

Temporary Employees of a Community College District



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This workbook contains generalized legal information as it existed at the time the workbook was prepared. Changes in the law occur on an on going basis. For these reasons, the legal information cited in this workbook should not be acted upon in any particular situation without professional advice.

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TABLE OF CONTENTS

1-24 c

INTRODUCTION	6
FACULTY MEMBERS	
SECTION 1	
General Principles.....	8
A. Limitations on the Number of Temporary Faculty Members.....	8
B. Classification of Temporary Faculty Members	8
1. Faculty Employed to Fill Positions of Regularly Employed Persons Absent from Service—§ 87478....	8
2. Faculty Employed to Fill a Position for Which No Regularly Employed Person Is Available—§ 87478	9
3. Faculty Employed to Serve Day-to-Day During First 3 Months of “School Term” —§ 87480	9
4. Faculty Employed in Case of Emergency—§ 87480	9
5. Faculty Employed Due to Need for Additional Faculty During a Particular Semester, Quarter, or Year—§ 87481	9
6. Faculty Employed Based upon Need for Additional Faculty During a Particular Semester or Quarter Due to Higher Enrollment—§ 87482	10
7. Faculty Employed up to 67% of Full-Time Hours per Week—§ 87482.5.....	10
SECTION 2	
Historical Background.....	11
SECTION 3	
Case Law Since <i>Peralta</i>	12
SECTION 4	
Basic Rules	15
SECTION 5	
When Temporary Hours May Advance an Employee Toward Tenure	16
SECTION 6	
Other Relevant Education Code Statutes.....	16
SECTION 7	
Impact of Collective Bargaining Agreements.....	17
A. Provisions in Collective Bargaining Agreements Are Not Preempted by the Education Code.....	17
B. Obligation to Bargain Reemployment Preferences for Part-Time, Temporary Faculty	17
SECTION 8	
Impact of ACA on Temporary Faculty Members.....	19
A. Who is a Full-Time Employee?.....	19
B. How Should Districts Calculate “Hours of Service” for Temporary Faculty Members?	20
SECTION 9	
Conclusion	21

GOING OUTSIDE THE CLASSIFIED SERVICE: SHORT-TERM EMPLOYEES, SUBSTITUTES, AND PROFESSIONAL EXPERTS

SECTION 1

What is the Classified Service?23

 A. Non-Academic Employees.....23

 B. Definition of “Classification”.....23

 1. Classification Means That Each Position in the Classified Service Has:23

 2. Establishment of Classified Service in Merit Districts.....24

 C. Rights and Responsibilities of Classified Employees24

SECTION 2

Why Go Outside the Classified Service?.....25

SECTION 3

When Can You Go Outside the Classified Service?.....25

 A. Merit vs. Non-Merit Distinction.....25

 B. Temporary Employment Positions Specifically Excluded from Classified Service.....25

 1. Substitutes (Non-Merit Systems)26

 2. Short-Term Employees (Non-Merit Systems).....27

 3. Apprentices (Merit and Non-Merit Systems).....29

 4. Professional Experts (Merit and Non-Merit Systems)30

 5. Full-Time Students Employed Part-Time (Merit and Non-Merit Systems)34

 6. Part-Time Students Employed Part-Time on Work Study (Merit and Non-Merit Systems).....34

 7. Architectural and Engineering Firms (Merit Systems).....34

 8. Community Representatives in Advisory or Consulting Capacities (Merit Systems).....34

 9. Professional Services and Advice to District (Both Merit and Non-Merit Systems)35

 C. Employee in Regular Status Who Reduces Time.....35

 D. Must All Work That is Neither Academic nor Exempt Be Performed by Classified Employees?.....35

 1. Non-Merit Districts:35

 2. Merit System Districts:36

 E. A Note on Employees in Categorically Funded Programs37

SECTION 4

Personal Services Contracts.....37

 A. To Achieve Cost Savings When All of the Following Conditions Are Met:38

 B. Contract Mandated by the Legislature.....39

 C. Services Not Available Within the District40

 D. Services Incidental to a Contract for Purchase or Lease of Real Property40

 E. Contracts Necessary to Accomplish Community College District Goals and Purposes40

 F. Emergency Appointments40

 G. Equipment or Materials Not Available from District41

 H. Services are of Urgent, Temporary, or Occasional Nature41

Section 5 Under What Circumstances Can a Temporary (Exempt) Employee Become a Classified Employee? .41

SECTION 6

Conclusion42

ENDNOTES43

INTRODUCTION

As the Court of Appeal in *Haase v. San Diego Community College District*¹ aptly observed:

“Entry into the Education Code is painful.”

The complex web of laws that is the Education Code can be daunting to decipher. The provisions relating to employment of part-time, temporary faculty to meet a community college district’s ongoing instructional and non-instructional needs, and to employment and classification of non-academic community college district employees specifically exempt from the classified service, are no exception. This workbook focuses on simplifying and de-mystifying the provisions regarding hiring temporary faculty members and provides guidance to community college districts regarding when and why districts can hire temporary, non-academic employees.

This workbook addresses important questions pertaining to the employment of temporary faculty members such as:

- How often can the district employ them?
- Under what circumstances do they acquire tenure, if at all?
- If they do acquire tenure, how to calculate their tenure?
- How many hours a week can they work?
- How can a district or college use them flexibly, but without exploitation?
- Should they be required to maintain office hours?
- Can they accrue vacation?
- Can the district employ them in different disciplines?
- Can the district employ them in categorically funded programs?

Likewise, this workbook addresses important questions pertaining to the employment of non-academic community college district employees and to positions specifically exempt from the classified service such as:

- What is the classified service?
- Why go outside the classified service?
- When can a district hire outside the classified service?
- When can a community college district employ personal service contracts?
- Under what circumstances can an employee exempt from the classified service become a classified employee?

Faculty Members

A. LIMITATIONS ON THE NUMBER OF TEMPORARY FACULTY MEMBERS

Education Code sections 87482.6 and 87482.7 require community college districts to carefully consider staffing decisions to accomplish the legislative goal of providing at least 75% of credit hour instruction in community colleges by full-time instructors, while still maintaining program flexibility. As specified under those statutes and Title 5 of the California Code of Regulations, the State Chancellor’s office may enforce the 75% full-time faculty obligation through funding and allocation reductions.²

B. CLASSIFICATION OF TEMPORARY FACULTY MEMBERS

The Education Code, sections 87480 et seq., authorizes community college districts to hire temporary faculty members under certain conditions. Districts should not label these positions as temporary unless the employment meets one of these enumerated conditions.³ Moreover, districts must provide temporary faculty with written notice at the time of employment that clearly indicates both the temporary nature of the employment and the length of employment. If a district fails to provide this notice, the employee may be a contract employee by operation of law. To avoid the automatic conversion of temporary faculty to contract or regular status, districts must provide clear, written notice of the employee’s temporary status and the salary he or she will receive on or before the first date of paid service and annually in July.⁴

1. FACULTY EMPLOYED TO FILL POSITIONS OF REGULARLY EMPLOYED PERSONS ABSENT FROM SERVICE—§ 87478

Education Code section 87478 states that faculty employed to fill positions of regularly employed persons absent from service shall be temporary employees. Regular employees on leave are entitled to return to their positions. Therefore, districts must be careful not to fill such temporary vacancies with contract employees, also known as probationary or tenure-track employees.

However, section 87478 also mandates that any person employed for one complete school year under this section must, if reemployed for the following school year in a “faculty position,” be classified as a contract employee—and have the previous year’s employment as a temporary employee deemed a year of contract employment. In other words, under this scenario the faculty member’s status when rehired into a faculty position is a second year probationary employee.

As set out below, the district must provide the salary for this kind of temporary employment to the employee in writing.

2. FACULTY EMPLOYED TO FILL A POSITION FOR WHICH NO REGULARLY EMPLOYED PERSON IS AVAILABLE—§ 87478

Section 87478 also provides that, where no regular employee is available, any otherwise qualified person who consents to be employed in a temporary status may be hired after September 1 of any school year. In order to hire a temporary employee under this provision, the district must demonstrate, to the satisfaction of the Board of Governors, that it was unable to acquire the services of a qualified regular employee. Again, if the employee serves for a complete school year and is rehired into a faculty position, the governing board must classify the employee as a contract employee, and count the prior year as a year of contract employment.

3. FACULTY EMPLOYED TO SERVE DAY-TO-DAY DURING FIRST 3 MONTHS OF “SCHOOL TERM” —§ 87480

Section 87480 provides that districts must classify as temporary faculty who serve from day to day during the first three school months of any “school term,” to instruct temporary classes or to perform other duties which do not last longer than the first three school months of any school term, or to instruct in special day and evening classes for adults or in schools of migratory population for not more than four school months of any school term. However, if the classes or duties continue beyond three or four months, respectively, the employee must be re-classified as a contract employee.

4. FACULTY EMPLOYED IN CASE OF EMERGENCY—§ 87480

Education Code section 87480 also authorizes district governing boards to make temporary emergency appointments for no more than 20 working days *to prevent the stoppage of district business where no persons are immediately available for contract classification*. Persons appointed in this way are temporary employees employed to serve from day to day. Service by a person in such a temporary appointment does not count toward achieving status as a regular district employee.

5. FACULTY EMPLOYED DUE TO NEED FOR ADDITIONAL FACULTY DURING A PARTICULAR SEMESTER, QUARTER, OR YEAR—§ 87481

Pursuant to Education Code section 87481, when a district has a specific need for additional faculty members during a particular semester, quarter, or year because a faculty member has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, a district may fill that need by employing qualified individuals as temporary faculty members for a complete academic year. However, the number of persons so employed must be limited to the specific need identified, as determined by the governing board. Districts must be careful not to allow the number of temporary faculty hired on this basis to exceed the actual number of faculty members on leave. Failure to do so could result in having to “convert” any temporary hires that exceed the actual need to contract employees.

