

# **Reducing Personnel Costs**

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## **Reducing Personnel Costs TASB Legal Services**

### **The Problem**

Unfortunately, this story may sound all too familiar. A school district is facing a budget shortfall, as it has for several years in a row. The district has already exhausted a number of cost-cutting measures that did not affect staff, including reducing facilities costs and delaying major purchases. The district has also dipped into fund balance, but the district's financial advisors do not advise further depletion of the district's reserves. In order to balance the budget, the district has no choice but to cut staff costs.

### **The Solutions**

This paper considers the district's options, as well as the legal ramifications and practical implications of each proposed solution.

### **A Word to the Wise**

As you consider the district's situation and the proposed solutions, think about the total time necessary to visualize, communicate, and accomplish these strategies. Some of the solutions proposed here may require more than one school year to complete. To prevent grievances and poor morale among staff, build in sufficient time to communicate openly with staff about the district's financial situation and its strategies for meeting the financial crisis while losing as few employees as possible.

*This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the district's own attorney in order to apply these legal principles to specific fact situations.*

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## FREEZING PAY

**Proposed Solution:** The school district is considering freezing pay for all staff at the same rate as the previous school year.

### Legal Ramifications:

**At-will and non-certified positions:** For both at-will employees and professional employees in non-certified positions, no legal impediment restricts the school district from freezing pay.

**State minimum salary:** Classroom teachers, full-time librarians, full-time counselors, and full-time nurses are entitled to be paid not less than the minimum monthly salary, based on the employee's level of experience, specified by state law. Tex. Educ. Code § 21.402; 19 Tex. Admin. Code § 153.1021. In addition, classroom teachers, nurses, librarians, counselors, educational diagnosticians, principals, assistant principals, superintendents, and others required by local policy to hold certification are entitled to contracts governed by Chapter 21 of the Texas Education Code. Tex. Educ. Code § 21.002.

**Floor set at penalty-free resignation date:** After the annual deadline for certified educators to unilaterally resign without penalty (the "penalty-free resignation date"), which is 45 days before the first day of instruction, the school district will be obligated to pay educators at least the amount they received the previous year, since that is what they reasonably relied on when deciding to remain with the district. *San Elizario Educ. v. San Elizario Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 222-R3-392 (Dec. 9, 1994).

**Reducing elements of pay:** As long as an educator's total pay does not decrease, an educator is not entitled to the previous year's level of any single element of compensation (e.g., a supplemental duty stipend or local supplement), even if the educator was not notified before the penalty-free resignation date. *Saenz v. San Diego Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 089-R10-199 (Aug. 6, 1999); *Griffin v. Van Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 084-R10-197 (May 7, 1998).

**No raise required:** The district is not required to give a pay raise, even if it has traditionally done so. *See Smith v. Amarillo Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 184-R10-799 (Dec. 20, 1999) (upholding district's decision to abandon traditional midpoint raise system after legislature mandated teacher pay raise). Moreover, even after the penalty-free resignation date, a district is not required to keep in place its salary schedule from the previous year, so long as the district does not reduce an educator's total compensation. *United Educators Ass'n v. Arlington Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 012-R10-1102 (Oct. 21, 2004) (denying teachers' grievance after district gave one percent raise, which yielded less than some would have earned under the previous salary schedule).

**Returning teachers and Section 21.402(d):** Full-time teachers, counselors, librarians, nurses, and speech pathologists are entitled to be paid at least the salary they would have received given their current years of experience under the district's local salary schedule from 2008-09, including the pay raise awarded in 2009 (\$80/month or \$60/WADA), plus any other local salary supplements associated with the employee's assignment, unless the employee's assignment has changed. Op. Tex. Att'y Gen. No. GA-0785 (2010). Moreover, as currently written, Texas Education Code section 21.402(d) will require districts to *continue* paying returning teachers (teachers employed by the same district since 2010-11) at least this amount into the future.

