

COVID-19 Employment/Leave/Pay Frequently Asked Questions¹

1. Q: Can school employers continue to pay employees on extended leaves of absence differential compensation during school closures?

A: The Education Code provides two systems for differential pay during employee extended leaves of absence. These systems are often called “sub-dock” (the employer compensates the absent employee the difference between their regular salary and the cost of a substitute) or “50% pay” (100 days of paid sick leave paid at a rate at least 50% of the absent employee’s regular salary). The usual process for payment of differential salaries to employees on extended leaves of absence (once all accrued and accumulated full pay leave has been exhausted) has come into question now that most schools are closed to students.

As to K-12 certificated employees, unless a district has adopted the alternative 50% pay differential system, Education Code section 44977(a) provides the differential salary rules. Specifically, the amount deducted from an absent certificated employee’s salary during an extended leave of absence “shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence or, if no substitute employee was employed, the amount that would have been paid to the substitute had he or she been employed.” This means that certificated employees are typically paid the differential amount between their regular salary and the salary of a substitute, or if no substitute is hired, what would have been paid to a substitute. Importantly, Education Code section 44977(a) also provides: “The school district shall make every reasonable effort to secure the services of a substitute employee.” During school closures, unless a long-term substitute was already in place due to the regular employee’s absence, a substitute may not be secured and paid.

As to K-12 classified employees, unless a district has adopted the alternative 50% differential pay system, Education Code section 45196 provides that the amount deducted from an absent classified employee’s salary during an extended leave of absence “shall not exceed the sum which is actually paid a substitute employee employed to fill his position during his absence.” This provision has been strictly construed by courts and requires an actual, outside substitute be hired in order to be able to pay an absent employee the differential rate. If a district has adopted the alternative 50% pay differential system, a regular classified employee is credited 100 working days of paid sick leave, including regular sick leave, each year. After full pay sick leave is exhausted, the absent employee is compensated at a rate of at least 50% of the employee’s regular salary. There is no consideration as to whether a substitute is hired or not.

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Based on the foregoing, during school closures, unless a district uses the alternative 50% pay differential system, or a substitute was already secured and will continue to be employed during the closure or an actual, outside substitute is hired now, classified employees cannot be sub-docked or paid differential pay. However, whether or not an actual, outside substitute is hired, certificated employees could technically continue to be sub-docked or paid differential pay. This seems inequitable given the fact that unless a long-term substitute was already hired and will continue to be employed, it is unlikely that a district will look to secure a substitute for certificated employees during school closures. Further, as stated above, the Education Code requires districts to “make every reasonable effort to secure the services of a substitute employee.” These efforts may not occur during a school closure.

Therefore, it is our recommendation that districts who provide differential sub-dock extended sick leave to both classified and certificated staff consider applying the same rules to classified and certificated staff during school closures. Unless a substitute is secured to replace an employee absent due to reasons other than COVID-19 school closures, the employee should be compensated at their regular rate of pay. This should be a non-precedent setting change of the rules and should only be in effect during school closures as a result of the current COVID-19 pandemic. Additionally, we recommend ensuring at least one Human Resources staff member is available to address employees’ changing leave needs during school closures. If an employee’s medical status or other cause for leave changes, the employee should be invited to contact HR to discuss implications of that changed status.

2. Q: Can or should substitutes be paid during school closures?

A: This may be a district decision. The state has indicated a desire that any local education agency receiving a hold harmless apportionment during school closures as a result of the COVID-19 pandemic ensure that its employees and contractors are compensated and paid during the period of a school closure as they reasonably anticipated to be paid if the school had not been closed due to COVID-19. Therefore, we understand that many agencies are considering paying those substitutes who had secured substitute work prior to the closures for the days of previously secured work.

Additionally, a question has arisen as to substitutes being able to utilize their paid sick leave during school closures to continue to receive pay. California’s Paid Sick Leave law provides eligible employees at least 24 hours or three days of paid sick leave each year. This leave can be taken for the employee or their family member, for preventive care or diagnosis (including annual physicals or flu shots), care or treatment of an existing health condition, or for specified purposes if the employee is a victim of domestic violence, sexual assault or stalking. Accordingly, if a substitute, or their family member, is actually ill or is engaged in preventive care or diagnosis during a school closure, they would qualify for paid sick leave. However, if the substitute will be off work simply due the school closure, the substitute technically would not qualify for leave under California’s Paid Sick Leave law.

Districts may nonetheless wish to treat this leave as personal necessity, especially if all annual sick leave is treated in that manner for other employees, and provide up to three days of available paid leave to substitutes.

3. Q: How do we address Designated Spring Break as it relates to employees' work status and leaves of absence status?

A: We understand districts have rescheduled or extended their previously planned spring recess or break, or they may plan to proceed with spring recess or break as previously planned while schools are closed. We recommend that districts proceed as usual during any planned recess or break. If staff were previously scheduled to be off duty and not expected to be available to provide instruction or services, that expectation should continue. If, on the other hand, an employee was previously scheduled to work during a recess or break, that employee unless needed to be physically present on site, should be assigned to remote work or paid administrative leave. That status should continue during spring recess or break. Additionally, days on recess or break that would not normally count against FMLA/CFRA, pregnancy disability, or other leave usage should continue to not count against such leaves.