Section 87481 further provides that, if the employee served a complete school year and is rehired into a vacant faculty position (i.e., a position that is not filled by a regular or contract employee on leave) the employee must be classified as a contract employee, and their prior year counts as a year of contract employment. In other words, as under Section 87478, faculty rehired under this scenario enjoy the status of second-year probationary employees.

6. FACULTY EMPLOYED BASED UPON NEED FOR ADDITIONAL FACULTY DURING A PARTICULAR SEMESTER OR QUARTER DUE TO HIGHER ENROLLMENT—§ 87482

Education Code section 87482 also permits a community college district to employ qualified individuals as temporary faculty members for a complete school year, or at least a complete school term, where there is a need for additional faculty during a particular semester or quarter because of the higher enrollment of students during that semester or quarter, or because a faculty member has been granted leave for a semester, quarter, or year, or is experiencing long-term illness.

Employment under this section cannot exceed more than two semesters or three quarters within any period of three consecutive years. This restriction reinforces the requirement that the district is responding to unusual or unexpected higher enrollment. Where the higher enrollment becomes consistent, districts must fill these positions with contract employees. If a temporary employee is hired under this section for more than two semesters or three quarters within a three-year period, the employee may become a contract employee.

7. FACULTY EMPLOYED UP TO 67% OF FULL-TIME HOURS PER WEEK—§ 87482.5

Last—but certainly not least—Education Code section 87482.5 provides that, “notwithstanding any other provision of law,” faculty may be employed on a temporary basis if they are employed to teach for, “not more than 67 percent of the hours per week considered a full-time assignment for regular employees having comparable duties.”

Note that this is in contrast to temporary hiring under Section 87482, described above, which provides that temporary employment may not exceed more than two semesters, or three quarters, within any three consecutive years. Thus, if a temporary employee stays under the 67 percent cap on weekly hours, he or she may be rehired indefinitely. However, if the hours exceed the 67 percent cap, the employee will be treated as a temporary employee under Section 87482, which will require conversion to contract status if the employee exceeds the 67 percent cap for more than two semesters or three quarters in three consecutive years.

The rules for hiring and compensating hourly rate faculty derive from a series of cases interpreting Education Code section 87482.5 and related statutes. The first was *Balen v. Peralta Junior College District* (1974) 11 Cal.3d 821, 114 Cal.Rptr. 589. In that case, the California Supreme Court addressed the rights of so-called pre-1967 part-time faculty. In the process of finding tenure for these part-time employees who were first employed before November 8, 1967, the Court expressed the following general principle, which has continued to be applicable in determining whether part-time faculty acquire rights to tenure:

“The essence of the statutory system is that continuity of service restricts the power to terminate employment which the institution’s governing board would normally possess Because the . . . temporary classifications are not guaranteed procedural due process by statute, they are narrowly defined by the Legislature, and should be strictly interpreted.”

In *Peralta Federation of Teachers v. Peralta Community College District*,⁵ the California Supreme Court concluded that while the language that now appears in Education Code section 87482.5 precluded faculty members who worked less than 60 percent from acquiring permanent status, this result was only applicable to persons so employed after November 8, 1967, the operative date of that language. As a result, persons first employed before November 8, 1967 successfully claimed that they were entitled to more pay.

In *California Teachers Assn. v. San Diego Community College District*,⁶ the California Supreme Court interpreted the Education Code section requiring that compensation for tenured part-time faculty be calculated on a pro rata basis by comparing time actually spent on the job, both inside and outside of the classroom, by part-time and full-time faculty.

However, in *Peralta Federation of Teachers, supra*, the California Supreme Court also held that districts may employ post-1967, part-time faculty as temporary employees indefinitely. The Court further found that the limitation of Education Code section 87482 to employment for not more than two semesters or three quarters within three consecutive years was applicable to part-time faculty. Thus, an employee employed less than the 60 percent threshold [now 67 percent] can be employed semester after semester, indefinitely. But, in the event an employee is employed for more than the 60 percent threshold [now 67 percent] for two semesters and is subsequently employed for a third semester within a three year period, that employee must then be deemed to be probationary and not temporary.

On July 10, 2008, the Legislature amended Education Code section 87482.5, subdivision (a) to raise the percentage of full-time assignment hours per week a faculty member could work on a temporary basis to 67%. Accordingly, a temporary faculty member can work not more than 67 percent of the hours considered a full-time assignment for regular employees having comparable duties.

The foregoing seemingly simple principles have generated much litigation, and many cases have made their way to the California Court of Appeal. For example:

In *Winslow v. San Diego Community College District*⁷, the Court of Appeal rejected the argument that the contract under which a temporary employee was hired could act as a waiver of the rights guaranteed by the Education Code. The same principle was adopted in *Covino v. Contra Costa Community College District*⁸.

In *Haase v. San Diego Community College District*⁹, the Court of Appeal rejected a part-time employee's argument that he was entitled to tenure where he had been employed initially for three years as a temporary teacher working less than 60 percent, and for three additional years in a categorically funded program. The employee did not prevail despite the fact that the district had not complied with the Education Code's requirement of providing him with a written contract.

NOTE: This failure to give notice would probably cause the district to lose the case today. In a case involving K-12 teachers, the California Supreme Court found that this requirement is mandatory, and a temporary employee will be deemed probationary if the district does not give required notice.¹⁰ While it involves K-12 teachers, the case analyzes parallel language applicable to community college districts.

In *Rooney v. San Diego Community College District*¹¹, the Court of Appeal concluded that it was not necessary to include activities undertaken voluntarily by part-time faculty when comparing time actually spent on the job with time spent by full-time faculty. In the same decision, the Court held that the employee failed to establish a right to tenure when his assignment in the fall semester was below 60 percent, even though in the succeeding spring semester it exceeded 60 percent; this "averaging calculation," however, is only applicable in a case where the employee is hired on a yearly contract rather than semester by semester.

In *Saraceno v. Foothill-De Anza Community College District*¹², an assistant basketball coach failed to persuade the Court that he was entitled to permanent status because his duties did not require a credential.

In *Kalina v. San Mateo Community College District*¹³, a college was required to classify a temporary instructor as a probationary employee when it employed her to teach more than 60 percent of a full-time assignment during the fall semester, as a temporary sabbatical replacement during the spring semester, and then as a full-time employee the following school year.

In *Ferris v. Los Rios Community College District*¹⁴, a different district of the Court of Appeal required that non-classroom activities that part-time employees were *expected* to perform be included in the pro rata calculation.

In *McGuire v. Governing Board of San Diego Community College District*¹⁵, a temporary faculty member argued that time spent teaching in the classroom should be combined with time spent tutoring in an Independent Learning Center. The Court of Appeal rejected this theory, noting, “the extra work McGuire did was not comparable to teaching a class.”

In *Balasubramanian v. San Diego Community College District*¹⁶, the Court of Appeal rejected a claim that day-to-day substitute teaching assignments could be combined with a part-time temporary assignment to exceed 60 percent. The case is significant for two principles: (1) the Court rejected the effort to combine the two types of temporary assignments; and (2) the Court specifically stated that even where a temporary faculty member exceeds 60 percent of the time for a full-time assignment, the faculty member does not automatically obtain contract status, but rather may simply become “eligible” for reclassification as a contract employee.

Two years later, in *Stryker v. Antelope Valley Community College District*¹⁷, the Court of Appeal rejected the holding and reasoning of the *Balasubramanian* case. There, a temporary employee did not teach in excess of 60 percent of the hours per week considered a full time assignment for regular faculty having comparable duties. She also supervised students enrolled in the college work experience classes, which included conferring with their on-the-job supervisors, and giving a final grade. She claimed the work experience assignment, when added to her other teaching, caused her to exceed the 60 percent limit. The Court returned the case to the trial court to decide the work experience question, and held that where a temporary faculty member is employed in excess of 60 percent for more than two semesters or three quarters in three years, the faculty member must be reclassified as a contract employee as a matter of law.

In *Womack v. San Francisco Community College District*¹⁸, the Court of Appeal determined that Section 87482.5 does not set forth a state-wide definition for what constitutes a “full-time teaching assignment” in a community college. Instead, the Court found that the statute states only that the “60 percent” determination will be based upon the “hours per week considered a full-time assignment for regular employees having comparable duties.” (Ed. Code § 87482.5, subd. (a).) The court found that this language permits individual community college districts to decide “what constitutes a full-time assignment” for the purpose of the 60 percent rule under Section 87482.5. Because the district had mandated 18 hours or units per week as a full-time assignment for Womack’s position as an English as a Second Language instructor, which he had not satisfied, he had not met the 60 percent requirement.

The Court of Appeal also rejected Womack’s argument that the District should use only actual teaching time, and not office hours, to determine the work hours of a full-time load. The Court determined that Section 87482.5 gives a community college district “substantial discretion” to decide what constitutes a “full-time load.” The Court found that the District had exercised its discretion when it determined that 18 hours, including three mandatory office hours, constitute a full-time assignment for an ESL instructor. Nevertheless, the district could exclude Womack’s office hours in calculating his total hours worked, because Section 87884, subdivision (b) excludes office hours from that calculation for temporary employees. Thus, the Court found that based upon Womack’s nine hours, or 10.5 units of instruction, his percentage of the full-time equivalent was less than 60 percent.