**Practical Implications:** Be cautious about solutions that are legally expeditious but that violate a fundamental sense of fairness, such as freezing pay for only certain classes of employees.

## REDUCING PAY

**Proposed Solution:** The district may consider paying some employees less than they made the previous year. For example, the district may reduce some administrators from 12- to 11-month contracts.

### Legal Ramifications:

**At-will and non-certified positions:** The pay of an at-will employee may be reduced prospectively at any time, but employees subject to the Fair Labor Standards Act (“nonexempt” employees) must continue to be paid at least minimum wage (\$7.25/hour). The salary of a non-certified professional on a non-Chapter 21 contract can be reduced between contract years or in accordance with the terms of the contract.

**Certified employees:** Texas Education Code section 21.402(d) requires school districts to pay full-time classroom teachers, speech pathologists, librarians, counselors, and nurses at least the monthly salary they received in 2010-11. There are exceptions, however. Employees hired after the 2010-11 school year are not covered by the salary protection. Moreover, districts may be able to reduce the number of months in an educator’s contract or reduce components of pay other than salary, such as extra duty stipends, as long as the employee’s monthly salary remains intact and the affected employee is given advance notice. A district considering altering pay for covered employees should seek further legal advice about how to reduce pay while preserving salaries in accordance with the statute.

**Reduction permitted with notice:** To the extent reductions are permitted by law, a district that lowers educators’ compensation must provide sufficient notice before the penalty-free resignation date. *United Educators Ass’n v. Arlington Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 012-R10-1102 (Oct. 21, 2004).

**Sufficient notice:** Districts are often locked into a salary floor by the penalty-free resignation date before they have received firm revenue projections for the next school year. Consequently, the commissioner of education has agreed that districts can reduce teacher compensation even after the penalty-free resignation date if teachers were given sufficient warning of a possible reduction of pay.

To be sufficient, a warning must be both formal and specific. To be formal, the notice must be in writing from a person in a position of authority. To be specific, a warning needs to convey how much of a reduction of salary is possible. The question to be answered is whether the teachers actually knew or reasonably could have known, before the penalty-free resignation date, the amount their salaries could be reduced. *Brajenovich v. Alief Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 021-R10-1106 (March 6, 2009).

**Reducing benefits:** Districts may reduce health insurance benefits, even after the penalty-free resignation date. *Ector County TSTA/TSTA/NEA v. Ector County Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 185-R10-799 (Sept. 5, 2000).

**Practical Implications:** Employees will never be enthusiastic about a reduction in pay, but when faced with a choice between losing staff and cutting or freezing pay for all, some districts have been able to generate employee support for a plan that will save jobs.

As a general rule, an overall pay reduction (including benefits) of 20 percent or more will provide an employee with good cause to voluntarily resign, entitling the claimant to unemployment compensation.

## HIRING FREEZE

**Proposed Solution:** The district is considering implementing a hiring freeze. This would allow the district to reduce staff by attrition. The district could also choose not to renew probationary and/or non-Chapter 21 contracts.

### Legal Ramifications:

**Attrition:** No legal restraints prevent the school district from allowing its workforce to dwindle by not filling the vacancies caused by natural attrition, namely resignations and retirements.

**Not renewing probationary contracts:** To terminate a probationary contract at the end of the contract term, the board must: (1) determine whether termination will serve the best interests of the district; *and* (2) provide the employee with notice of the board's decision at least *45 calendar days* before the last day of instruction. Tex. Educ. Code § 21.103(a). The board does not have to make any findings, document its decision, or provide any reasons for termination.

**Not renewing non-certified contracts:** Typically an employment contract that is not governed by Chapter 21 simply expires at the end of the contract term. No particular notice or process is required to end the employment relationship at that time, unless otherwise provided by local policy or the contract itself.

**Practical Implications:** Obviously, if the district allows its workforce to shrink by not filling the vacancies left by natural attrition, the district will have fewer employees to accomplish its business. This will require the district to consolidate functions, reassign duties among positions, and in some cases reassign employees to different positions.

