



CLIENT ALERT
March 18, 2020

CORONAVIRUS (COVID-19)

District Financial Obligations and Wage Payments

As you are aware, Beard Legal Group has sent out prior Client Alerts regarding the impact of the Coronavirus. Outlined below is another topic you should be aware of as we move forward in the first few days of school closings as a result of the Coronavirus/COVID-19 Pandemic.

Who Gets Paid?

You have probably seen several emails relative to the fact that under Section 1153 of the Public School Code, it provides, in pertinent part, as follows:

When a board of school directors is compelled to close any school or schools on account of contagious disease, the destruction or damage of the school building by fire or other causes, **the school district shall be liable for the salaries of the teachers of said school or schools for the terms for which they were engaged.**

Simply stated, this applies to teachers. An argument could be made that it applies to administrators. It does not apply to other individuals; however, each School District needs to make a decision on a case-by-case basis of what they are going to do relative to the employee groups (organized or not organized) and how that will be handled. The operative word in Section 1153 is "teachers." Please keep in mind, the definition of teachers within the School Code also covers educational administrators and other personnel. Section 1141 of the Public School Code defines teachers as:

(1) "Teacher" shall include all professional employes and temporary professional employes, who devote fifty per centum (50%) of their time, or more, to teaching or other direct educational activities, such as classroom teachers, demonstration teachers, museum teachers, counsellors, librarians, school nurses, dental hygienists, home and school visitors, and other similar professional employes and temporary professional employes, certificated in accordance with the qualifications established by the State Board of Education.

Please keep in mind that some classifications do not fall within this definition, such as social workers and nurses who are not certified. Please remember that school entities could have other classifications for purposes of their teachers Collective Bargaining Agreement and Act 195, which may not be professional employees for purposes of School Code Section 1101.

While there are other rules that apply for Intermediate Unit staff (Section 913a) and for temporary professional and professional employees in vocational-technical schools (Section 1850.1), each school entity will need to make a decision about compensating employees that do not fit in to the general definition under Section 1153 of the School Code.

Organized Employees (non-professional)

As outlined above, Section 1153 does **not** in fact apply to non-professional employees that are covered by a Collective Bargaining Agreement. Schools have the option to compensate 9-month employees during this initial 10-day period if they so choose. However, the Board must agree and/or should take some affirmative action at a School Board Meeting to authorize paying them. In so doing, please keep in mind that it is still unclear as to where we stand relative to meeting the 180-day student instructional requirement (990-hours elementary or 900-hours secondary), which may mean at some point those days may have to be made up prior to June 30, 2020.

Some of the options that are being contemplated and taken by School Boards are as follows:

1. Notifying the employees and/or their exclusive bargaining representatives that they will not be compensated thereby forcing them to file for unemployment compensation.
2. Others have indicated that they will be paying the initial two weeks and taking a wait and see approach as it relates to any time beyond the initial 10-day closure.
3. Others are compensating with a clear understanding that in the event these 10 days need to be made up prior to June 30, 2020, if the 180 day requirement is not waived, they will not be compensated for that time and/or their salaries will be adjusted and are entering into agreements with various union locals on that particular topic.
4. Others have indicated that they will not compensate their employees, let them sign up for unemployment compensation, and after they receive same compensate them for the first unpaid week, imposed under unemployment compensation laws, which is generally referred to as the waiting period.

Noncovered (nonorganized) Employees (non-professional)

The same approach can be taken for non-organized groups, they could be paid or not paid, but that could basically cripple some people who work for the School District due to the inability to pay for their food, clothing, shelter, and any other utility obligations they may have.

Commentary

Please keep in mind that this is going to be a Monday-morning quarterbacking scenario where we are going to have to look back and see what happened and make a decision sometime in the future as it relates to some of the decisions that were made in the early stages of this emergency situation. If the Governor announces schools will be closed for another 2 to 4 week period after March 30, 2020, school entities will have to reassess if they will continue to pay these employees or take other action to temporarily lay them off or look at formal long-term layoff or elimination of the positions.

Board Action

As identified above, School Districts can make a decision to pay hourly employees for the time that school is closed. It is critical to know that only the School Board has the power and authority to authorize such payments. In a perfect world this would occur in a public meeting held in accordance with the Sunshine Act and the School Code and would require at least 5 affirmative votes. For those school administrators who have made the decision to pay staff, in consultation with their Board, we could argue that these employees were on paid administrative leave until the Board has time to make a decision at a Board meeting; alternatively, the authorization could be applied retroactively to the relevant two-week period.

We have already issued a Client Alert relative to conducting Board Meetings. In some instances as to how this unfolds, Boards may have to retroactively approve these if Board Meetings were cancelled or

not held during the initial 10-day period due to the recommendations of the CDC and/or the President relative to no more than 10 people being in the same area at one time.