The Court also found that it was unreasonable for Womack to wait until 2002 to assert that he had exceeded the 60 percent level, when he claimed he had started teaching the 10.5 units that exceeded the 60 percent level in 1993. By not challenging his status as a temporary employee within a reasonable time after he claimed it had changed, the court found that Womack had “acquiesced” in the action and that the District was prejudiced by this acquiescence because of its increased exposure to back pay for the years of alleged misclassification. The Court also found that the District suffered additional prejudice by Womack’s three-year delay in prosecuting his petition to a hearing once he filed his petition. Thus, the Court found that Womack’s claim was time-barred.

In *Theiler v. Ventura County Community College Dist*¹⁹, the Court of Appeal held that a basketball coach who taught less than 60 percent of a full-time assignment and received a stipend for ancillary duties was a temporary employee. The Court found that only the hours spent teaching in a class count in determining the full-time assignment. Under the relevant collective bargaining agreement, any additional duties were “found to be ancillary, even if such duties could be broadly classified as teaching.” Here, the Court concluded that the proper formula for calculating the full-time equivalent was the number of class hours per week specified in the offer of temporary non-contract employment, reduced by an amount defined under the collective bargaining agreement, which discounted certain types of teaching assignments, including physical education classes. The Court of Appeal agreed with the district that Theiler was a temporary employee because he did not spend at least 60 percent of a full-time assignment teaching classes.

In summary, to calculate the “67 percent of the hours per week considered a full-time assignment,” a district may generally look to the number of hours per week that corresponds to 67 percent of the hours of classroom instruction considered a full-time assignment for a full time employee teaching the same classes. Section 87482.5, subdivision (c) specifically excludes service in professional ancillary activities, including, but not necessarily limited to, governance, staff development, grant writing, and advising student organizations from counting towards

attainment of contract or regular status unless otherwise provided for in a collective bargaining agreement applicable to a person employed under this section. Additionally, service as a substitute on a day-to-day basis does not count toward calculating eligibility for contract or regular status. Furthermore, under *Theiler v. Ventura County Community College Dist.*, if ancillary duties are performed outside course hours and are paid with a stipend, they do not count in calculating eligibility for contract or regular status.

Section 4 **BASIC RULES**

Over the years, the courts have interpreted these Education Code provisions to create few basic principles.

- Districts may employ persons for 67 percent or less of the hours per week of a full-time assignment indefinitely as temporary employees.
- Districts may employ persons for 67 percent or less of the hours per week of a full-time assignment without regard to the two-semester or three-quarter limitation of Section 87482.
- If a temporary employee exceeds the 67 percent threshold, he or she may possibly become a probationary or tenured employee.
- For computation of the 67 percent threshold, a district may average the faculty load over an academic year, but *only* where the employee has an annual employment contract. In the more usual case, where a district hires temporary employees each semester, districts should be cautious to prevent a faculty member from exceeding 67 percent in any week.
- A district has discretion to determine the number of hours that constitute “Full-Time Instruction” for purpose of the 67 percent rule (as evidenced, for example, in its faculty handbook or collective bargaining agreement).
- A faculty member cannot waive their rights to tenure if the employee would otherwise have those rights based upon statute.
- Tenure is the rule and temporary employment the exception, such that it is the employing district’s burden to demonstrate, legally and factually, that the employee is temporary.
- Service as a substitute on a day-to-day basis by persons employed as a temporary employee do not count for purposes of calculating eligibility for contract or regular status.

- For purposes of calculating eligibility for contract or regular status, hours spent performing ancillary activities such as staff development, grant writing, and advising student organizations are not considered, unless a collective bargaining agreement specifically requires the District to consider these activities.
- For purposes of calculating eligibility for contract or regular status, only the hours spent teaching in a class may be used in determining the full-time assignment and any additional duties performed outside course hours and paid with a stipend are ancillary and do not count in calculating eligibility for contract or regular status.

Section 5

WHEN TEMPORARY HOURS MAY ADVANCE AN EMPLOYEE TOWARD TENURE

As noted above, where a temporary employee serves *for a complete school year* in a temporary position, and is then rehired into a faculty position, a district must classify the employee as a contract employee and treat the prior year as a first year of contract employment. Additionally, Section 87475 provides that where a contract faculty employee has served for one complete school year, a district may (but is not required) to count the employee’s prior service as a temporary faculty towards attainment of regular employment status, *if* that service was:

- In the immediately preceding year; and
- Was for at least 75% of the number of days the district’s regular schools were maintained.

Section 6

OTHER RELEVANT EDUCATION CODE STATUTES

Within the last few years, the Legislature has enacted several statutes that affect a community college district’s decision whether and how to utilize temporary faculty:

- Education Code sections 87482.6 and 87482.7 require that at least 75 percent of the hours of credit instruction in community colleges be taught by full-time instructors. Thus, community college districts must consider carefully their staffing decisions in order to satisfy this requirement and still maintain program flexibility.

- Education Code sections 87860 et seq. created the Part-Time Community College Faculty Health Insurance Program. This program creates an incentive for community college districts to offer health insurance for part-time faculty. To be eligible, a faculty member must have a teaching assignment that equals or exceeds 40 percent of the cumulative equivalent of a minimum full-time teaching assignment. The program must be negotiated with the exclusive representative. Half the cost of such a program is provided by the state through the Chancellor’s Office. The state last funded this program in 2008-2009.
- By Education Code sections 87880 et seq., the Legislature created the Community College Part-Time Office Hours Program. The purpose of the program is to encourage community college districts to pay temporary faculty to maintain office hours. Education Code section 87884 subdivision (b) states hours negotiated under the program will not apply to the hours per week requirement of Section 87882. The program must be negotiated with the exclusive representative. Half the cost of such a program is provided by the state through the Chancellor’s Office. The state last funded this program in 2008-2009.

IMPACT OF COLLECTIVE BARGAINING AGREEMENTS

A. PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS ARE NOT PREEMPTED BY THE EDUCATION CODE

The Public Employment Relations Board (PERB) has ruled that provisions in collective bargaining agreements governing the rehiring of temporary faculty are *not preempted* by the Education Code.²⁰ Therefore, districts must be careful not only to comply with Education Code provisions but also with any collective bargaining provisions that may be relevant to the rehiring of temporary teachers.

Moreover, even though technically PERB lacks jurisdiction to enforce the Education Code, it does have limited jurisdiction to interpret Education Code provisions that are incorporated into collective bargaining agreements, for purposes of determining whether a unilateral change charge has merit.

B. OBLIGATION TO BARGAIN REEMPLOYMENT PREFERENCES FOR PART-TIME, TEMPORARY FACULTY

In 2017, the Legislature enacted SB 1379, which provides temporary, part-time faculty with reemployment rights.²¹ Specifically, the bill requires community college districts to collectively bargain the terms of a district’s reemployment preference and regular evaluation process for part-

time, temporary faculty. Bargaining over these subjects is a condition of a district's receipt of Student Success and Support Program (SSSP) funds.²² (The provisions of SB 1379 apply to SSSP funds allocated to districts on or after July 1, 2017.) This is an affirmative obligation for districts, and is required regardless of whether or not the bargaining unit requests to bargain over these matters.

As a condition of receiving SSSP funds, districts without a collective bargaining agreement with part-time, temporary faculty in effect as of January 1, 2017 were required to commence negotiations with the exclusive representative of part-time, temporary faculty on the terms of reemployment preference up to the range of 60 to 67 percent of a full-time equivalent load.²³

These reemployment terms must be based on minimum standards and include the following:

- The length of service at the community college or district;
- The numbers of courses taught at the community college or district;
- The results of temporary faculty evaluations conducted pursuant to Education Code section 87663; and
- The availability, willingness, and expertise of part-time, temporary faculty to teach specific classes or take on specific assignments that are necessary for student instruction or services.²⁴

In addition, a district must negotiate a regular evaluation process for part-time, temporary faculty and policies for termination.²⁵

In all cases, all part-time faculty assignments shall be temporary in nature, contingent on enrollment and funding, and subject to program changes. Further, no part-time faculty member shall have reasonable assurance of continued employment at any point, irrespective of the status, length of service, or reemployment preference of that part-time faculty member. However, districts must be careful when releasing part-time faculty members. While part-time faculty serve at the pleasure of the Board, they may have reemployment preference rights as a result of the negotiated provisions required by SB 1379. Districts must be sure to review and follow any collectively bargained provisions for terminating reemployment preference rights when they seek to release a part-time faculty member.

A district that already had a collective bargaining agreement with its part-time faculty members in effect as of July 1, 2017 that satisfies the requirements of SB 1379 is deemed in compliance with the requirements while that bargaining agreement is in effect.

The Patient Protection and Affordable Care Act (ACA) became law on March 23, 2010 with the goal of providing affordable health coverage for all individuals.

The ACA required all states to establish an on-line marketplace called an “exchange” where individuals and small businesses can compare options and obtain health coverage. Under the ACA, the federal government operates its own exchanges in states that refuse to establish one. However, California has been very proactive in implementing the ACA. California’s exchange, Covered California, allows individuals and small businesses to enroll in health coverage. This means that all district employees have the option of obtaining health coverage through Covered California, rather than using a district’s health coverage plans. The Internal Revenue Service (IRS) previously assessed tax penalties against individuals who did not have any health coverage. For 2014, the tax was \$95 per year or 1% of household income, whichever was greater. These tax penalties increased drastically for 2015 to \$325 or 2% and further in 2016 to \$695 or 2.5%. As of 2019, this tax penalty no longer applies at the federal level. However, in response to this change, the California Legislature passed Senate Bill 78, which created the Minimum Essential Coverage Individual Mandate. This Mandate took effect on January 1, 2020, and requires California residents to either (1) have qualifying health insurance coverage; (2) obtain an exemption from the requirement to have coverage; or (3) pay a penalty when they file their state tax return.²⁶ This penalty, referred to as the Individual Shared Responsibility Penalty, will be applied by the California Franchise Tax Board.²⁷ Therefore, many individuals who do not have employer sponsored health coverage are now seeking coverage through Covered California.