Decisions about reassigning duties and staff are dedicated to the superintendent by law and policy. See TASB Policies BJA (superintendent's duties), DK (personnel assignments), and DP (principal's duties). Nevertheless, when these decisions occur as part of an overall strategy to reduce costs and positions, superintendents and boards normally collaborate in articulating the district's fiscal and staffing goals.

Beware of the legally expedient solution of terminating all probationary contracts at the end of the year. Although this solution presents little legal risk, it will cause the district to eliminate much of its new talent and may harm future recruiting.

## REASSIGNING REMAINING STAFF

**Proposed Solution:** In order to reduce the number of staff positions without a formal reduction in force, the district may consolidate job duties and reassign existing staff to fill gaps left by exiting employees.

### Legal Ramifications:

**Subject to reassignment:** Both local policy and educators' contracts typically provide that employees are subject to reassignment. Generally, as long as a reassignment does not decrease contractually guaranteed compensation or assign the employee to a different *professional capacity*, the reassignment is permissible. See, e.g., *Dooley v. Fort Worth Indep. Sch. Dist.*, 686 F. Supp. 1194 (N.D. Tex. 1987), *aff'd without opinion*, 866 F.2d 1418 (5th Cir. 1989) (upholding teacher's reassignment when changes did not violate contract or reduce pay).

**Assignment outside of certification:** All teachers must be appropriately certified, and teachers in core academic subjects must be *highly qualified*. See TASB Policy DBA(LEGAL). If the district assigns an inappropriately certified or uncertified teacher to the same classroom for an extended period, the district must provide written notice of the assignment to the parents or guardians of each student in that classroom. The written notice may be provided in compliance with the No Child Left Behind Act of 2001, 20 U.S.C. § 6311(h)(6) (requiring notice when a teacher is not highly qualified), or in accordance with Texas Education Code Section 21.057. See TASB Policy DK(LEGAL).

**Emergency permits:** A district may activate an emergency permit only when a *competent* teacher—meaning an appropriately certified and qualified individual—is not available. *Meridith v. Austin Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 022-R10-1204 (March 5, 2007). A current teacher may not be assigned to a position that requires activating an emergency permit unless: (1) the teacher has given written consent; or (2) because of changes in enrollment or course offerings, the teacher's previous assignment no longer exists and no alternative assignment for which the teacher is fully certified is available on that campus. A teacher who refuses to consent to activation of an emergency permit may not be terminated, nonrenewed, or otherwise retaliated against because of the teacher's refusal. However, a teacher's refusal does not impair the district's right to implement a necessary reduction in force or other personnel action. 19 Tex. Admin. Code § 230.501(c). See TASB Policy DK(LEGAL).

**Advertising for open positions:** Must the district post notice of vacancies as the superintendent is reassigning the remaining staff? No. With limited exceptions for vacancies that must be filled during the school year, a district must post notice of vacancies for certified positions for ten school days before filling the positions. Tex. Educ. Code § 11.1513(d). However, in most situations, a vacancy occurs when an applicant will be offered a new contract for an open position. If an employee is simply reassigned under his current contract, a new contract was not created. The position that employee vacated may become a vacancy if it too is not filled by reassignment.

**Practical Implications:** An employee assigned to a position for which he is not fully certified should be placed on a deficiency plan. Consider also seeking a contract addendum specifying a time by which the employee must be fully certified.

Remember to engage in open communication with employees about the district's situation. Alert employees as soon as possible to the benefit of gaining certification in new subjects.

## REDUCTION OF AT-WILL POSITIONS

**Proposed Solution:** Attrition and reassignments of duties and staff have not been sufficient to meet the district's financial needs. As part of an overall strategy for reducing positions, the district may eliminate selected at-will positions.

### Legal Ramifications:

The termination of at-will employees is straightforward. At-will employees may be terminated at any time for any reason, so long as the underlying reason is not illegal (such as illegal discrimination). *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990).

