
FOR WHOM AB 1344 TOLLS – IT TOLLS FOR THEE!

California Council of School Attorneys Spring Meeting

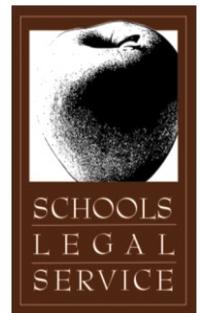
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**FOR WHOM AB 1344 TOLLS
IT TOLLS FOR THEE!**

May 18, 2012
Burlingame

Presenter: Grant Herndon



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- This bill restores public trust in local government in response to scandals in the City of Bell.
- Local officials allegedly enriched themselves and committed fraud by using flexibilities in the law regarding the adoption of a city charter, how election materials are drafted, and the lack of limits on compensation policies for senior officials.
- This bill responds to those deficiencies, addresses the most flagrant violations, and fortifies public disclosure and notice requirements.

-Senate Committee Analysis

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- Brown Act Implications
- Contract Compensation Restrictions for “Local Agency Executives”
- New Required Contract Provisions - Abuse of Office

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I. BROWN ACT IMPLICATIONS

Brown Act Implications – Internet Posting

- The Brown Act now applies in cyber-space!
- Prior to AB 1344, the law *permitted* local agencies to post their agendas on an Internet website.
- Web posting is *now required* for those agencies that maintain Internet websites. (Gov't Code Section 54954.2)

Brown Act Implications – Internet Posting

- The electronic posting requirement applies to governing bodies of local agencies created by statute.
- The requirement also applies to 54952(b) entities - commissions, committees, etc. created by Board action but not advisory committees composed of less than a Board quorum, except certain standing committees **IF**
 - (1) the members are compensated for their appearance **--and--**
 - (2) one or more members are also members of a governing body.

Gov't Code Sections 54954.2(d) and 54956(c)

Brown Act Implications – Internet Posting

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- Electronic postings must be timely (e.g., 72 hours for regular meetings, 24 hours for special meetings).
- A failed physical posting means the meeting cannot proceed (e.g., couldn't post due to snow).
- What happens if the electronic posting fails? Inadvertent electronic posting error? What if the e-mail server goes down?

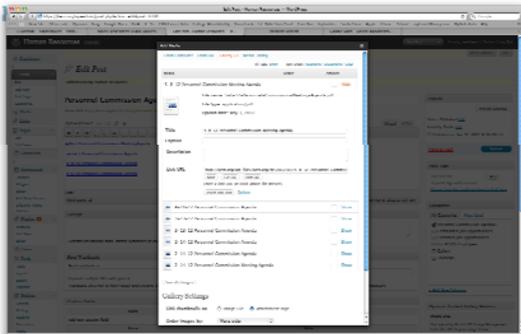
Brown Act Questions

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- Integration with electronic agenda programs, such as "Agenda Online."
- Is a link to "Agenda Online" sufficient?
- Some districts maintain separate paper agendas.
- How long must the agendas remain posted on line?
- Must the minutes be posted electronically?

Brown Act Questions

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New CSBA K-12 Policy Language

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- Board Bylaw 9320 (Meetings and Notices) adds references to AB 1344 and the following:
- At least 72 hours prior to a regular meeting, the agenda shall be posted at one or more locations freely accessible to the public *and on the district's Internet website. (Government Code section 54954.2)*
- Written notice of special meetings shall be delivered personally or by any other means to all Board members and the local media who have requested such notice in writing. *The notice also shall be posted on the district's Internet web site.*

Brown Act – Compensation Approval

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- A Board may not call a *special meeting* “regarding” salaries, salary schedules or compensation in the form of fringe benefits, for “local agency executives.”
- Can a Board discuss in closed session - but not approve - compensation at a special meeting closed session to instruct its negotiators?

Brown Act - Who is a Local Agency Exec?

