

## HOLIDAY CHEER FROM SCHOOLS LEGAL SERVICE

### CHANGES TO THE BROWN ACT AND RULES FOR APPROVAL OF EXECUTIVE COMPENSATION TAKE EFFECT JANUARY 1, 2012 !



The elves in the Legislature have been busy turning out new laws to take effect this holiday season. AB 1344 is another legislative response to the events in the City of Bell. It attempts to increase transparency concerning the approval of compensation for top executives in local agencies. Several provisions in the Brown Act and other statutes in the Government Code are affected.

#### 1. BROWN ACT CHANGES

AB 1344 includes the following changes to the Brown Act:

##### ► RALPH M. BROWN GOES DIGITAL!

Ralph M. Brown would no doubt be thrilled that the Brown Act must now be observed in cyberspace.



Currently, the Brown Act permits, but does not require, districts to post their agendas online. Many districts and county boards of education are now using “Agenda Online” or similar electronic agenda development software. Others do post agendas as time permits, not necessarily within the timeline for physical posting.

Under AB 1344, **effective January 1, 2012**, if a district maintains a website, meeting agendas must be posted online and in compliance with the usual timelines for posting (at least 72 hours in advance for regular meetings and 24 hours in advance for special meetings).<sup>1</sup>

It is critical that districts maintaining websites gear up for this change in law. Failure to timely post on a district’s website will now be grounds to assert a violation of the Brown Act, with all of the consequences that can entail.

---

<sup>1</sup> See Brown Act, Government Code sections 54952.2(a)(1) and 54956(a).

► **DISCUSSION OF EXECUTIVE COMPENSATION**

Also effective January 1, 2012, a Board cannot call a special meeting regarding the salary, salary schedule, or compensation in the form of fringe benefits for any “local agency executive” – this can now happen only via a regular meeting.<sup>2</sup> For a discussion of who is a “local agency executive,” see section 2 below.

While the law would prohibit discussion or action on a contract or compensation issues for specified administrators at a special meeting, if a Board uses labor negotiators to negotiate the contracts for its superintendent, chancellor or other executives, the law presumably does not prohibit a Board from meeting in closed session to instruct the negotiators with respect to compensation parameters at a special meeting.

**2. AUTOMATIC COMPENSATION INCREASE FORMULAS FOR CERTAIN CERTIFICATED ADMINISTRATORS TABOO AFTER JANUARY 1, 2012**

Under AB 1344, an employment contract between a school or community college district and a “local agency executive” cannot contain provisions for automatic renewal of any contract that provides for a automatic increase in compensation beyond a cost-of-living adjustment measured by the California Consumer Price Index for Urban Wage Earners and Clerical Workers, as calculated by the California Department of Industrial Relations. The law was written in terms applicable to cities and counties, and leaves many open questions concerning its application to school and community college districts.

Put more simply: Executive contracts approved after January 1, 2012, containing automatic compensation increases above a specified level cannot have an automatic renewal feature.

► **WHICH EXECUTIVE POSITIONS ARE COVERED BY THE NEW LAW?**

The new law defines “local agency executive” as a “chief executive officer” or a “department head of a local agency,”<sup>3</sup> and specifically excludes classified employees. Presumably this includes superintendents, chancellors, community college presidents, and assistant/associate/deputy superintendents, but the law is not clear as to whether, for example, this may include principals. While fairly rare, some principals do have multi-year employment agreements. Sources who followed the bill and had discussions with the author’s office indicate there was no intent to include principals.

---

<sup>2</sup> See Brown Act, Government Code section 54956(b).

<sup>3</sup> See new Government Code section 3511.1(d).

What is unclear is whether classified district office-level administrators such as chief business officials should be included. The literal wording of the statute would appear to exclude any classified employees (anyone subject to Education Code section 45100/88000 and following). For cities and counties, employees who are subject to their collective bargaining statutes were excluded, but similar language for school and community college districts was not used. For now, districts may want to take the conservative approach and treat contracts for these administrators in the same way as you handle contracts for senior certificated administrators.

▶ **WHAT IS AN AUTOMATIC RENEWAL PROVISION?**

While the law does not define the term, an automatic renewal provision is likely one that provides for a contract renewal or extension without specific Board approval. Thus, the new law will impact so-called “evergreen clauses,” which provide for automatic contract extensions, typically one year at a time, often triggered by a satisfactory evaluation. (It has been this office’s view that such provisions are unlawful anyway, unless board approval is obtained for the extension, since the Government Code specifically contemplates the approval of contracts for superintendents and deputy/assistant/associate superintendents in an open session meeting.)

