employee to pass a subject matter competency test in the appropriate subject.

[Deviations from the reappointment sequence]

(b) Notwithstanding subdivision (a), a school district may deviate from reappointing a probationary employee in order of seniority for either of the following reasons: (1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the employee has special training and experience necessary to teach that course or course of study, or to provide those services, which others with more seniority do not possess. (2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

[Upon return to a tenure track position,⁴ no break in service]

(c) As to any such employee who is reappointed, the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service, he shall retain the classification and order of employment he had when his services were terminated, and credit for prior service under any state or district retirement system shall not be affected by such termination; provided, however, that the period of his absence shall not be counted as a part of the service required for attaining permanent status in the district or, except as provided in subdivision (e), for retirement purposes.

[Specific reference to a return for substitute work]

(d) During the period of his preferred right to reappointment, any such employee shall, in the order of original employment, and subject to the rights of permanent employees as set forth in Section 44956, be offered prior opportunity for substitute service during the absence of any other employee who has been granted leave of absence or who is temporarily absent from duty; provided, that his services may be terminated upon a return to duty of such other employee, that such substitute service shall not affect the retention of his previous classification and rights, and that such an employee shall be given a priority over employees whose right to a substitute position is derived pursuant to Section 44918.

³ This sentence in effect would preclude an automatic award of a board or site-based waiver to a person on the rehire list who lacks a qualifying valid credential for an open position. The statute does not, however, explain what sort of subject matter competency test might be required. Given NCLB highly qualified mandates, perhaps the employer could prescribe a CSET exam? That would set the bar higher than mere possession of units required for a waiver.

⁴ A return to substitute, long term temp or - possibly - categorical section 44909 positions is not necessarily the type of reappointment referred to here. See subdivision (d) below for reference to returns for substitute or temporary replacement returns.

[Retirement system re-entry considerations⁵]

(e) At any time prior to the completion of one year after his return to service, an employee reappointed under the provisions of this section may elect to continue or to reinstate his membership and interest in any state or district retirement system and to receive retirement benefits as if no absence from service had occurred. In the event of such election the employee shall pay into the retirement system the amount of his share of contribution and the district's share of contribution attributable to the period of absence and the amount of any contributions withdrawn, plus interest.

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44956 Rehire Rights for Permanent Teachers

[Enhanced benefits for permanent employees on a layoff rehire list]

(a) (*) Any permanent employee whose services have been terminated as provided in Section 44955 shall have the following rights:

(1) For the period of 39 months from the date of such termination, any employee *who in the meantime has not attained the age of 65 years*⁶ shall have the preferred right to reappointment, in the order of original employment as determined by the board in accordance with the provisions of Sections 44831 to 44855, inclusive, if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render. However, prior to reappointing any employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require⁷ the employee to pass a subject matter competency test in the appropriate subject.

(2) The aforesaid right to reappointment may be waived by the employee, without prejudice, for not more than one school year, unless the board extends this right, but such waiver shall not deprive the employee of his right to subsequent offers of reappointment.⁸

⁵ This subdivision apparently refers to returning employees who in the meantime retired under STRS (or similar system) but now want to reinstate.

⁶ This age limit language long ago became unenforceable in California.

⁷ This sentence in effect would preclude an automatic award of a board or site-based waiver to a person on the rehire list who lacks a qualifying valid credential for an open position. The statute does not, however, explain what sort of subject matter competency test might be required. Given NCLB highly qualified mandates, perhaps the employer could prescribe a CSET exam? That would set the bar higher than mere possession of units required for a waiver.

⁸ In our limited experience, employers treat probationary persons in the same manner. Several districts statewide reportedly flesh out details for callbacks and waivers by an MOU process. But beware bargaining agreement arrangements which purport to apply to non-represented staff. These statutes do not distinguish between unit and non-unit members.

(3) Notwithstanding paragraph (1), a school district may deviate from reappointing a certificated employee in order of seniority for either of the following reasons:

(A) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the employee has special training and experience necessary to teach that course or course of study, or to provide those services, which others with more seniority do not possess.

(B) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.⁹

[Upon return to a tenure track opening,¹⁰ no break in service]

(4) As to any such employee who is reappointed, the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service, he shall retain the classification and order of employment he had when his services were terminated, and credit for prior service under any state or district retirement system shall not be affected by such termination, but the period of his absence shall not count as a part of the service required for retirement.

(5) During the period of his preferred right to reappointment, any such employee shall, in the order of original employment, be offered prior opportunity for substitute service during the absence of any other employee who has been granted a leave of absence or who is temporarily absent from duty; provided, that his services may be terminated upon the return to duty of said other employee and that said substitute service shall not affect the retention of his previous classification and rights.

[Special provision for salary adjustments when a permanent person renders more than 20 days of substitute work in any 60 day period]

If, in any school year the employee serves as a substitute in any position requiring certification for any 21 days or more within a period of 60 schooldays, the compensation the employee receives for substitute service in that 60-day period, including his or her first 20 days of substitute service, shall be not less than the amount the employee would receive if he or she were being reappointed.¹¹

⁹ With the passage and judicial validation of Prop. 209, we think this subsection (B) is not available as a basis for avoidance of seniority requirements.

¹⁰ A return to substitute, long term temp or - possibly - categorical section 44909 positions is not necessarily the type of reappointment referred to here. See subdivision (5) for reference to returns for substitute or temporary replacement returns.

¹¹ This resets the employee's daily pay rate to that he/she would have if reappointed. Left unanswered by the statute are two other entitlement issues: (a) does "compensation" include restoration of sick leave and group medical plan eligibility, and (b) does this restoration operate prospectively for any work performed during the rest of the school year?

[Employees working for single board, joint administration districts]

(6) During the period of the employee's preferred right to reappointment, the governing board of the district, if it is also the governing board of one or more other districts, may assign him to service, which he is certificated and competent to render, in said other district or districts; provided, that the compensation he receives therefor may in the discretion of the governing board be the same as he would have received had he been serving in the district from which his services were terminated, that his service in the said other district or districts shall be counted toward the period required for both state and local retirement, as defined by Section 22102, as though rendered in the district from which his services were terminated, and that no permanent employee in said other district or districts shall be displaced by him. It is the intent of this subsection that the employees of a school district, the governing board of which is also the governing board of one or more other school districts, shall not be at a disadvantage as compared with employees of a unified school district.

[Retirement system re-entry considerations¹²]

(7) At any time prior to the completion of one year after his return to service, he may continue or make up, with interest, his own contributions to any state or district retirement system, for the period of his absence, but it shall not be obligatory on state or district to match such contributions.

[Other Retirement system benefit issues¹³]

(8) Should he become disabled or reach retirement age at any time before his return to service, he shall receive, in any state or district retirement system of which he was a member, all benefits to which he would have been entitled had such event occurred at the time of his termination of service, plus any benefits he may have qualified for thereafter, as though still employed.

(*) Curiously, although this code section starts with a subsection "(a)," there is no (b) nor any further subsection.

¹² This subdivision apparently refers to returning employees who in the meantime retired under STRS (or similar system) but now want to reinstate.

¹³ This language does not appear in the probationary employee rehire statute, section 44957. But STRS and other systems may provide for this contingency either way.