



# AB 438 FAQs



## **Basis for Layoff**

### **Q. If our district's funds are increasing, are we unable to layoff classified employees?**

- A. Court cases have ruled that “lack of funds” does not mean inability to pay employees. Similarly, lack of work could be due to program changes or restructuring. A school district has substantial discretion to allocate funds for staffing, and to layoff employees as a result.

## **Ability to Use Current 60-day Notice Process for Permanent Classified Employees**

### **Q. Can we issue layoff notices before January 1, 2022, using the current 60-day notice process?**

- A. It would be risky to do this. If a layoff notice takes effect after December 31, 2021, then there is an argument that you would have to follow the new AB 438 process, even though the school board acted prior to January 1, 2022.

## **AB 438 Layoff Process - Mechanics**

### **Q. Does any of this apply to classified management or confidential employees?**

- A. Yes, this will apply to most permanent classified employees, including classified management and confidential employees. The only classes of employees exempt from the AB 438 layoff process are substitutes who serve less than 75% of the school year, short-term employees who serve less than 75% of the school year, probationary employees, and employees serving in specially funded positions.

### **Q. Does this law also apply now to child development programs?**

- A. This applies to any school district, county superintendent, or community college district that has classified employees and has determined a need to lay off one or more classified employees. This may potentially include child development programs.

### **Q. Can you serve employees layoff documents via email?**

- A. Layoff documents must be served via certified or registered mail. Email may be used in addition to certified mail, but email alone is insufficient to satisfy the service of process requirements. Education Code section 70 provides that where the Education Code requires documents to be served by registered mail, sending the documents via certified mail “shall be deemed to be a sufficient compliance with the requirements of law.”

### **Q. Does “by March 15” mean “before March 15” or does it include March 15?**

- A. The preliminary/precautionary layoff notice may be served on March 15 at the latest. Earlier service is recommended.

**Q. When must final layoff notices be provided to employees?**

A. Final layoff notices must be provided to affected employees before May 15.

**Q. Do the timelines to request a hearing refer to calendar days or workdays?**

A. The timelines within the AB 438 classified layoff process, including the timelines to request a hearing, are based on calendar days.

**Q. For a county office of education, the layoff resolution does not go to the county board for approval, correct? It is just signed/approved by the County Superintendent?**

A. Correct. County superintendents generally serve as the employer of county office of education employees, in which case the county superintendent approves the layoff resolution.

**Q. Is there a deadline by when you can withdraw a layoff notice?**

A. Technically, you can rescind a layoff notice anytime before June 30, which is when the layoff becomes effective. After June 30, if a position is restored, you would re-employ the most senior laid off employee on the re-employment list in the classification restored.

### ***AB 438 and Specially Funded Programs***

**Q. What does “specially funded” program mean?**

A. AB 438 does not define “specially funded,” however, other parts of the Education Code seem to use “categorically funded,” “grant funded,” and “specially funded” interchangeably.

**Q. For specially funded positions, do we need to notify staff at the time of hire that they are in a specially funded position (like certificated) in order to use the 60-day notice layoff process?**

A. Although there is no requirement in law to notify a classified employee that their position is specially or categorically funded, it would be a good practice going forward so the employee is on notice that, in the event of layoff, they will not be afforded the same due process rights as permanent classified employees not employed in a specially funded position.

**Q. If an employee has a portion of their salary paid for through a specially funded program, are we able to layoff the whole position or only reduce the portion of the position funded by these programs?**

A. If a portion of the employee’s position is specially funded but the Board is laying off the entire position, and the employee would be entitled to a hearing under AB 438 on the portion of their job paid using unrestricted funds, it is unclear whether they would be entitled to a hearing on their entire position. If the employee’s hours will be reduced due to the expiration of the special funds, that decision is negotiable with the union prior to reducing the hours, if the position is within a bargaining unit. If the employee has two classifications, for example a .4 specially funded position and a .6 regular position, then you could likely layoff the .4 using the 60-day notice process if elimination of that position is due to expiration of the specially funded program.