The ACA is a complex law that amends many other existing laws. It imposes various new requirements on employers, and provides few exceptions for public entities. The applicability of ACA’s provisions typically will depend on the type of health plan offered or the size of the employer.

A. WHO IS A FULL-TIME EMPLOYEE?

Community colleges are struggling to determine which employees are considered “full-time” under the ACA because only a full-time employee can trigger the penalties, and the size of the penalties are based on the number of full-time employees.

The ACA’s definition of a full-time employee is an average of 30 hours of service per week in any given month. Districts are struggling with this definition is because it deviates from the traditional “full-time” employee definition of 40 hours of work per week. Further, the definition does not use “hours worked,” but rather “hours of service.” Hours of service include not only hours worked, but also paid time off.

Districts may have ACA-defined full-time employees who are not currently receiving benefits. Most districts have large groups of employees who currently work between 30 and 40 hours per week. These groups of employees may not currently be offered benefits. The ACA will define

those employees as “full-time.” This means that if one of those employees goes to Covered California, buys coverage, and receives a subsidy, it could trigger a penalty against the district. Districts should examine their workforce and identify employees who are averaging between 30 and 40 hours of service. If the district wants to avoid penalties, it will need to offer affordable coverage to these identified employees (and their dependent children up to age 26).

B. HOW SHOULD DISTRICTS CALCULATE “HOURS OF SERVICE” FOR TEMPORARY FACULTY MEMBERS?

The challenge facing districts with regard to temporary faculty members is how to calculate “hours of service.” Employers must use a “reasonable method of crediting hours of service.” Although districts pay temporary, part-time faculty members hourly, they do not track temporary, part-time hours as they do classified employee payroll hours. Temporary, part-time faculty members are paid based on the load they teach or their lecture hours’ equivalent. The proposed regulations relating to the penalties state that an employer may use a reasonable method to calculate hours of service for temporary, part-time faculty members. The regulations specifically indicated that it would not be reasonable to take into account only lecture hours.

Most districts are used to restricting the workload of its part-time faculty members to 67% of the hours of a full-time faculty member having comparable duties. However, the IRS has determined that the 67% determination is not a reasonable method for calculating hours of service for the ACA because it does not account for all paid work the part-time faculty member performs. The ACA requires college districts to add up all hours of service of an part-time faculty members, including work performed for ancillary activities, office hours, stipend work, and any other work assignments.

The ACA regulations provide guidance on one reasonable method of crediting hours of service. Districts may credit part-time faculty members with (a) 2.25 hours of service per week for each hour of teaching or classroom time and, separately, (b) an hour of service per week for each additional hour outside of the classroom the faculty member spends performing duties he or she is required to perform, such as required office hours or meetings. Districts should also assign hours to stipend work performed by part-time coaches to factor into the calculation.

If a district opts to create its own reasonable method for calculating hours of part-time faculty members, it should ensure their method accounts for hours outside of classroom time, such as class preparation, grading, and office hours. For most districts, the 67% determination will not be considered a reasonable method for calculating hours of service for ACA because it does not account for all “hours of service” the part-time faculty member performs.

Most districts have adopted the Look Back Safe Harbor, which allows the district to average hours of service over a measurement period. However, there are specific legal requirements tied to the operation of the safe harbor. For example, new employees who are reasonably expected to be ACA full-time employees, must be offered affordable coverage within the first three full calendar months or they could trigger potential penalties. Districts must measure the hours of service of new variable hour, new seasonal or new part-time employees under both an initial

measurement period and the first full standard measurement period. Districts should make sure that Human Resources personnel are trained to calculate the hours of service based on all of the safe harbor rules.

Section 9

CONCLUSION

The information included here highlights some of the complexities of community college temporary faculty employment. The rights and responsibilities of both the districts and the employees are dependent upon an accurate reading of the many Education Code provisions, which control the process. The Basic Rules set out above will help minimize the risk that temporary faculty become contract or probationary employees. However, a court will decide the issues on a case-by-case basis. Many possible unique situations may arise. When in doubt, do not hesitate to consult counsel to assist your district in navigating through the nuances and interpretations of this law.

**Going Outside the
Classified Service:
Short-Term Employees,
Substitutes, and
Professional Experts**

WHAT IS THE CLASSIFIED SERVICE?

NOTE: Although the Education Code uses the term “specifically exempt” to describe temporary non-academic employees who are specifically exempt from the classified service, each community college district has its own individual term for these employees. For ease of reference, we will be referring to non-academic employees employed outside the classified service as “temporary employees.” In addition, the Education Code makes certain distinctions between merit and non-merit system districts throughout its provisions relating to the classified service. Therefore, you should ensure that the Education Code section you are reading is applicable to your district. Throughout this workbook, we differentiate between those provisions applicable to merit districts and those applicable to non-merit districts.

A. NON-ACADEMIC EMPLOYEES

Pursuant to the California Education Code, employment in community college districts falls into one of two categories: “academic” or “classified.” Education Code section 87001, subdivision (b) defines academic employment as, “every type of service, excluding paraprofessional service, for which minimum qualifications have been established by the board of governors pursuant to Section 87356.” Academic employees, such as faculty members, are part of the academic service.²⁸

The remaining employees fall into the category of “classified” employees.²⁹ However, the California Education Code gives limited flexibility to districts to hire temporary non-academic employees that are not part of the classified service, where the work involved is temporary or short-term in nature. Education Code section 88003 governs classification in non-merit system districts. Education Code section 88076 governs classification in merit system districts.

In both merit and non-merit system community college districts, all positions that are not academic and are not specifically excluded from the classified service under the Education Code must be part of the classified service.³⁰ Therefore, if a particular non-academic employee does not fall within a specific statutory exemption, you should presume that the employee is in the classified service.

B. DEFINITION OF “CLASSIFICATION”

1. CLASSIFICATION MEANS THAT EACH POSITION IN THE CLASSIFIED SERVICE HAS:³¹

- 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 position; and
- The regular monthly salary ranges for each position.

2. ESTABLISHMENT OF CLASSIFIED SERVICE IN MERIT DISTRICTS

Under Section 88076, subdivision (a), applicable to merit districts only, “to classify” includes, but is not limited to:

- Allocating positions to appropriate classes;
- Arranging classes into occupational hierarchies;
- Determining reasonable relationships within occupational hierarchies; and
- Preparing written class specifications.

C. RIGHTS AND RESPONSIBILITIES OF CLASSIFIED EMPLOYEES

Classified employees have certain rights and protections that are not afforded to temporary employees. These rights include termination only for cause, certain layoff rights, and bargaining rights. However, classified employees do not reach permanent status when reemployed in a new position in which they have not yet passed probation; they only attain permanent status by passing probation in a specific position or class.³² The following is a side-by-side comparison of classified and temporary employees.

Classified Employees	Temporary Employees
Right to continue in employment.	At-will, employed for finite period.
Employer cannot change workweek to include Saturdays or Sundays without written consent of employee. ³³	Employer can require employee to work Saturdays or Sundays.
Entitled to layoff procedures under the Education Code, including: <ul style="list-style-type: none"> • If laid off, automatically placed on rehire list;³⁴ • 60 days’ written notice required before layoffs, or notice by April 29 for categorical positions.³⁵ 	No layoff rights.
Can only terminate for cause.	At-will.
Can only discipline for cause.	Not subject to for-cause requirements.

Part-time workers entitled to same benefits and leaves as full-time workers. ³⁶	Not entitled to benefits.
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Section 2

WHY GO OUTSIDE THE CLASSIFIED SERVICE?

Districts frequently need employees to perform work that is temporary in nature. For example, a permanent employee may be out on a two-month leave. The district will need to hire a replacement worker. Does the district have to hire an extra, classified employee to cover for the worker on leave? If the district were required to employ an additional classified worker, what would happen at the end of two months? Could the district have to lay an employee off when the permanent employee returns? Suppose the district has a particular project that will take four months and requires special skills that no one currently employed in the district has. Does the district have to employ an additional classified worker?

The answer to these questions is simple. Districts are not required to expand the ranks of their classified service to cover work that is not an ongoing component of their services or activities. Such a requirement would force districts to create permanent positions for work that is not permanent in nature. In that case, districts would regularly need to implement layoffs, making them a prominent fixture of personnel management as districts responded to the ebbs and flows of their temporary work needs. The Education Code provides some flexibility for the district to employ persons outside the classified service in very specific situations, which are addressed below.

Section 3

WHEN CAN YOU GO OUTSIDE THE CLASSIFIED SERVICE?

A. MERIT VS. NON-MERIT DISTINCTION

The Education Code governs when a community college district may hire an employee outside of the classified service. Merit system districts face both greater statutory controls in employee classification and the obligation to comply with rules of their Personnel Commissions. Before relying on a particular statute, be sure it applies to your district.