At the present time, PSEA and others have indicated that they are working with Governor Wolf and the Legislature to try to secure legislative actions guaranteeing that employees would not lose pay during this initial period of shutdown. The mere fact that there is an effort to secure such legislative actions clearly implies that employees who are not teachers and not covered under Section 1153 of the School Code for payment of salaries, are not guaranteed to receive that compensation.

Each School District needs to weigh its options. Boards and School Administrators need to keep in mind that money that is gratuitously paid during this two-week period could be considered a gift. That can create issues down the line when employees have to make up said days and school entities are not excused under the 180-day requirement for student instruction. It could overly complicate issues as well where people agree to things now and then change their mind later and feel as though they are entitled to pay even though it was issued gratuitously, when the school entity had absolutely no obligation to do so, or where they agreed to be paid now and have their paychecks adjusted when they have to possibly make up time.

Other Considerations

Please keep in mind that hourly employees and non-teachers that do not have the protections under Section 1153, may have other special considerations if they are in the Pennsylvania National Guard and called to service. In those situations, school administrators should refer to the Pennsylvania Military Code 51 Ps/4102(a)(i)a, which would need to be addressed.

Memorandums of Agreement/Memorandums of Understanding

Some School Districts have been already presented with Memorandums from various organized groups for teachers and support staff alike. The recommendation is not to rush into signing these without a review by the School Solicitor, Labor Counsel or Special Counsel.

Several Schools have sent us Memorandums of Understanding that have been presented to them. At least two provisions of those Memorandums forwarded for our review so far are extremely problematic for Schools and we would recommend that the District be reluctant or resistive to sign Memorandums with these types of provisions.

Example 1: Teachers have been told to take home work and try to provide assistance to students on-line particularly where people would be working remotely during school closures and provide some opportunities to students whereby bargaining unit members would log on daily to post lessons and be available via District email to assist students with instruction.

In those scenarios, the Association has inserted a clause that provides as follows:
“That each work day shall be considered towards satisfying the parties’ contractual work year.”

We need to emphasize that we are only 3 days into the 10-day closure. We have yet to receive any clear direction from PDE and the Governor’s presentation and proclamation has not been entirely clear as to what the Pennsylvania Secretary of Education is going to do relative to the 180-day requirement and making that up prior to June 30.

Example 2: The second clause that is problematic is as follows:

“That should exigent circumstances prevail and require the District to remain closed beyond the March 27th date without any interruption, this MOU will continue in full force and effect until mutually agreed upon by the parties to dissolve it.”

These types of provisions are inherently problematic. Once again, we are only 3 days into the 10-day closure. It is virtually impossible for a District to know what is going to occur next week, the following week or even in 2 or 3 weeks.

As the wording clearly indicates, unless both parties mutually agree to dissolve the MOU, it could continue virtually into perpetuity and the District would be bound by same.

While each District is free to make its own decision, our recommendation is to not agree to any type of MOU that would be presented from any organized group that contains such language without first checking with your Solicitor, Labor or Special Counsel.

As you may recall, some of these provisions appeared in the Flexible Instructional Day (FID) memorandums that first appeared several months ago when Schools were discussing what they would do in closures due to inclement weather.

Other Things to Consider

Existing Leave

We have received a lot of inquiries on what Districts should consider or do when employees who are already on existing leave that was approved prior to the Governor’s announcement on March 13, 2020, now want to rescind unpaid leaves, sabbatical leave, unpaid medical leave, etc. in the hopes of being paid pursuant to the mandates of Section 1153 of the School Code. Here are some common questions posed:

Example 1: Teacher is currently on a sabbatical leave for restoration of health for the entirety of the 2019-2020 school year receiving health care benefits and half pay, pursuant to Section 1166 of the School Code. The request for sabbatical leave of absence was submitted prior to the beginning of the 2019-2020 school year and was approved. The employee is now asking to rescind their sabbatical leave for the remainder of the 2019-2020 school year and receive full salary. Must the District approve the request to cancel the sabbatical leave for the remainder of the 2019-2020 school year?

Answer: The suggested answer is no.

Example 2: Employee had exhausted all available sick and other compensable leave and took an unpaid medical leave for the entirety of the 2019-2020 school year. Employee is now attempting to submit a doctor’s note to cancel same to come back on the payroll to be paid commencing March 16, 2020 during this 10-day period or in the event that school is closed for an additional period of time to be compensated for that period as well. Must the District permit this?

Answer: The suggested answer is no, however, the information in the doctor’s note must be evaluated on a case by case basis.

Example 3: Employee took an unpaid leave of absence beginning in January to extend through April 1, 2020, after exhausting all available paid and FMLA leave. The leave was previously approved in January and a long term substitute was secured to cover this period of time. Employee is now asking to be compensated for the period between March 16, 2020 and April 1, 2020. Must the School District abide by this request?

Answer: The suggested answer is no.