### ***Seniority and Permanent Status***

**Q. What is the definition of a “higher class”? Does it mean higher starting salary?**

A. Generally, a higher class would be a position that is considered a promotion from the employee’s current position. Usually this is a higher paying position.

**Q. What employees are considered probationary for the purposes of AB 438 layoff rights?**

A. Under AB 438 “permanent” means any classified employee who would be permanent as of March 15 or sometime after, likely until June 30. Therefore, most probationary employees will be considered permanent and entitled to rights under the AB 438 process.

**Q. Based on that definition of “permanent,” would you then advise districts to be much “tighter” on releasing probationary employees before March?**

A. If the reason for the employee’s release is due to a lack of work or lack of funds, then you cannot use the probationary release process pursuant to *Cousins v. Weaverville* (1994) 24 Cal.App.4th 1846, in which the Court of Appeal expressly provided that you cannot non-reelect a probationary teacher when the reason for the non-reelection was economic. Rather, you must use the layoff process. Even though that case involved a teacher, it would likely apply to classified employees.

**Q. Is an employee who was permanent and has since promoted to another position and is currently serving a probationary period considered “probationary” under AB 438, or are they considered permanent?**

A. If the employee will not be permanent by June 30, and their promotional position is being eliminated, then they would not have a right to hearing under AB 438. AB 438 does not speak to whether probationary classified employees have any notice rights prior to their layoff. However, it is recommended that you provide probationary employees with a 60-day notice of their layoff and provide any bumping rights set forth in the classified collective bargaining agreement.

**Q. Do leaves play into seniority?**

A. Education Code section 45308 provides that “classified employees shall be subject to layoff for lack of work or lack of funds. If a classified employee is laid off, the order of layoff within the class shall be determined by length of service. The employee who has been employed the shortest time in the class, plus higher classes, shall be laid off first ... ‘length of service’ means all hours in paid status, whether during the school year, a holiday, recess, or during any period that a school is in session or closed, but does not include any hours compensated solely on an overtime basis as provided for in Section 45128.” Education Code section 45308, subdivision (c), further provides that:

Nothing contained in this section shall preclude the granting of “length of service” credit for time spent on unpaid illness leave, unpaid maternity leave, unpaid family care leave, or unpaid industrial accident leave. In addition, for military leave of absence, “length of service” credit shall be granted pursuant to Section 45297. In the event an employee returns to work following any other unpaid leave of absence, no further seniority shall be accrued for the time not worked.

This statute also provides that length of service does not include hours worked prior to being a probationary or permanent classified employee.

Thus, to determine whether an unpaid leave would impact length of service, you would need to consult the relevant collective bargaining agreement as well as board policy to determine if an employee gets seniority credit for that time. Recall that a district and union can negotiate length of service to mean hire date instead of hours in paid status.

**Q. Does this mean an 8-hour employee has more seniority than a 6-hour employee?**

A. Not necessarily. The order of layoff is based on length of service in the class identified for elimination/reduction. Under Education Code section 45101, “‘Classification’ means that each position in the classified service shall have a designated title, **a regular minimum number of assigned hours per day, days per week, and months per year**, a specific statement of the duties required to be performed by the employees in each such position, and the regular monthly salary ranges for each such position.” (Emphasis added.) Thus, you could have a 6-hour, 10-month custodian classification and an 8-hour, 12 month custodian classification, which are two distinct classifications. If the layoff is only for the 6-hour, 10-month custodian, then 8-hour, 12 month position would not enter the layoff analysis.

**Q. Does date of hire mean with the District, or in a permanent/probationary position?**

A. If date of hire has been negotiated with the union to serve as “length of service,” the date of hire is typically the employee’s date of hire in the classification as a probationary or permanent employee, which may be the same as the employee’s hire date in the district if they have only held one classified position. Otherwise, an employee may have more than one hire date if they have been employed by the district in additional classifications. The collective bargaining agreement likely clarifies this issue.