B. TEMPORARY EMPLOYMENT POSITIONS SPECIFICALLY EXCLUDED FROM CLASSIFIED SERVICE

The Education Code establishes several non-academic employment positions that are not part of the classified service:

- “Substitutes” (Non-merit Systems)
- “Short-Term” Employees (Non-Merit Systems)
- Apprentices (Merit and Non-Merit Systems)
- Professional Experts (Merit and Non-Merit Systems)
- Full-Time Students Employed Part-Time (Merit and Non-Merit Systems)
- Part-Time Students Employed Part Time in Work Study (Merit and Non-Merit Systems)
- Architectural and Engineering Firms (Merit Systems)
- Persons specially trained, experienced, and competent to furnish services and advice in financial, economic, accounting, engineering, legal or administrative matters to the district (Merit and Non-Merit Systems)

1. SUBSTITUTES (NON-MERIT SYSTEMS)³⁷

A “substitute” employee is one hired to replace a classified employee temporarily absent from duty. To exclude an employee from the classified service, a district must employ and pay a substitute employee for less than 75% of the college year.

Seventy-five percent of a college year means 195 working days, including holidays, sick leave, vacation, and other leaves of absence, irrespective of the number of hours worked per day. The 195 days must be all in the same school year.³⁸ Non-working Saturdays and Sundays are not counted in determining whether employees of a school district should be regarded as classified employees.³⁹

If the district is recruiting to fill a permanent position, the governing board can fill the vacancy with substitute employees on a temporary basis, provided that the employment does not exceed 60 days, unless a provision in a collective bargaining agreement provides otherwise.

Note: A substitute employee who is employed for more than 195 working days is presumed to become a probationary employee.⁴⁰

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In addition to consulting the Education Code, you should always check the appropriate collective bargaining agreement provisions to determine if there are any applicable additional hiring rules.

Case Law on Substitute Employees

*CSEA v. Oroville Union High School District*⁴¹

A substitute grounds keeper worked for a district from March 31, 1986 until March 25, 1987. He was hired as a probationary employee on April 10, 1987 and terminated from probation on September 28, 1987. He argued that he had become a permanent employee based on the length of his substitute service. The trial court and Court of Appeal ruled for the District. The Court did presume that a substitute employee will become a probationary employee after having been employed by a district for 195 days. However, the Court held that the 195 days must all be in the same year. Here, part of the substitute service was in the 1985-1986 school year and part of it was in the 1986-87 school year. The substitute service did not exceed 195 days in either year.

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In the short run, it may seem less costly to districts to continue with their practices of seasonal temporary employment. However, following the law and complying with the Education Code will save districts from the possibility of facing even more costly liability in the long run.

*California School Employees Assn. v. Governing Bd. of the South Orange County Community College District*⁴²

The District hired Samuel Hamblen as a substitute warehouse worker during the 1997-1998 college year. During that time, Hamblen substituted for several classified employees totaling 222 days of the college year. Alfredo Osuna worked as a substitute custodian for 229 days during the 1998-1999 college year. From 1996 until 1999, Gerald Schwab worked as a maintenance worker over 195 days each year. The California School Employees Association and the three employees sought a writ of mandate to compel the District to recognize the workers as “classified workers.”

The court held that substitute workers who work more than 75 percent of the college year are entitled to classified employee status. The court ordered the District to reclassify the workers under Education Code section 88003, as each of the three workers had worked more than 75% of each college year. The reclassification entitled the workers to benefits such as vacation and sick leave.

2. SHORT-TERM EMPLOYEES (NON-MERIT SYSTEMS)⁴³

a. Violations Are a Frequent Source of Liability

The hiring of “short-term employees” is one of the most hotly contested and difficult issues facing community college districts. Violations of these requirements are a frequent source of liability and have resulted in millions of dollars in settlements. The most frequently violated requirement—and most often resisted—is that the service, once completed, *will not be extended*

or needed on a continuing basis. This means that districts cannot continually hire seasonal financial aid clerks, admissions clerks, bookstore clerks, and instructional aides, for example. Instead of seasonal temporary employment, these employees must be permanent part-time employees.

b. Definition

The Education Code defines a “short-term employee” as an employee hired to perform a service, which once completed will not be extended or needed on a continuing basis. As with substitute employees, “seventy-five percent of a college year” means 195 working days, including holidays, sick leave, vacation, and other leaves of absence, irrespective of the number of hours worked per day. The 195 days must be all in the same school year. Non-working Saturdays and Sundays do not count in determining whether employees of a school district should be classified employees.

c. Requirements for Certification of Short-Term Employee Assignments

There are several steps that districts must take before hiring employees on a short-term basis. First, as discussed above, districts must ensure the following:

- The service to be done is one that once completed will NOT:
 - Be extended or
 - Needed on a continuing basis; AND
- The employee will be working less than 75% of the college year (or 195 working days, including holidays, sick leave, vacation, and other leaves of absence).
- Additionally, before a district may hire a short-term employee, the governing board must certify the employment meets statutory requirements. This certification by the governing board must take place at a regularly scheduled board meeting. The board must:
 - Specify the service required to be performed by the employee; and
 - Certify the ending date of service.
 - The ending date may be shortened or extended by the governing board, but cannot exceed 75% of the college year.

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Failure to comply with the requirements for certification of short-term employee assignments will result in those employees being regular classified employees. Once they have served a probationary period, the district will only be able to terminate them for cause.

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Categorically Funded Positions: The Attorney General has concluded that teacher aides employed by a district whose salaries are paid from federal funds under a specific federal project, do not come within any of the positions which may be excluded under this section, and therefore must be included in the classified service.⁴⁴ See also, “A Note on Employees in Categorically Funded Programs,” below.

3. APPRENTICES (MERIT AND NON-MERIT SYSTEMS)⁴⁵

Neither the merit nor non-merit Education Code sections define “apprentice.” Therefore, we used the Labor Code definition of “apprentice”: “a person at least 16 years of age who has entered into...an ‘apprentice agreement,’ with an employer or program sponsor.”⁴⁶ The term of apprenticeship cannot be less than 2,000 hours of reasonably continuous employment and for the apprentice’s participation in an approved program of training through employment and through education in related and supplemental fields.

Under the Labor Code, every apprentice agreement must contain the following:⁴⁷

- Names of the contracting parties;
- Date of birth of the apprentice;
- Statement of the trade, craft, or business which the apprentice is to be taught;
- The time at which the apprenticeship will begin and end;
- Statement showing the number of hours the apprentice will spend in work and the learning objectives to be accomplished through related and supplemental instruction;
- Statement setting forth a schedule of the processes in the trade or industry divisions in which the apprentice will work and the approximate time to be spent at each process;
- Statement of the graduated scale of wages to be paid the apprentice and whether the required school time will be compensated;
- Statement providing for a period of probation of not more than 1,000 hours of employment and not more than 72 hours of related instruction, during which time the program sponsor may terminate the apprentice agreement at the written request of either party, and providing that after the probationary period the administrator may terminate the apprentice agreement by mutual agreement of all parties, or canceled by the administrator for good and sufficient reason;

- Provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally, or which the collective bargaining agreement does not cover shall be submitted to administrator for determination;
- Provision that an employer who is unable to fulfill their obligation under the apprentice agreement, may, with approval of the administrator, transfer the contract to any other employer if the apprentice consents and the other employer agrees to assume the obligation of the apprentice agreement;
- Such additional terms and conditions the California Apprenticeship Counsel may approve or prescribe; and
- Clause providing that there shall be no liability on the part of the other contracting party for an injury sustained by an apprentice engaged in schoolwork at a time when the employment of the apprentice has been temporarily or permanently terminated.

4. PROFESSIONAL EXPERTS (MERIT AND NON-MERIT SYSTEMS)⁴⁸

Districts may hire professional experts who are exempt from the classified service when there is need for work on a discrete and finite project that falls outside the skills and knowledge of existing positions within the classified service. Further, while the duration of employment for professional experts is not limited (as it is for substitute and short-term employees) the work *must* be temporary in nature, and for a specific project. If a discipline requires minimum qualifications then the person is an academic employee.

The greatest difficulty community colleges face in implementing the “professional expert” exemption is understanding what a “professional expert” actually is. Statutory and case law are virtually silent on the meaning of “professional expert,” leaving districts to apply a common sense approach, coupled with basic principles of statutory interpretation. The following guidelines will aid in that process.

a. What is a Professional Expert?

As discussed more fully below, districts may rely on the following approach to assess whether it is appropriate to utilize professional experts:

- If the work requires specialized knowledge or skills that fall outside the existing classified service, use of professional experts may be appropriate, and the district should next consider whether the work meets the “specific project” criterion. If instead, the work falls within the duties and expertise of an existing classified position, the district should assign the work to that position.

- If the work is for a specific project, then use of professional experts may be appropriate, and the district should next consider whether the employment would be on a “temporary basis.” Specific projects may include one-time projects and work for which the on-going need is uncertain because the funding source is unpredictable, or is demand driven. If the work is not for a specific project, the district should not use professional experts.
- If employment would be on a temporary basis, it may be appropriate to utilize professional experts. However, if the work entails regular and on-going work of the district, then the district should consider other staffing options including: assignment to existing classified staff consistent with their duties; creating or redefining classifications to cover the on-going work; or contracting out the work as permitted by law.

b. Implementing the “Professional Expert” Exemption

As noted above, the term “professional expert” is not defined in the law. However, Sections 88003 and 88076 treat professional experts as a discrete exception to the general rule that employment of non-academic employees should occur through the classified service. Thus, we interpret “professional expert” in this section to mean an employee with specialized knowledge or expertise not generally required of, or found within, the employee classifications established by the governing board pursuant to section 88001.

c. What is a Specific Project?

Here again, the statutes offer no guidance and we rely on their plain meaning. In so doing, we read “specific project” broadly to include most courses that can be defined in terms of a projected end date. Where a district has a clearly finite, but long-term project, we suggest dividing the project into smaller phases, if possible. For example, we believe a district could hire a professional expert to oversee implementation of a bond measure, even if it is a project of up to ten years. Although Sections 88003 and 88076 appear to allow such long-term projects, the longer the “project” the more likely it is on-going work of the district and the higher the risk that the employee hired is not exempt from the classified service. The better course of action would be to engage the professional expert in shorter phases of two-to-three year projects. A district should define the scope of the project in the body of the employment contract or other document utilized by the district to memorialize the hiring of professional experts.