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- The Brown Act requirements of AB 1344 apply to consideration of compensation of “local agency executives,” as defined in the new provisions in the Government Code regarding executive compensation (section 3511.1):
- (d) "Local agency executive" means any person employed by a local agency who is not subject to the Meyers-Millas-Brown Act (Chapter 10 (commencing with Section 3500)), Chapter 5 (commencing with Section 45100) of Part 25 of Division 3 of Title 2 of the Education Code, or Chapter 4 (commencing with Section 88000) of Part 51 of Division 7 of Title 3 of the Education Code, and who meets either of the following requirements:
 - (1) The person is the *chief executive officer* of the local agency.
 - (2) The person is the *head of a department* of a local agency.

Brown Act - Who Is a Local Agency Exec?

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- It appears clear that this definition includes K-12 superintendents and community college chancellors / superintendents / presidents.
- District-office level certificated administrators would also appear to be covered. This may include deputy / assistant / associate superintendents, vice-chancellors and could extend to directors and deans in some districts.
- Community college presidents are presumably covered.

Who Is a Local Agency Exec?

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- While unclear, it appears that the Brown Act provisions were not intended to apply to site principals, although some principals are employed under multi-year contracts.
- To play it safe, districts could decide not to approve salary and benefits for principals at a special meeting.

Who Is a Local Agency Exec?

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- What about classified administrators? Whether intended or not, the bill appears to exclude classified administrators.
- For cities and counties, employees subject to the bargaining statute were excluded. In contrast, the Education Code references appear to exclude not bargaining unit members but all classified employees.
- Should the "regular meeting only" policy be extended to employment contracts for classified administrators just to be safe and consistent? (In other words, does it make sense to treat a contract for the classified Assistant Superintendent for Business differently than a contract for the certificated Assistant Superintendent for Curriculum?)

New CSBA K-12 Policy Language

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- Board Policy 4312.1 Contracts:
- The Board shall deliberate in the closed session of a *regular meeting* about the terms of an employment contract for a deputy, associate or assistant superintendent, other certificated employee holding a position requiring a supervision or administration credential; or a senior manager of the classified service. (Government Code 54957).
- Any such employment contract shall be ratified by the Board during an open session of a *regularly scheduled* Board meeting and reflected in the Board's minutes. Copies of the contracts shall be available to the public upon request. (Government Code 53262)

Text of Government Code section 54956(b)

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- 54956 (b) Notwithstanding any other law, a legislative body shall not call a special meeting regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Section 3511.1. However, this subdivision does not apply to a local agency calling a special meeting to discuss the local agency's budget.

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II. CONTRACT COMPENSATION RESTRICTIONS FOR LOCAL AGENCY EXECUTIVES

Compensation Limitations for Execs

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- On or after January 1, 2012, any contract executed or renewed between a local agency and a local agency executive shall not provide for the following:
 - (a) An automatic renewal of a contract that provides for an automatic increase in the level of compensation that exceeds a cost-of-living adjustment.
 - (b) A maximum cash settlement that exceeds the amounts determined pursuant to Article 3.5 (commencing with Section 53260) of Chapter 2 of Part 1 of Division 2 of Title 5.
Government Code section 3511.2

Contract Limitations – Time Frame

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- Contracts executed **before January 1, 2012** are not affected unless they are “renewed” after that.
- Is a contract “renewed” by operation of an evergreen clause?
- Is a contract renewed by operation of Education Code section 35031? (In the event the governing board of a district fails to reelect or reemploy the superintendent ... deputy, associate, or assistant superintendent of schools, or employee in the senior management of the classified service as such and the written notice herein provided for has not been given, he or she shall be deemed reelected for a term of the same length as the one completed, and under the same terms and conditions and with the same compensation.)

Education Code sections 35031/ 72411

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- **35031.** In the event the governing board of a school district determines the superintendent of schools of the district, or deputy, associate, or assistant superintendent of schools, or employee in the senior management of the classified service is not to be reelected or reemployed as such upon the expiration of his or her term, he or she shall be given written notice thereof by the governing board at least 45 days in advance of the expiration of his or her term. In the event the governing board of a district fails to reelect or reemploy the superintendent of schools of the district, or deputy, associate, or assistant superintendent of schools, or employee in the senior management of the classified service as such and the written notice herein provided for has not been given, **he or she shall be deemed reelected for a term of the same length** as the one completed, and under the same terms and conditions and with the same compensation.
- **72411 c)** If the governing board fails to reemploy an administrator by appointment or contract in his or her administrative position and the written notice provided for in this section has not been given, the administrator shall, unless the existing appointment or contract provides otherwise, **be deemed to be reemployed for a term of the same duration** as the one completed with all other terms and conditions remaining unchanged.