## **Bumping**

**Q. Due to bumping, do you recommend sending notices to all employees or only affected employees?**

A. To properly layoff a permanent classified employee, they must receive initial notice by March 15. If you know beforehand that the individual identified for layoff can bump and has agreed to bump in lieu of layoff, you will need to give a March 15 notice to the bumpee (the person being bumped). If you do not know by March 15 who will be bumped, then you should issue precautionary layoff notices to all employees who may be affected by March 15 with the understanding that you will be rescinding layoff notices as you work through the bumping analysis.

**Q. When do those displaced by bumping need to be notified?**

A. By March 15, because they are now subject to layoff.

**Q. What if an employee identified for layoff has not worked in any other position in the district? Do they still have bumping rights?**

A. Generally, no. However, review your collective bargaining agreement.

**Q. Does an employee have rights to a previous classification in which they obtained permanent status, absent contract language providing bumping rights?**

A. No. Bumping for classified employees only exists in collective bargaining agreements; it is not set forth in the Education Code.

**Q. Do bumping rights apply to classified employees who have not joined the union?**

A. Yes. If your classified collective bargaining agreement provides for bumping, all employees in positions within the bargaining unit are afforded all the rights and benefits in the collective bargaining agreement even if they are not dues-paying union members.

**Q. A certificated administrator has return rights to the classroom under certain circumstances. If we need to lay off a classified manager, do they have bumping rights into a former represented classification?**

A. Probably not, but you would need to check the classified collective bargaining agreement to be sure. Because the classified manager is being laid off from a position outside the union, they are not entitled to the rights and benefits provided for in the collective bargaining agreement.

### ***Union/Negotiation Issues***

**Q. Can the board or county superintendent go ahead with layoff if the union delays negotiation on the effects of layoff?**

A. Because the layoff timelines are defined by statute, if impacts and effects negotiations have not concluded by March 15, the school board or county superintendent may adopt the layoff resolution to initiate the layoff process. While the layoff process is underway, impacts and effects negotiations must continue until completed or the matter goes to impasse and fact finding.

**Q. Should unions be sent a separate notice for the layoff within their bargaining unit?**

A. The impacts and effects of a layoff are negotiable. Districts should notify the union of the intent to conduct layoffs as soon as such decision is made.

### ***Odds and Ends***

**Q. Is the elimination of a vacant position considered a layoff?**

A. If you are eliminating a vacant position, it is a best practice to include it on the layoff resolution. That way it is off the books and there is no argument that a vacancy exists for the subsequent school year that could be filled by a laid off or other employee.

**Q. Can the 60-day notice be done at any time during the school year?**

A. If an employee is subject to the 60-day notice procedure, this can generally be done at any time during the school year. However, for classified employees employed in specially funded programs, in order to use the 60-day notice process, elimination of the position must be due to the program's expiration.

**Q. What if we don't have a union in our district for classified employees?**

A. Then there are likely no bumping rights and you would just issue the layoff notice to the least senior classified employee in the classification identified for layoff.

**Q. Under what circumstance can date of hire be used for unrepresented management staff?**

A. Education Code section 45308, subdivision (b), provides that "If a governing board enters into an agreement with the exclusive representative of classified employees that defines 'length of service' to mean the hire date, the governing board may define 'length of service' to mean the hire date for a classification of employee not represented by any exclusive bargaining unit."

**Q. If the District makes a mistake, does that nullify the layoff? What would happen to the employee who was supposed to be laid off?**

- A. Typically, if a prejudicial error is made, the administrative law judge will order the District to rescind the layoff notice of the person(s) who should not be laid off (usually due to bumping) or whose preliminary layoff notice(s) was untimely served. In the teacher layoff context, administrative law judges have rescinded layoff notices of persons who were improperly bumped.

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