To preserve the district's ability to respond to an allegation that an employee's dismissal was motivated by an illegal reason, the district should create and maintain adequate documentation that firing decisions were motivated by costs. Even though a formal RIF process is not required to eliminate at-will jobs, the district would be wise to develop and document a non-discriminatory method for identifying which positions will be cut.

**Practical Implications:** Don't forget to factor in the cost of unemployment. Unemployment compensation is paid after the district has already paid any salary, severance pay, or unused leave pay owed to the employee. The current maximum weekly unemployment benefit a claimant can draw is \$10,790. In addition, the federal government has offered an emergency unemployment package that may provide additional benefits.

## REDUCTION IN FORCE (RIF) OF TERM CONTRACT POSITIONS

**Proposed Solution:** As part of its overall strategy for reducing positions, the district may also need to eliminate some of its certified positions through a RIF.

### Legal Ramifications:

A RIF requires the board and superintendent to take several procedural steps designed to eliminate term contract *positions*, not target individual employees. Generally, these steps include declaring a need due to financial exigency or a program change, identifying the affected employment areas, and systematically applying criteria to identify the individuals to be discharged. See TASB Policy DFF(LOCAL).

**Declaring a need:** The *board* must declare the need for a RIF. TASB Policy DFF(LOCAL) defines *financial exigency* as any event or occurrence that creates a need for the district to reduce financial expenditures for personnel, including a decline in the district's financial resources, a decline in enrollment, a cut in funding, a decline in tax revenues, or an unanticipated expense or capital need. The commissioner of education generally defers to local boards in declaring a financial exigency. *Ruiz v. Edinburg Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 241-R3-787 (Sept. 19, 1989).

TASB Policy DFF(LOCAL) defines *program change* as any elimination, curtailment, or reorganization of a curriculum offering, program, or school operation. Again, the commissioner defers to reasonable local judgment: "[a] school district is always free to change its organizational structure as it seeks to increase its efficiency." *Wassermann v. Nederland Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 171-R1-784 (Sept. 1, 1988).

**Identifying affected employment areas:** The *board* then defines the scope of the RIF. *Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003). In accordance with TASB Policy DFF(LOCAL), the superintendent may make recommendations to the board regarding the employment areas to be affected. The board's identification of an affected employment area is significant because, once the employment area is defined, all employees *within* the area must be considered for the RIF and no employees *outside* of the identified area may be considered.

The employment areas to be affected by a RIF need not be limited to the examples in local policy. *Arredondo v. Brooks County Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 065-R1-0709 (Aug. 20, 2009). In determining the affected areas, the board may combine or coordinate areas. For example, instead of the areas of "elementary grades, levels, subjects, departments, or programs" and "library programs," the board could define the employment area as "elementary school library programs." *Westbrook v. Colorado Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 170-R1-599 (July 12, 1999).

**Application of RIF criteria:** The *superintendent* must then apply the preset criteria from the district's RIF policy to all employees in the affected employment areas to determine which employees will be recommended for discharge. The district's RIF policy should specify the criteria, in order of importance, to be used to identify affected employees within the relevant employment areas. TASB Policy DFF(LOCAL) lists the following criteria in this order: Certification; Performance; Seniority; and Professional Background.

**Practical Implications:** When a board's RIF decision is reversed, it is rarely due to the underlying reason for the RIF, but rather because the board or administration did not follow the district's own RIF policy.



## RIF OF TERM CONTRACT POSITIONS (END OF CONTRACT)

**Proposed Solution:** After following its RIF policy step by step to identify affected individuals, the board has identified several term contract employees for discharge. The board may decide to end these contracts through the nonrenewal process at the end of the current school year.

### Legal Ramifications:

The RIF process is a justification for discharge, not a substitute for the due process required to end a Chapter 21 contract. Typically, when single-year term contract employees are affected by a RIF, the RIF process leads to the end-of-year nonrenewal process. A reduction in force should be listed in board policy as a reason for term contract nonrenewal. See TASB Policy DFBB(LOCAL).