Which Agencies Are Affected?

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- In addition to counties and cities, the statute specifically references a “**school district**,” “**political subdivision**,” “**district**” and “**other local public agency**.” (Government Code section 3511.1)
- The definition surely extends to community college districts and county boards of education.
- What about ROPs and other school-related entities that operate as joint powers agencies?

Which Agencies Are Affected?

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- What about the office of county superintendent? (as an employer)
- Elected versus appointed?

Who is a Local Agency Exec?

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- The same definition applies as with the Brown Act provision: K-12 superintendents and community college chancellors / superintendents / presidents / associates/ deputies / assistants; probably includes directors, community college presidents.
- While unclear, site principals arguably *could* be included if they are employed by contract.
- Classified employees are excluded.
- Elected County superintendents of schools are normally not employed by contract.

When is a Contract Feature "Automatic"?

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- When it does not require Board approval in an open session of a regular meeting?
- What if a contingency must occur before the contract provision becomes applicable? (e.g., satisfactory evaluation)

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If the local agency executive contract has an auto extension feature (e.g., "evergreen" clause), it cannot have an auto compensation increase feature that exceeds CPI.

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If the contract has an auto compensation increase feature in excess of CPI, it cannot have an auto term extension.

Sample "Evergreen" Language

[Alternative 1] (Rollover/Evergreen) Should the Superintendent receive a satisfactory evaluation pursuant to this Agreement, or should the Superintendent not receive a formal evaluation at all during any school year, this Agreement will be automatically extended for an additional year, so long as the term of the Agreement does not at any time exceed four (4) years.

[Alternative 2] (Rollover/Evergreen) Unless the Superintendent is notified in writing by no later than May 16 of the then existing school year that the Board does not intend to extend the Superintendent's term of employment, this Agreement shall automatically extend by one additional year effective July 1 of the next succeeding school year, provided that at no time shall the term of this Agreement exceed four (4) years.

Source: ACSA Sample Contract 2008-09



Views on the "Evergreen Clause" Differ

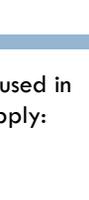
Government Code section 53262

(a) All contracts of employment with a superintendent, deputy superintendent, assistant superintendent, associate superintendent, community college president, community college vice-president, community college deputy vice president, general manager, city manager, county administrator, or other similar chief administrative officer or chief executive officer of a local agency shall be ratified in an open session of the governing body which shall be reflected in the governing body's minutes.



Which Elements of Compensation Are Involved?

- Government Code section 3511.1. As used in this chapter, the following definitions apply:
- (a) "Compensation" means:
 - Annual salary
 - Stipend
 - Bonus
- What about fringe benefits and expense accounts?



Examples of an Automatic Compensation Increase Provisions

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- A provision or formula for compensation increases in subsequent years which does not require Board approval
- Salary schedules
- “Me too” provisions – same increase as certificated bargaining unit, or average of increases granted to all units
- Multiplier provision (1.682 x highest teacher step)

What Cost of Living Standard Is Used?

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- AB 1344 measures automatic compensation increases against the Consumer Price Index for Urban Wage Earners and Clerical Workers as calculated by the Department of Industrial Relations (www.bls.gov/cpi).
- This is not necessarily the same as the revenue limit COLA assessed by the State, which is based on the implicit price deflator for goods and services published by the U.S. Department of Agriculture
- Will it be possible to know the amount of the CPI increase at the time a compensation increase provision is approved?

Consumer Price Index v. Revenue Limit COLA

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| Year | Revenue Limit COLA | Consumer Price Index (July-July) |
|---------|--------------------|----------------------------------|
| 2011-12 | 2.24% | Not available |
| 2010-11 | [0.39%] | 4.11% |
| 2009-10 | 4.25% | 1.64% |
| 2008-09 | 5.66% | [-.27%] |
| 2007-08 | 4.53% | 6.19% |

Would this Language Pass Muster?