Many administrator contracts contain language reflecting the provisions of the Education Code which provide that contracts for superintendents and deputy/associate/assistant superintendents and community college educational administrators will automatically roll over for the same term absent timely notice of nonrenewal by the governing board (Education Code sections 35031/72411). It is not clear whether this would be considered an automatic renewal provision under the new law. Again, the legislature did not appear to take into account the school and community college district setting in imposing these requirements. To be on the safe side, districts at a minimum may want to make certain that these contracts do not roll over by operation of law and instead are renegotiated at least 45 days prior to their expiration.

▶ **WHAT IS AN AUTOMATIC COMPENSATION INCREASE PROVISION?**

As with contract renewals and extensions, an automatic compensation increase is likely one which is driven by some formula which does not require board approval of individual increases. Some administrators’ contracts, for example, contain language providing the administrator with the same increase as that granted to a bargaining unit, or the average increase among several bargaining units. To the extent those increases may exceed the Consumer Price Index, they will no longer be lawful if incorporated into a contract that has an automatic renewal feature. Districts should consult legal counsel to develop new, legally compliant contract language.

Contracts which specifically provide for salary increases in future contract years (whether by specifying a specific amount or a percentage) and those which incorporate or are tied to a salary schedule are also likely to trigger application of the statute.

Automatic compensation increases for the administrators affected are still lawful, so long as they are not combined with automatic renewal provisions.

▶ **WHAT ABOUT EXISTING CONTRACTS?**

Existing contracts (those executed or renewed on or before January 1, 2012) are not affected, even if they have automatic renewal and compensation increase provisions.

However, under Education Code sections 35031/72411, the maximum duration of a contract for a superintendent or associate/deputy/assistant superintendent or community college educational administrator is four years total.

▶ **DOES THIS BILL PLACE LIMITS ON THE AMOUNT OF A SALARY INCREASE?**

AB 1344 does not place limits on the amount of a salary increase. It simply prohibits a the inclusion of an automatic compensation increase greater than a cost of living adjustment if there is an automatic renewal feature.

▶ **WHAT TYPES OF COMPENSATION ARE INCLUDED?**

For purposes of the new law “compensation” is defined as “annual salary, stipend, or bonus, paid by a local agency employer to a local agency executive.”<sup>4</sup> This would encompass most forms of compensation, presumably including car and equipment allowances. Reimbursement of expenses (such as the costs of attending a conference) are likely not covered. Open questions include how to address certain payments in lieu of benefits.

To sum up, **IF** your district will be negotiating new contracts for district-office level administrators and other potential “department heads” which have an automatic renewal provision, and **IF** those contracts also have an automatic compensation increase feature, and **IF** the compensation increases may exceed the Consumer Price Index, we recommend that you consult in advance with legal counsel as to the best way to move forward with your contract.

---

<sup>4</sup> See new Government Code section 3511.1(a).

### 3. SEVERANCE BENEFITS

Another part of AB 1344 deals with severance benefits. Existing law arguably already addresses this by requiring employment contracts between employees and local agencies to include a provision that, if the contract is terminated, the maximum cash settlement an employee may receive is the monthly salary of the employee multiplied by the number of months left on the unexpired term of the contract, with a maximum of 18 months. AB 1344 prohibits any employment contract with a local agency executive from providing a cash settlement greater than this.<sup>5</sup>

### 4. CRIMINALS MUST REIMBURSE!

Beginning January 1, 2012, AB 1344 requires new contract language in any contract executed or renewed by a district which provides for any of the following:

- ◆ paid leave for the official pending an investigation;
- ◆ funds for the legal criminal defense of the official; or
- ◆ any cash settlement related to the official's termination.

The contracts must now require full reimbursement of these funds if the employee is convicted of a crime involving abuse of office or position.

The new law further provides that even if a district provides these types of payments absent a contractual obligation, such sums must be fully reimbursed by the employee if convicted of a crime involving abuse of his or her office or position.<sup>6</sup>

Statewide groups such as ACSA continue to have discussions concerning the impact of the new law. We will keep you apprised of any developments.

Best wishes for the holiday season.

— *Grant Herndon*, General Counsel  
Schools Legal Service

---

<sup>5</sup> See new Government Code section 3511.2(b).

<sup>6</sup> Government Code section 53243 and following.