A district may probably assign a current temporary faculty member to a specific project as a professional expert, without those project hours counting for the purposes of Section 87482.5, so long as the hours do not constitute teaching in a credit or noncredit program. The hours as a professional expert would not count toward the 67-percent calculation for contract status. However, the project may *not* consist of teaching or work performed as part of the load of a full time faculty member. If it does, it must also then meet the definition in Section 87482.5, subdivision (c)(1) of “professional ancillary activities,” which is defined to include, but not necessarily be limited to, governance, staff development, grant writing, and advising student organizations.

d. What is Hiring on a Temporary Basis?

Hiring on a temporary basis means that the term of the employment is finite in nature—that the district’s need is temporary. This is different from “short-term.” There is no cap on the length of service for professional experts (as it is for short-term employees). However, as discussed above, the length of employment should not be open. Professional experts should be hired for a specified period, and the contract should clearly state the term of employment. The contract should also set out any contingencies to continued employment.

Districts should be particularly careful in employing professional experts on successive contracts or work orders (e.g., returning instructors in a community education program). Recurring employment not only raises questions as to whether the employee is working on a specific project, it calls into question the temporary nature of the employment. This is not to say that districts may not employ professional experts on successive contracts. Rather, a district should be aware of the risks involved and how best to guard against those risks. We identify three factors below, consideration of which will assist districts in determining whether a particular position constitutes employment “on a temporary basis”:

- Consider the certainty of the funding stream (or lack thereof): Where the employee is not being paid out of the general fund, and the funding derives from a categorical, limited, or uncertain, funding source, the employment of the expert can more likely be characterized as “on a temporary basis.”
- Consider the certainty of demand (or lack thereof): Where the district legitimately cannot predict semester-to-semester, or year-to-year, whether it will require professional expert services in a particular area, the district likely may treat the employment as “on a temporary basis.” For example, a district may hire professional experts to serve as instructors in a community education program. Because such not-for-credit classes must be self-supporting, they are generally offered only when demand is high enough. A district legitimately cannot predict semester-to-semester whether it will require the instructor’s services.
- Consider the past practice in the district, any relevant negotiating history and union expectations, and applicable language (if any) in your collective bargaining agreement: How the district has utilized professional experts in the past, and whether that utilization has been with the union’s consent or over its objection, may also inform how a district approaches professional expert hiring in the future. In particular, districts may avert disputes by communicating openly with the bargaining representative regarding the basis for a professional expert assignment. Indeed, some districts have negotiated terms, developed procedures, and clarified spheres of authority and expectations in their collective bargaining agreement.

e. Conclusion – Professional Experts

Exemptions to the classified service afford community college districts with necessary flexibility in staffing work that is temporary or short-term in nature. The professional expert exemption allows districts to go outside the classified service when the scope of the work is discrete, temporary, and requires expertise unavailable within the classified service. However, neither statutory nor decisional law offers guidance on how to apply these concepts. Given this lack of definition, and the uncertainty it can create, we suggest that districts take the following steps to protect its appointment decisions from challenge that the work does not require professional expertise outside the classified service:

- Define the project;
- Articulate an end date for the project;
- Make continued employment contingent on continued demand and/or funding;
- Carefully review recurring professional expert contracts;
- Break long-term projects into phases; and
- Communicate with your bargaining representative.

Case Law – Professional Experts

***CSEA v. Sunnyvale Elementary School District*⁴⁹**

Sunnyvale Elementary School District contracted with School Research and Service Corporation (a private corporation) to provide research and development work and services for the school district. The California School Employees Association sought to enjoin the agreement as a violation of the Education Code. The Court of Appeals held that the district’s contract with the corporation for research and development services did not violate the Education Code provisions requiring a district to employ classified employees, in view of the exemption for professional experts employed on a temporary basis for a specific project, and the lack of any requirement that the corporation employees work on school premises in close contact with students and teachers.

***CSEA v. Del Norte County School District*⁵⁰**

All persons, including supervisors, who are regularly employed by districts and are not specifically exempted by the statutes are part of the classified service. The court held that a contract with an outside consulting firm to provide custodial supervision violates the Education Code. “Regular supervisors are not professional experts, whatever skills [they] may bring to the job.” They did not meet the definition of “professional experts.”

f. Attorney General Opinion – Professional Expert

The Attorney General has opined that a community college district could enter into a negotiated contract, without bidding, with a licensed general contractor who would act as a construction manager but would not perform any construction work on the project.⁵¹

5. FULL-TIME STUDENTS EMPLOYED PART-TIME (MERIT AND NON-MERIT SYSTEMS)⁵²

Full-time students in both merit and non-merit system districts who are employed part-time are not part of the classified service.

6. PART-TIME STUDENTS EMPLOYED PART-TIME ON WORK STUDY (MERIT AND NON-MERIT SYSTEMS)⁵³

Part-time students who are employed part-time in any college work-study program, or who are employed in a work experience education program conducted by a community college district and which is financed by state or federal funds are also exempt from the classified service.

Education Code section 88076 governing merit system districts defines a part-time position as one for which the assigned time, when computed on an hourly, daily, weekly, or monthly basis, is less than 87 ½ percent of the normally assigned time of the majority of employees in the classified service.

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The Education Code prohibits displacement of classified personnel and impairment of existing contracts by either the employment of full-time or part-time students in any college work-study program, or in a work experience education program.

7. ARCHITECTURAL AND ENGINEERING FIRMS (MERIT SYSTEMS)⁵⁴

Education Code section 88077 specifically exempts from classified service architectural and engineering firms employed by a merit system district on a temporary basis for a specific project by a governing board or commission.

8. COMMUNITY REPRESENTATIVES IN ADVISORY OR CONSULTING CAPACITIES (MERIT SYSTEMS)⁵⁵

Community representatives in advisory or consulting capacities that are employed no longer than 90 working days in a fiscal year may be exempt from the classified service in a merit system district, provided that:

- The authorized duties are not those normally assigned to a class of positions in the classified service;

- The authorized duties are approved by the personnel commission in advance of employment, AND
- A regular classified employee of the community college district shall not receive a concurrent appointment to such a position.

9. PROFESSIONAL SERVICES AND ADVICE TO DISTRICT (BOTH MERIT AND NON-MERIT SYSTEMS)⁵⁶

Government Code section 53060 allows a district to contract with and employ any persons for the furnishing of special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.

The test for whether a district may contract for special services depends on the nature of services, the necessary qualifications required of the person furnishing services, and the availability of services from public sources.⁵⁷

C. EMPLOYEE IN REGULAR STATUS WHO REDUCES TIME

Education Code section 88076, subdivision (b)(6) (merit system districts) specifically states that an employee who has retained regular status in a full-time position may reduce their time and still retain regular status. “Regular employee” refers to a classified employee who has probationary or permanent status.

D. MUST ALL WORK THAT IS NEITHER ACADEMIC NOR EXEMPT BE PERFORMED BY CLASSIFIED EMPLOYEES?

1. NON-MERIT DISTRICTS:

Generally, all work that is neither academic nor exempt must be performed by classified employees. However, there are limited exceptions that permit a district to contract for services that would otherwise be performed by the classified service.

First, work can be contracted out unless to do so would violate a provision of a collective bargaining agreement or a specific Education Code section mandating that classified employees perform the work. “Section 88003 simply requires that all persons employed in [non-exempt] positions not requiring certification be classified. It does not require that all work be performed by classified employees.”⁵⁸

In *CSEA v. Kern Community College District*,⁵⁹ the school employees’ union alleged that a contract between the non-merit community college district and a grounds keeping service violated Education Code sections 88003 and 88004. The collective bargaining agreement between the union and the district

prohibited the district from contracting out for services that would result in a layoff or reduction of regular hours or wages of existing bargaining unit members. The Court held that the contract did not violate the non-merit Education Code provisions providing for classification of nonacademic employees, and that there was no statute mandating the hiring of groundskeepers to support finding that groundskeepers were required to be classified. The Court noted that the distinction between merit and non-merit school districts is crucial and that merit districts are subject to additional statutory provisions not applicable to non-merit districts. The Court noted that the opinion in *CSEA v. Del Norte County Unified School District*,⁶⁰ (discussed below) applies only to merit districts. As for non-merit districts, the Court opined that Section 88003 merely requires all persons employed in positions not requiring certification to be classified. Absent other specific provisions mandating employment of such individuals, Section 88003 does not require classified employees to perform all work.

Second, districts may contract out work *if* the district complies with the requirements of the Education Code. These requirements are discussed in more detail in Section 5 below.

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Always remember to look at the collective bargaining agreement provisions regarding hiring. The collective bargaining agreement may contain rules that are more restrictive than the Education Code.

2. MERIT SYSTEM DISTRICTS:

Generally, classified employees must perform all work that is neither academic nor exempt. Education Code section 88076 imposes an obligation on merit system school districts to employ classified employees that “can’t be avoided by the use of contracts.”⁶¹ Section 88076 contains additional limiting language applicable only to merit system districts: “No person whose contribution consists solely in the rendition of individual personal services and whose employment does not come within the scope of the exceptions listed above shall be employed outside the classified service.” In *CSEA v. Del Norte County Unified School District*,⁶² the district contracted out to ServiceMaster to provide regular supervision of employees along with consultation, research, and development work and services regarding maintenance and custodial operations at the schools within the district. Since employees hired through the ordinary district hiring channels could have performed the work, the Court held the contract was invalid. The Court also noted that the Education Code governing classification of school district employees and classification of employees in school districts that have adopted merit systems mandate that all persons, including supervisors, who are regularly employed by school districts and not specifically exempt, be part of the classified service.