Example 4: Employee has no available sick leave and takes efforts to have the Association sick leave bank that is outlined with the four corners of the Collective Bargaining Agreement cover their time from the beginning of the 2019-2020 school year, up through the end of the 2019-2020 school year. Said request was already approved and the employee has been paid their regular pay as a result of other days that were donated through the sick leave bank. A request is made to no longer utilize sick leave bank days and pay the employee effective March 16, 2020 until such time that school resumes session and the Association would like to have sick bank days restored.

Answer: Suggested answer is no; however, this does not mean that there will not be discussions or a potential claim be made that somehow the Collective Bargaining Agreement has been violated as a result of the Section 1153 of the School Code being incorporated into the four corners of the Agreement. Each school is free to decide how they want to handle the case. The fact of the matter remains is, this is a fluid situation. What we say today may be changed by the fact that in the next week the Governor may make another announcement that school is closed for an additional period of time.

We have indicated that it is better to take a “wait and see” approach and decide retroactively how this matter should be considered.

Cocurriculars and Extracurriculars

Questions have been posed about cocurricular and extracurricular positions. Please remember that Section 1153 of the School Code does **not** apply to cocurricular or extracurricular positions that might be outlined within the four corners of a teacher’s Collective Bargaining Agreement. Some cocurriculars and extracurriculars have commenced but at the same time are currently on hold. If school extends for another 4, 6, 8 or 10 weeks, none of these cocurricular and/or extracurricular activities will continue, nor will there be practices. So the question is, how do you deal with this particular scenario?

Once again, while each school is free to decide, it needs to be kept in mind that many schools are contemplating only paying those individuals in both cocurricular and extracurriculars for the time spent on those activities up through the time that they were postponed or otherwise cancelled as a result of the COVID-19 pandemic.

As the days go on and in the ensuing week, additional questions may arise as to how School Districts are going to address other situations such as: what do we do with the long term substitute that was in for the balance of the school year or the second half of the 2019-2020 school term and school is now cancelled. Are we still obligated to compensate them for the time that they are not teaching?

Please keep in mind, when it comes to long term substitutes the answer is not as easy as when you are dealing with day-to-day substitutes that the District has absolutely no obligation to compensate

once school was closed effective March 16, 2020; long term substitutes are not expressly mentioned in Section 1153, but may be considered.

Student Transportation

Questions have been posed about transportation agreements and arrangements with van and other transportation vendors as it relates to busing and transporting of students. Each school entity is going to have to look at their respective agreements, but for the most part a majority of school bus contracts outlined that the transportation vendor will only be paid for runs actually made. Most recent events may cause people to realize that once the dust settles and we are past this, they will have to look at their respective transportation agreements when they come time for renewal or submitting for request for proposals, how language regarding the payment of runs should be addressed in their next transportation agreement.

As with anything that comes along, each day will bring new questions on how to handle certain things during this very difficult and strenuous period of time.

Essential/Non-essential Employees

Inquiries have been made as to who is an essential employee. Guidance from PDE has come down:

What staff may schools deem essential:

- These decisions should be made locally, in the context of school and community needs.
- Examples of essential responsibilities may include, but are not limited to, school administration, food preparation and distribution, information technology, and continuity of operations (e.g., payroll, and building operations).

In a nutshell, essential employees are those that are identified by the Superintendent of Schools and/or the Board of School Director as essential or critical for running the schools when students are not in attendance. That can range anywhere from cafeteria staff, to custodians, to secretaries, and building administrators. Each District will have to decide how they want to deal with coverage issues as it relates to each School District's specific needs during this initial shutdown period.

Payment of Bills

In Beard Legal Group's Client Alert dated March 13, 2020, we had mentioned payment of bills. Please recall any school entity who is part of PSBA's Policy Service should have a Policy 616 entitled "Payment of Bills." In that Policy under "Authority" it provides in pertinent part:

Each bill or obligation of this district must be fully itemized, verified and approved by the Board before a check can be released for its payment, except that the Board Secretary or Business Manager is permitted, provided that funds are available and reported at the next regular meeting of the Board, to draw payment orders for:

1. The prompt payment of items that will accrue to the district's advantage.
2. Progress payments to contractors specified in a contract approved by the Board.
3. Orders to cover approved payrolls and agency account deposits.
4. Utility bills in months the Board does not meet.

As stated throughout most of our Client Alerts, we are in extraordinary times and common sense should prevail in taking proactive measures to keep the schools in good working order meeting the District's financial obligations.

Please also see Guidance from Pennsylvania School Boards Association dated March 18, 2020. See attached and link below:

<https://www.psba.org/wp-content/uploads/2020/03/PSBA-Coronavirus-FAQ.pdf>

NOTE: It is anticipated that Beard Legal Group will have additional communications as the days and weeks progress relative to COVID-19's impact on Pennsylvania Schools/entities.

While the Beard Legal Group Client Alert is designed to provide inform on topics of concern to Pennsylvania Public Schools, it is not legal advice and School Districts should contact their Solicitor, Labor of Special Counsel for advice related to their specific circumstances.