**Before nonrenewal, consider reassignment:** Once the superintendent has applied the RIF criteria to identify affected employees, those employees must be considered for other available positions in the district for which they are qualified. “A legitimate reduction in force is a valid reason for nonrenewal. However, it must be a reason for nonrenewal, not merely an excuse . . . . It does not constitute a reason if . . . there is another position for which the teacher is qualified, unless the district has a valid reason, supported by substantial evidence, for not reassigning the teacher to that position.” *Parr v. Waco Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 264-R1-689 (Apr. 11, 1991).

A district may require affected employees to express interest in open positions by applying and interviewing for the jobs. *Amerson v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 022-R2-1202 (Feb. 10, 2003). Up until the date the nonrenewal is final, an employee who applies for an open position must be offered the position if the employee meets the district’s objective criteria for that position and is the most qualified internal applicant for the position. If no positions become available before the nonrenewal is final, the district has no obligation to give the employee special consideration for vacancies that open up in the future. *Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984).

**Nonrenewal deadlines and process:** A board must follow the applicable statutory procedures to prevent a term contract from automatically renewing for another school year. To nonrenew a term contract, the board must: (1) provide the employee with notice of *proposed* nonrenewal at least *45 calendar days* before the last day of instruction; (2) upon the employee’s request, provide a *formal hearing* on the proposed nonrenewal; (3) determine whether nonrenewal is appropriate under the board’s policies; *and* (4) timely notify the employee of its decision. Tex. Educ. Code §§ 21.206-.208. The employee may appeal the board’s decision to the commissioner of education.

**Practical Implications:** The end-of-year nonrenewal process can be used only at the end of the final year of a multiple-year term contract. Because in practice most multiple-year term contracts are extended each year, these contracts rarely reach their final year. Consequently, the nonrenewal process may be unavailable for ending multiple year contracts after a RIF. On the advice of counsel, a district seriously anticipating a RIF in future school years might consider not extending or offering multiple-year term contracts.

Don’t forget to include the cost of unemployment compensation, described above, in the district’s cost analysis for the RIF.

## RIF OF TERM CONTRACT POSITIONS (MID-CONTRACT)

**Proposed Solution:** After following its RIF policy step by step to identify affected individuals, the board has identified several term contract employees for discharge. The board may decide to eliminate selected term contracts, including multiple-year term contracts, through the statutory termination process.

### Legal Ramifications:

The RIF process is a justification for discharge, not a substitute for the due process required to end a Chapter 21 contract. Typically, when multiple-year term contract employees are affected by a RIF, the RIF process leads to the termination process. See TASB Policy DFBA.

**Before termination, consider reassignment:** As with nonrenewal, once the superintendent has applied the RIF criteria to identify affected employees, those employees must be considered for other available positions in the district for which they are qualified. A district may require affected employees to express interest in open positions by applying and interviewing for the jobs. *Amerson v. Houston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 022-R2-1202 (Feb. 10, 2003).

Up until the date the termination is final, an employee who applies for an open position must be offered the position if the employee meets the district's objective criteria for that position and is the most qualified internal applicant for the position. If no positions become available before the termination is final, the district has no obligation to give the employee special consideration for vacancies that open up in the future. *Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984).

**Termination procedure:** The procedure for the mid-contract termination of a Chapter 21 contract is the same for probationary, term, or continuing contracts. The board must: (1) provide the employee with notice of *proposed* termination; (2) upon the employee's request, provide a hearing before an independent hearing examiner appointed by TEA; (3) determine whether good cause exists to terminate the contract; and (4) timely notify the employee of its decision. The employee may appeal to the commissioner of education. Tex. Educ. Code §§ 21.251, .253, .258.