E. A NOTE ON EMPLOYEES IN CATEGORICALLY FUNDED PROGRAMS

Education Code section 88017 (applicable to both non-merit and merit system districts) specifically states that an employee employed in a specially funded program that is expiring may be laid off for lack of funds. The district must give notice of the layoff by April 29 of the fiscal year in which the funding is ending. If the terminated date of the specially funded program is other than June 30, the district must give notice not less than 60 days prior to the effective date of the layoff.⁶³

This section has given rise to a common misconception that classified employees employed in categorically funded programs are all “temporary,” and do not have regular status as classified employees. This is not correct. Unlike faculty, whose service in categorically funded programs does not count towards the acquisition of tenure unless they are employed in the regular academic program before being assigned to the categorically funded program, classified employees in a categorically funded program are regular classified employees. If they are subject to layoff for lack of funds at the end of the program, they will have bumping rights, displacements rights, and reinstatement rights in the same way that any classified employee has such rights.

Section 4 **PERSONAL SERVICES CONTRACTS**

Both merit and non-merit community college districts may, under very limited and prescribed circumstances, use personal service contracts for services currently or customarily provided by classified school employees for the purpose of achieving cost savings or in other specific statutorily prescribed circumstances. In merit districts, a personal services contract must be made with someone who is a classified employee, unless the person falls within one of the specific exemptions under Education Code section 88076, subdivision (b) (academic positions, full-time students working part-time, part-time students in work study, apprentice positions, or professional experts).⁶⁴

There are eight different circumstances under which a personal service contract may be permissible:⁶⁵

- To achieve cost savings under very specific conditions (see Section A below);
- Where a contract is mandated by the Legislature;
- When certain services are not available within the district;
- When the services are incidental to a contract for the purchase or lease of real or personal property;

- Where the contract is necessary to accomplish certain policy, administrative or legal community college district goals and purposes, and are necessary to protect against conflict of interest or to ensure independent and unbiased findings;
- For emergency appointments, not to exceed 60 working days;
- When equipment or materials are not available from the district; or
- When the services are of an urgent, temporary, or occasional nature.

A. TO ACHIEVE COST SAVINGS WHEN ALL OF THE FOLLOWING CONDITIONS ARE MET:

Community college districts may enter into personal services contracts for all services currently or customarily performed by classified school employees to achieve cost savings, if all of the following conditions are met:

☐ *Clearly demonstrated overall cost savings:*

The governing board or contracting agency must clearly demonstrate that the proposed contract will result in actual overall cost savings to the community college district, if the district uses the following principles to compare costs:

- Include the community college district's additional cost of providing the same service as proposed by a contractor. The additional costs include the salaries and benefits of additional staff and the cost of additional space, equipment, and materials.
- Exclude the community college district's indirect overhead costs unless these costs are attributable solely to the function in question and would not exist if that function were not performed by the community college district. Indirect overhead costs shall mean the pro rata share of existing administrative salaries and benefits, rent, equipment costs, utilities, and materials.
- Include any continuing community college district costs that would be directly associated with the contracted function. These continuing community college district costs shall include, but not be limited to, those for inspection, supervision, and monitoring.

☐ *Contractors' Wages Are at Industry Level:*

Districts cannot approve proposals to contract out work solely on the basis that savings will result from lower contractor pay rates or benefits. Proposals to contract out work shall only be eligible for approval if the contractors' wages are at industry level and do not undercut community college district pay rates.

Contract Cannot Displace Community College District Employees:

“Displacement” includes layoff, demotion, involuntary transfer to a new classification, involuntary transfer to a new location requiring a change of residence, and time base reductions. It does not include changes in shifts or days off, nor does it include reassignment to other positions within the same classification and general location or employment with the contractor, so long as wages and benefits are comparable to those paid by the school.

Savings Are Large Enough:

The savings from contracting out must be large enough to ensure that they will not be eliminated by private sector and community college district cost fluctuations that could normally be expected during the contracting period.

Amount of Savings Clearly Justifies the Size and Duration of the Contracting Agreement.

Contract Is Awarded Through a Publicized, Competitive Bidding Process.

The Contract Includes Specific Provisions Regarding Staff Qualifications:

The contract must include specific provisions pertaining to the qualifications of the staff who will perform the work under the contract, and assurance that the contractor’s practices meet applicable nondiscrimination standards.

Economic Risk Is Minimal:

The potential for future economic risk to the community college district from potential contractor rate increases is minimal.

Contract Is with a Firm:

A “firm” means a corporation, limited liability corporation, partnership, nonprofit organization, or sole proprietorship.

Public Interest Does Not Outweigh Economic Advantage:

The public’s interest in having a particular function performed directly by the community college district must not outweigh the potential economic advantage of contracting out.

B. CONTRACT MANDATED BY THE LEGISLATURE

The district may use a personal services contract where:

- The contract is for new community college district functions; AND
- The Legislature has specifically mandated or authorized the performance of the work by independent contractors.

C. SERVICES NOT AVAILABLE WITHIN THE DISTRICT

The district may enter into a personal services contract where:

- The services contracted are not available within community college districts;
- Cannot be performed satisfactorily by community college district employees; or
- Are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the community college district.

D. SERVICES INCIDENTAL TO A CONTRACT FOR PURCHASE OR LEASE OF REAL PROPERTY

“Service agreements” under this criterion include, but are not limited to, agreements to service or maintain office equipment or computers that the district leases or rents.

E. CONTRACTS NECESSARY TO ACCOMPLISH COMMUNITY COLLEGE DISTRICT GOALS AND PURPOSES

Districts may enter into personal services contracts where the district cannot accomplish the policy, administrative, or legal goals and purposes through the utilization of persons selected pursuant to the regular or ordinary hiring process. Contracts are permissible under this criterion to protect against a conflict of interest or to ensure independent and unbiased findings in cases where there is a clear need for a different, outside perspective. These contracts include, but are not limited to, obtaining expert witnesses in litigation.

F. EMERGENCY APPOINTMENTS

A district may enter into emergency personal services contracts under the following conditions:

- The nature of the work is such that the criteria for emergency appointments apply.
- “Emergency appointment” means an appointment made for a period of not more than 60 working days either during an actual emergency to prevent the stoppage of public business or because of the limited duration of the work. The method of selection and the qualification standards for an emergency employee shall be determined by the community college district. The frequency of appointment, length of employment, and the circumstances appropriate for the appointment of firms or individuals under emergency appointments shall be restricted to prevent the use of emergency appointments to circumvent the regular hiring process.

G. EQUIPMENT OR MATERIALS NOT AVAILABLE FROM DISTRICT

A personal services contract is also permissible when it will provide equipment, materials, facilities, or support services that the district could not feasibly provide in the location where the services are to be performed.

H. SERVICES ARE OF URGENT, TEMPORARY, OR OCCASIONAL NATURE

A district may also contract for services where the services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under the community college district's regular or ordinary hiring process would frustrate their very purpose.

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Merit system caveat:

Merit system districts should note that under Education Code section 88076, merit system community college districts must classify employees whose contribution consists solely of the rendition of individual personal services and does not fall within the scope of the following exceptions: Academic positions; Full-time students employed part-time; Part-time students employed part time in any college work-study program or in a work experience education program conducted by a community college that is financed by state or federal funds; Apprentice positions; or Professional experts hired on a temporary basis for a specific project by the governing board or by the commission when so designated by the commission.

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The "test" for whether a district may contract for services depends on the nature of the services, necessary qualifications required of the person furnishing the services, and the availability of service from public sources.⁶⁶

Section 5

UNDER WHAT CIRCUMSTANCES CAN A TEMPORARY (EXEMPT) EMPLOYEE BECOME A CLASSIFIED EMPLOYEE?

Once a temporary employee no longer falls into a specific category of exemption, he or she will become a classified employee and will have the right to continued employment. For example, a substitute employee will become a probationary employee after working for a district for 195 days or more.

Section 6 **CONCLUSION**

Non-academic employees are within the classified service unless they fall into one of the categories of employees specifically excluded from classification. Community college districts should tread carefully and follow the guidelines in this workbook in determining whether they can employ workers outside of the classified service.