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- Board shall pay Superintendent a base annual salary of \$155,000. In addition, for each year this contract remains in effect, Superintendent's base annual salary shall be adjusted and increased by the percentage positive increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers as calculated by the Department of Industrial Relations for the *prior fiscal year.*

New CSBA K-12 Policy Language

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- Board Policy 2121 – Superintendent's Contract
- Note: The following optional paragraph provides that any extension of the contract be based on Board action rather than automatic "rollover" or "evergreen" provisions. Government Code 3511.2, as added by AB 1344 (Ch. 692, Statutes of 2011), prohibits the automatic renewal of a contract with a provision for automatic increase that exceeds the cost of living adjustment.*
- During an existing contract, the Board may reemploy the Superintendent on mutually agreed upon terms and conditions. However, the Superintendent's contract shall be extended only by Board action subsequent to a satisfactory evaluation of the Superintendent's performance and in accordance with Government Code 3511.2.

AB 1344 Compensation Restriction Checklist

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- Is this a contract for a school district, political subdivision, district or other local public agency? If not, AB 1344 does not apply. If so, go to next question.
- Is this a contract for a superintendent/chancellor/president, certificated district-office administrator, or other potential "department head?" If not, AB 1344 does not apply. If so, go to next question.
- Does the contract contain an automatic extension provision such as an "evergreen" clause? If not, AB 1344 does not apply. If so, go to next question.
- If the contract contains an automatic extension provision, does it also allow for automatic compensation increases such as a salary schedule? If not, AB 1344 does not apply. If so, go to next question.
- Might the automatic compensation increase exceed the Consumer Price Index ceiling? [Timing Issue] If this is possible, contract will have to be restructured.

Maximum Settlement Requirements

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- Contracts for local agency execs executed or renewed after January 1, 2012 cannot provide for a maximum cash settlement that exceeds the amounts specified in Article 3.5 of Chapter 2 of Part 1 of Division 2 of Title 5 of the Government Code.



Maximum Settlement Requirements

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- Government Code section 53260: For all local agency employment contracts, the maximum cash settlement in the event of termination is limited to the lesser of remaining salary for the term or an amount equivalent to 18 months' salary.
- Doesn't this just restate existing law?

Mandated Cost?

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- "If the Commission on State Mandates determines that this act contains costs mandated by the state . . . "
- Requires successful mandate reimbursement claim.
- Senate analysis opined that costs would be one-time with minor ongoing costs for most agencies.

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IV. NEW REQUIRED CONTRACT PROVISIONS - ABUSE OF OFFICE



Abuse of Office Crimes

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- Employment contracts must now contain specific language relating to repayment of certain expenses if the administrator is convicted of an “abuse of office” crime.
- These requirements apply to all employment contracts providing for paid leave, criminal defense funds, or cash settlements upon termination, not just executive contracts.

Government Code sections 5243-5243.4

Required Abuse of Office Crime Language

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- The employee must reimburse the District for “**paid leave salary**” granted pending an investigation, **cash settlements** and/or **criminal defense funds** if subsequently convicted of an abuse of office crime.
- The reimbursement is required whether or not the funds are made pursuant to a contractual obligation.
- Is it only the investigation of the abuse of office charge that triggers the reimbursement?

New Language Required in Exec Contracts

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- Government Code section 53243. On or after January 1, 2012, any contract executed or renewed between a local agency and an officer or employee of a local agency that provides paid leave salary offered by the local agency to the officer or employee pending an investigation shall require that any salary provided for that purpose be fully reimbursed if the officer or employee is convicted of a crime involving an abuse of his or her office or position.
- 53243.1. On or after January 1, 2012, any contract executed or renewed between a local agency and an officer or employee of a local agency that provides funds for the legal criminal defense of an officer or employee shall require that any funds provided for that purpose be fully reimbursed to the local agency if the officer or employee is convicted of a crime involving an abuse of his or her office or position.