Texas Education Code section 21.211 states that a board may terminate a term contract at any time for: 1) good cause as determined by the board, or 2) a financial exigency that requires a RIF. Tex. Educ. Code § 21.211(a). Unfortunately, this statute raises the question of whether a RIF due to a program change would be considered good cause to terminate, rather than nonrenew, a term contract. At least one hearing examiner has concluded that a program change is not good cause for a mid-contract termination.

**Practical Implications:** If the district conducts the RIF process with transparency, most employees in affected positions will resign. If an employee resigns, the district does not have to complete the nonrenewal or termination process.

Don't forget to include the cost of unemployment compensation, described above, in the district's cost analysis for the RIF.

## REDUCTION OF CONTINUING CONTRACT POSITIONS

**Proposed Solution:** If the district could include all teachers in its RIF process, some of the teachers affected by the RIF might be on continuing contracts. The district's school attorney has advised the district, however, that continuing contract employees may not be included in the RIF. In fairness to the term contract employees affected by the RIF, the district is still considering a reduction of continuing contract personnel.

### Legal Ramifications:

Continuing contracts are not subject to the district's RIF policy. See TASB Policy DFF(LOCAL). This is because continuing contracts are subject to different statutory criteria for a reduction of personnel.

**Special process:** The Texas Education Code prescribes special procedures to terminate or otherwise modify continuing contracts under a "necessary reduction of personnel," as opposed to a "reduction in force." The statute imposes two special requirements:

1. Continuing contracts can be terminated only at the end of a school year, not during the school year; and
2. Reductions must be made in the reverse order of seniority in specific teaching fields.

Tex. Educ. Code § 21.157. See TASB Policy DFCA(LEGAL).

**Termination procedure:** Assuming a board followed this unique statutory position to identify affected continuing contract employees, the board would then use the statutory termination process to end a continuing contract. Tex. Educ. Code § 21.158. See TASB Policy DFCA(LEGAL).

**Practical Implications:** A district should work closely with its attorney when considering termination of any continuing contracts. Even experienced school attorneys consider it a challenge to coordinate the elimination of continuing contract positions with a RIF of term contract positions.

To avoid this challenge, the district could consider modifying rather than terminating continuing contracts. For example, the district might reduce the number of duty days and thus reduce salary for the next school year, as long as it does so before the penalty-free resignation date. *Sanford v. La Porte Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 262-R3-593 (Nov. 4, 1994). Such a solution would also help the district avoid the cost of unemployment compensation for a discharged employee.

## OFFERING EXIT INCENTIVES

**Proposed Solution:** In anticipation of the need for a RIF in the near future, the district would like to offer employees a financial incentive to notify the district of the employee's resignation. The incentive would be available to all Chapter 21 contract employees, regardless of whether the employee is resigning or retiring.

### Legal Ramifications:

**Severance agreements:** A severance agreement is a legal agreement between an employer and an employee that specifies the terms of an employment separation, including a layoff or RIF. Typically, a severance agreement asks the employee for a waiver of legal claims against the employer.

According to the Equal Employment Opportunity Commission (EEOC), a waiver of discrimination claims in a severance agreement generally is valid when an employee knowingly and voluntarily consents to the waiver. In addition, a valid agreement must also: (1) offer consideration, such as additional compensation, in exchange for the employee's waiver; (2) not require the employee to waive future rights; and (3) comply with applicable state and federal laws. Additional rules apply to the waiver of age discrimination claims for employees over 40. 29 U.S.C. § 626(f).

**No bonuses:** Severance payments must also comply with the Texas Constitution's prohibition on gifts of public funds, which prohibits a governmental entity from giving compensation unless consideration is received. Tex. Const. art. III, § 53. A severance payment may be defensible to the extent a waiver of legal claims is received, but any such arrangement should be reviewed by district counsel. Op. Tex. Att'y Gen. No. JC-165 (2000).

**No retirement incentives:** Finally, Texas Education Code Section 22.007 prohibits districts from offering or providing a financial or other incentive to encourage the employee to retire from TRS. Not all payments to a retiring employee are considered a retirement incentive, however.