ENDNOTES

- 1 *Haase v. San Diego Community College Dist.* (1980) 113 Cal.App.3d 913 [170 Cal.Rptr. 366].
- 2 Cal. Code Regs., tit. 5, §§ 51025 & 53300 et seq.
- 3 *Stryker v. Antelope Valley Community College Dist., et al.* (2002) 100 Cal.App.4th 324 [122 Cal.Rptr.2d 489].
- 4 See *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911 [129 Cal.Rptr.2d 811], reh'g. den. and mod. (Apr 16, 2003), distinguished by (2011) 192 Cal.App.4th 187 [120 Cal.Rptr.3d] [holding that the parallel language applying to k-12 districts requires notice of temporary status on or before the first date of paid service].
- 5 *Peralta Federation of Teachers v. Peralta Community College Dist.* (1979) 24 Cal.3d 369 [155 Cal.Rptr. 679], cert. den. by (1979) 444 U.S. 966 [100 S.Ct. 455]
- 6 *California Teachers Assn. v. San Diego Community College Dist., et al.* (1981) 28 Cal.3d 692 [170 Cal.Rptr. 817], distinguished by *Kettenring v. Los Angeles Unified School Dist.* (2008) 167 Cal.App.4th 507 [84 Cal.Rptr.3d 196].
- 7 *Winslow v. San Diego Community College Dist.* (1979) 97 Cal.App.3d 30 [158 Cal.Rptr. 509].
- 8 *Covino v. Governing Board* (1977) 76 Cal.App.3d 314 [142 Cal.Rptr. 812].
- 9 *Haase v. Diego Community College Dist.* (1980) 113 Cal.App.3d 913 [170 Cal.Rptr. 366].
- 10 *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911 [129 Cal.Rptr.2d 811], reh'g. den. and mod. (Apr 16, 2003), distinguished by (2011) *Neily v. Manhattan Beach Unified School Dist.* (2011) 192 Cal.App.4th 187 [120 Cal.Rptr.3d 857].
- 11 *Rooney v. San Diego Community College Dist.* (1982) 129 Cal.App.3d 977 [181 Cal.Rptr. 464], distinguished by *People v. Nguyen* (Cal. Ct. App. 2007) 54 Cal.Rptr.3d 535, 538, *reh'g granted, opinion not citeable (Feb. 21, 2007)*, *vacated* (Cal. Ct. App. 2007) 62 Cal.Rptr.3d 255, *review granted and opinion superseded* (Cal. 2007) 67 Cal.Rptr.3d 460, *as modified (Aug. 19, 2009)*, *rev'd* (2009) 46 Cal.4th 1007 [95 Cal.Rptr.3d 615].
- 12 *Saraceno v. Foothill-De Anza Community College Dist.* (1982) 127 Cal.App.3d 850 [179 Cal.Rptr. 742].
- 13 *Kalina v. San Mateo Community College Dist.* (1982) 132 Cal.App.3d 48 [183 Cal.Rptr. 12], distinguished by 147 Cal.App.4th 1584 [54 Cal.Rptr.3d 558].
- 14 *Ferris v. Los Rios Community College Dist.* (1983) 146 Cal.App.3d 1 [194 Cal.Rptr. 16], distinguished by *Stryker v. Antelope Valley Community College Dist.* (2002) 100 Cal.App.4th 324 [122 Cal.Rptr.2d 489].
- 15 *McGuire v. Governing Board* (1984) 161 Cal.App.3d 871 [208 Cal.Rptr. 260], distinguished by *Womack v. San Francisco Community College Dist.* (2007) 147 Cal.App.4th 854 [54 Cal.Rptr.3d 558].
- 16 *Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977 [95 Cal.Rptr.2d 837], declined to follow *Stryker v. Antelope Valley Community College Dist.* (2002) 100 Cal.App.4th 324 [122 Cal.Rptr.2d 489].
- 17 *Stryker v. Antelope Valley Community College Dist.* (2002) 100 Cal.App.4th 324 [122 Cal.Rptr.2d 489].
- 18 *Womack v. San Francisco Community College Dist.* (2007) 147 Cal.App.4th 854 [54 Cal.Rptr.3d 558], distinguished by *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210 [169 Cal.Rptr.3d 51], *as modified on denial of reh'g (Mar. 26, 2014)*.
- 19 *Theiler v. Ventura County Community College Dist.* (2011) 198 Cal.App.4th 852 [130 Cal.Rptr.3d 273], *as modified (Aug. 24, 2011)*, as mod., review den. (Nov 16, 2011).
- 20 See *Fremont Unified School District* (1997) PERB Dec. No. 1240-E [22 PERC ¶ 29026].
- 21 Cal. Ed. Code, § 87482.3.

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- 22 Cal. Ed. Code, § 87482.3, subd. (b).
- 23 Cal. Ed. Code, § 87482.3, subd. (b).
- 24 Cal. Ed. Code, § 87482.3, subd. (a)(2)(B)(I)-(IV).
- 25 Cal. Ed. Code, § 87482.3, subd. (b)(1) and (2).
- 26 Cal. Gov. Code, § 100700, et. seq.
- 27 Cal. Rev. & Tax. Code § 61000, et. seq.
- 28 Cal. Ed. Code, § 87001.
- 29 *California School Employees Assn. v. Trona Joint Unified School Dist.* (1977) 70 Cal.App.3d 592 [138 Cal.Rptr. 852] [“Jobs in the classified service apparently include custodians, bus drivers, cafeteria workers, clerical staff, some instructional aides, and other nonteaching and nonadministrative positions”].
- 30 Cal. Ed. Code, § 88004.
- 31 Cal. Ed. Code, § 88001, subd. (a).
- 32 *California School Employees Association, et al. v. The Governing Board of the East Side Union High School District, et al.* (2011) 193 Cal.App.4th 540 [122 Cal.Rptr.3d 799].
- 33 Cal. Ed. Code, § 88010.5.
- 34 Cal. Ed. Code, § 88015.
- 35 Cal. Ed. Code, § 88017.
- 36 Cal. Ed. Code, § 88035.
- 37 Cal. Ed. Code, § 88003.
- 38 *California School Employees Assn. v. Oroville Union High Sch. Dist.* (1990) 220 Cal.App.3d 289 [269 Cal.Rptr. 90].
- 39 *California School Employees Assn. v. Trona Joint Unified Sch. Dist.* (1977) 70 Cal.App.3d 592 [138 Cal.Rptr. 852].
- 40 *California School Employees Assn. v. Oroville Union High Sch. Dist.* (1990) 220 Cal.App.3d 289 [269 Cal.Rptr. 90]; *California School Employees Assn. v. Governing Bd. of South Orange County Community College Dist.* (2004) 124 Cal.App.4th 574 [21 Cal.Rptr.3d 451], as mod. (Dec 10, 2004), reh. den. (Dec 29, 2004), review den. (Mar 16, 2005).
- 41 *California Sch. Employees Assn. v. Oroville Union High Sch. Dist.* (1990) 220 Cal.App.3d 289 [269 Cal.Rptr. 90].
- 42 *California School Employees Assn. v. Governing Bd. of the South Orange County Community College Dist.* (2004) 124 Cal.App.4th 574 [21 Cal.Rptr.3d 451], as mod. (Dec 10, 2004), reh. den. (Dec 29, 2004), review den. (Mar 16, 2005).
- 43 Cal. Ed. Code, § 88003.
- 44 49 Ops.Cal.Atty.Gen. 34 (1967).
- 45 Cal. Ed. Code, § 88003 [non-merit system], Cal. Ed. Code, § 88076, subd. (b)(5) [merit system].
- 46 Cal. Lab. Code, § 3077.
- 47 Cal. Lab. Code, § 3078.
- 48 Cal. Ed. Code, § 88003 [non-merit system], Cal. Ed. Code, § 88076, subd. (b)(6) [merit system].
- 49 *California School Employees Assn. v. Sunnyvale Elementary School Dist.* (1973) 36 Cal.App.3d 46 [111 Cal.Rptr. 433].

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- 50 *California School Employees Assn. v. Del Norte County School Dist.* (1992) 2 Cal.App.4th 1396 [4 Cal.Rptr.2d 35], review den., declined to extend (1996) 41 Cal.App.4th 1003 [48 Cal.Rptr.2d 889].
- 51 57 Ops.Cal.Atty.Gen. 417 (1974).
- 52 Cal. Ed. Code, § 88003 [non-merit system], Cal. Ed. Code, § 88076, subd. (b)(4) [merit system].
- 53 Cal. Ed. Code, § 88003 [non-merit system], Cal. Ed. Code, § 88076, subd. (b)(4) [merit system].
- 54 Cal. Ed. Code, § 88077.
- 55 Cal. Ed. Code, § 88078.
- 56 Cal. Gov. Code, § 53060.
- 57 *Service Employees Internat. Union v. Board of Trustees* (1996) 47 Cal.App.4th 1661 [55 Cal.Rptr.2d 484], declined to.
- 58 *Service Employees Internat. Union v. Board of Trustees* (1996) 47 Cal.App.4th 1661, 1671 [55 Cal.Rptr.2d 484] [rejecting claim that contracting for bookstore services with Barnes & Noble violated section 88003].
- 59 *California School Employees Assn. v. Kern Community College Dist.* (1996) 41 Cal.App.4th 1003 [48 Cal.Rptr.2d 889], reh'g. and review den. (Apr 11, 1996).
- 60 *California School Employees Assn v. Del Norte County Unified School Dist.* (1992) 2 Cal.App.4th 1396 [[4 Cal.Rptr.2d 35], review den. (Apr 16, 1992), declined to extend by (1196) 41 Cal.App.4th 1003 [48 Cal.Rptr.2d 889].
- 61 *California School Employees Assn. v. Del Norte County Unified School Dist.* (1992) 2 Cal.App.4th 1396 [4 Cal.Rptr.2d 35], review den. (Apr 16, 1992), declined to extend by (1196) 41 Cal.App.4th 1003 [48 Cal.Rptr.2d 889].
- 62 *California School Employees Assn. v. Del Norte County Unified School District* (1992) 2 Cal.App.4th 1396 [4 Cal.Rptr.2d 35], review den. (Apr 16, 1992), declined to extend by (1196) *California School Employees Assn. v. Kern Community College Dist.* (1996) 41 Cal.App.4th 1003 [48 Cal.Rptr.2d 889].
- 63 Cal. Ed. Code, § 88017.
- 64 Cal. Ed. Code, § 88076, subd. (b) [“No person whose contribution consists solely in the rendition of individual personal services and whose employment does not come within the scope of the exceptions listed above shall be employed outside the classified service.”].
- 65 Cal. Ed. Code, § 88003.1.
- 66 *California School Employees Assn. v. Sunnyside Elementary School Dist.* (1973) 36 Cal.App.3d 46 [111 Cal.Rptr. 433].

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