New Language Required in Exec Contracts

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- Government Code section 53243.2. On or after January 1, 2012, any contract of employment between an employee and a local agency employer shall include a provision which provides that, regardless of the term of the contract, if the contract is terminated, any cash settlement related to the termination that an employee may receive from the local agency shall be fully reimbursed to the local agency if the employee is convicted of a crime involving an abuse of his or her office or position.
- 53243.3. On or after January 1, 2012, if a local agency provides, in the absence of a contractual obligation, for any of the payments described in this article, then the employee or officer receiving any payments provided for those purposes shall fully reimburse the local agency that provided those payments in the event that the employee or officer is convicted of a crime involving the abuse of his or her office or position.

What is an Abuse of Office Crime?

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- Government Code section 53243.4. For purposes of this article, "abuse of office or position" means either of the following:
 - (a) An abuse of public authority, including, but not limited to, waste, fraud, and violation of the law under color of authority.
 - (b) A crime against public justice, including, but not limited to, a crime described in Title 7 (commencing with Section 92) of Part 1 of the Penal Code.

What is an Abuse of Office Crime?

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□ An “abuse of office” crime includes:

Bribes to and from judicial officers and jurors • improper attempts to influence jurors, arbitrators, referees • threats to jurors after verdict • juror misconduct • retaking goods from custody of person in charge • manufacture or sale or use of false citizenship or resident document • offering false or forged instruments for filing • publication of deceptive campaign advertisement with unauthorized signature • alteration of certified copy of official record • filing false or forged document affecting real property • making false statement to induce improper notarial act • jury tampering • perjury and suborning perjury • false affidavits • false statements in crime reports • irregularity in administering oath • procuring execution of innocent person by perjury • willful misrepresentation in investigation of corporate securities, commodities or business activities • offering false evidence • disclosure by witness of information relating to crime for valuable consideration • preparing false evidence • destroying evidence • intimidation of witnesses • preventing or dissuading witness from testifying • influencing or inducing testimony • taking or offering to take bribes as a witness • threats of force or violence against witness or crime victim • seizure of person or property under color of legal authority • impersonation of officers • misleading another to believe request for information is on behalf of state • malicious disclosure of peace officer address or telephone number • disclosure of criminal investigation information for financial gain • resisting public or peace officers or EMTs in discharge of their duties • false report of planting explosive • interfering with firefighter or emergency rescue personnel • false emergency report • false report of felony or misdemeanor • falsely representing self as another person to a peace officer • refusing to assist officers in arrest • active concealment of accidental death • removal or concealment of property by debtor • fraudulent pretenses relative to birth of infant • substituting one child for another • bribing local officials • criminal contempts • sale of liquor near UC Riverside • importing foreign convicts • involuntary servitude

New CSBA K-12 Policy Language

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- BP 2121 (Superintendent's Contract)
- *Note: Pursuant to Government Code 53243-53243.4, as added by AB 1344 (Ch. 692, Statutes of 2011), effective January 1, 2012, any Superintendent contract to be executed or renewed by the Board must contain a provision requiring the Superintendent to reimburse the district in circumstances specified below.*
- In addition, if the Superintendent is convicted of a crime involving an abuse of his/her office or position, he/she shall reimburse the district for payments he/she receives as paid leave salary pending investigation or as cash settlement upon his/her termination, and for any funds expended by the district in his/her defense against a crime involving his/her office or position. (Government Code 53243-53243.4, 53260)

Sample Abuse of Office Crime Language

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- Pursuant to Government Code section 53243-53243.4, if District provides funds to Superintendent for any of the following purposes, Superintendent shall fully reimburse District in the event Superintendent is convicted of a crime involving abuse of his/her office or position as defined in Government Code section 53243.4: (1) paid leave salary pending an investigation, (2) payment for the legal criminal defense of Superintendent, or (3) any cash settlement related to the termination of Superintendent's employment. This contract does not provide for the payment of paid leave salary pending an investigation or payment of the legal criminal defense of Superintendent.

AB 1344 – What's Next

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- ACSA has talked about getting information into the Legislative Journal as to which specific executives are covered in the educational setting.
- May introduce a clean-up bill in January.
- Are other groups talking about legislative changes?
- Other thoughts?

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Thank you for your participation.