**Practical Implications:** To avoid these various stumbling blocks, any severance package should be designed with the advice and involvement of a school attorney.

Again, do not fail to calculate the cost of unemployment compensation. Even employees who take advantage of a voluntary severance package may be entitled to unemployment benefits, and these benefits will be paid over and above the amount of any severance. The district may *not* ask an employee to waive the right to unemployment benefits; to do so is a criminal offense. Tex. Lab. Code §§ 207.072, .074.

Finally, be aware that, in practice, incentive payments tend to benefit the best employees who can quickly find work elsewhere, the worst employees who were likely to be fired anyway, and employees who were already planning to quit.

## Freezing and Reducing Pay for the 2011-12 School Year

Overall, school employee salaries have climbed consistently in recent years. In the current financial climate, however, many school districts are considering freezing or reducing employee compensation. In some instances, districts face a choice between reducing pay or reducing positions through a reduction in force. Districts facing this difficult decision need to consider not only the practical impacts on employee morale and retention, but also certain legal constraints on reduction of pay. Whether an employee's pay can be reduced will depend on the amount of the reduction, the classification of the employee, whether the employee was entitled to a state-mandated pay raise in 2009, and whether the employee has received sufficient advance notice of the reduction.

### I. Reductions for non-certified employees

**Reduction of more than 20 percent:** As a general rule for all classifications of employees, an overall pay reduction (including benefits) of 20 percent or more will provide the employee with good cause to voluntarily resign, entitling the claimant to unemployment compensation.

**Freezing or reducing pay for at-will employees:** No legal impediment restricts the school district from freezing the pay of at-will employees. Moreover, the pay of an at-will employee may be reduced prospectively at any time. Employees subject to the Fair Labor Standards Act ("nonexempt" employees) must continue to be paid at least minimum wage (\$7.25/hour).

**Freezing or reducing pay for non-certified, contract employees:** The salary of a non-certified professional employed on a non-Chapter 21 contract can be reduced between contract years or in accordance with the terms of the contract.

### II. Reductions for certified employees

**Freezing pay for certified employees:** School districts are not required to give pay raises in 2011-12. House Bill 3646, passed in 2009, mandated a pay raise for certain employees. Full-time teachers, counselors, librarians, nurses, and speech pathologists were entitled to be paid at least the salary they would have received given their current years of experience under the district's local salary schedule from 2008-09, plus a state-mandated pay raise of \$80/month or \$60/WADA. Tex. Educ. Code § 21.402; Op. Tex. Att'y Gen. No. GA-785 (2010). In addition, districts were required to advance employees on a salary schedule based on their years of experience. Many districts struggled to implement the requirement to advance employees on the salary schedule because their compensation plan called for pay increases based on some other measure, such as a percent of the midpoint. Nevertheless, assuming your district responded to the legislation and provided both the state-mandated raise and increases in 2009-10 and 2010-11 corresponding to additional years of experience, your district has fulfilled its obligation to give pay raises. State law does not require similar increases for 2011-12.

Furthermore, districts are not required to provide pay raises just because they traditionally have and employees have come to expect pay raises. *See Smith v. Amarillo Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 184-R10-799 (Dec. 20, 1999) (upholding district’s decision to abandon its midpoint raise system after legislature mandated teacher pay raise); *United Educators Ass’n v. Arlington Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 012-R10-1102 (Oct. 21, 2004) (denying teachers’ grievance after district gave one percent raise, which yielded a smaller increase than some would have earned under the previous salary schedule).

**Reducing pay for certified employees:** Actually reducing pay between contract years may be more difficult. When a district considers a plan to reduce pay for certified employees, the district must answer two questions: 1) When is it legal to reduce certified employees’ pay? 2) Assuming a reduction is permitted, what notice is required?

### 1) When is it legal to reduce certified employees’ pay?

**State minimum salary:** Classroom teachers, full-time librarians, full-time counselors, and full-time nurses are entitled to be paid not less than the minimum monthly salary, based on the employee’s level of experience, specified by state law. Tex. Educ. Code § 21.402; 19 Tex. Admin. Code § 153.1021.

**Salary protection for returning teachers:** For school year 2010-11, full-time teachers, counselors, librarians, nurses, and speech pathologists were entitled to be paid at least the salary they would have received, given their current years of experience, under the district’s 2008-09 local salary schedule, plus the state-mandated pay raise, plus any other local supplements associated with the employee’s assignment, unless the employee’s assignment had changed. Op. Tex. Att’y Gen. No. GA-785 (2010). Further, Texas Education Code section 21.402(d) requires districts to *continue* paying returning certified employees at least the same salary in future years:

“(d) A classroom teacher, full-time speech pathologist, full-time librarian, full-time counselor certified under Subchapter B, or full-time school nurse employed by a school district in the 2010-2011 school year is, as long as the employee is employed by the same district, entitled to a salary that is at least equal to the salary the employee received for the 2010-2011 school year.”

**Can compensation ever be reduced for certified employees?** Yes. While it is true that Texas Education Code section 21.402(d) creates a floor for the monthly salary to which certain certified employees are entitled, that floor does not apply to every certified employee in every situation. Districts may legally reduce the pay of certified employees in the following circumstances:

- **Administrators:** Administrator positions not subject to the state minimum salary schedule and not listed in Section 21.402(d) are not covered by the salary protection in that statute.
- **New hires:** Full-time classroom teachers, speech pathologists, librarians, counselors, and nurses hired after the 2010-11 school year are not covered by the salary protection in the statute.

## Reducing District Contribution to Health Insurance – FAQs

### **Q. Can a district reduce its contribution amount for employee health insurance?**

Yes. A court decision in 2002 confirmed a district's right to reduce health insurance benefits, even after the penalty-free resignation date, where health benefits were neither a contractual term nor listed on the salary schedule. *Ector County TSTA v. Alanis*, 2002 WL 31386061 (Tex. App.-Austin 2002, pet. denied). However, a district cannot reduce its contribution below the \$150 per month, per employee, "maintenance of effort" level required by the statute.

### **Q. What is "maintenance of effort"?**

"Maintenance of effort" is the minimum contribution a district must make toward the costs of health insurance for district employees. The statutory maintenance of effort level is \$1,800 per year, or \$150 per month, for each participating employee. Tex. Ins. Code § 1581.052(a). This amount does not include the state's contribution to employee health insurance.

### **Q. What does the state contribute to employee health insurance?**

The state currently pays \$75 per month for each employee covered under a district's group health plan. Thus, the combined state and district contributions to health insurance are at least \$225 per month, per participating employee. The state contribution is distributed to districts through school finance formulas.

### **Q. Does maintenance of effort apply only to TRS-ActiveCare participants?**

No. The maintenance of effort requirements apply to every employee who participates in a group health coverage plan provided by or through a district, including self-insured plans. Tex. Ins. Code § 1581.052(a). The minimum required contribution must be deposited in the Texas school employee's uniform group coverage trust fund (for districts that participate in TRS-ActiveCare) or in another fund for employee health coverage that meets state requirements (for districts that do not participate in TRS-ActiveCare).

### **Q. What does "Maintenance of Effort for 2000–01 School Year" mean?**

This provision no longer has any practical effect. The Texas Insurance Code includes maintenance of effort provisions for districts that contributed to employee health insurance in 2000–01. Tex. Ins. Code § 1581.051. Originally, the intent was to prevent districts from reducing the total amount that was spent on health coverage during 2000–01 in subsequent years. The law also provides that, if the total amount spent in 2000–01 divided by the total number of district employees today exceeds \$150 per month, the district can use the excess to provide employee compensation, benefits, or both. Tex. Ins. Code § 1581.054. Most districts have long since spent any available "excess" on compensation and benefits.