

Charter Schools and the Applicability of the California Labor Code

This Fiscal Alert addresses whether the California Labor Code applies to charter school employees. The question was raised after the October 2017 legal opinion of Hansberger & Klein (H&K), PLC, was shared with the External Services Subcommittee of the Business and Administration Steering Committee. H&K's information relates to the impact of the March 2017 opinion in *Gateway Community Charter School v. Heidi Spiess* (9 Cal. App. 5 499) by the Third District Court of Appeals. FCMAT is providing this Alert in response to questions from county offices and others. It should be considered as analysis, not as legal advice.

The application of the Labor Code to the public education system is not always clear; the Education Code is also inconsistent with the Labor Code. Although FCMAT cannot resolve these differences and inconsistencies, this Alert will address those provisions concerning the question at hand on whether twice-monthly payroll payments are required for charter schools.

Although the terms independent and dependent are not defined in the Charter Schools Act, they are often used to describe the relationship between an authorizing district and a charter school. FCMAT will refer to independent charter schools in this Fiscal Alert as those that are separate from the authorizer. Dependent charter school employees are considered employees of the authorizing entity and are usually conversion schools, subject to the same rules as other district employees.

Public employers are not subject to the Labor Code unless a Labor Code provision expressly makes a public agency subject to its provisions. Labor Code Section 204 expressly exempts certain employees from specified Labor Code sections, including employees that are "executive, administrative, and professional employees ..." (Labor Code Section 204(a)).

Labor Code Section 220 establishes the exemption of various public agencies from specified sections of the Labor Code, including the section involved in the Gateway matter. Section 220 reads:

- (a) Sections 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204(a), 204(b), 204(c), 204.1, 205, and 205.5 do not apply to the payment of wages of employees directly employed by the State of California. Except as provided in subdivision (b), all other employment is subject to these provisions.

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(b) Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation. All other employments ... are subject to these provisions.

The listed sections include the obligation to pay wages to a dismissed employee within 72 hours of discharge, late payment penalties, and provisions requiring payment at least twice monthly for most employees, including payment by the 26th of the month for the entire balance of the month. Section 220 exempts municipal corporations from application of those rules; school districts are municipal corporations. (See *Division of Labor Law Enforcement v. El Camino Hosp. Dist.* (1970) 8 Cal. App. 3d Supp. 30; *Kistler v. Redwoods Community College Dist.* (1993) 15 Cal. App. 4th 1326, 1336-1337.)

Accordingly, Gateway was primarily a determination of whether or not a public benefit corporation that operated charter schools was a municipal corporation and therefore exempt from the late payment penalties of Section 203. The court determined the charter school was not a municipal corporation and not exempt from the Labor Code sections enumerated in Section 220, and therefore was subject to Section 203. The H&K opinion letter correctly indicates Section 204(a), the obligation to pay at least twice monthly, applies to nonexempt charter school employees. It does not apply to exempt employees of charter schools because 204(a) includes language exempting executive, administrative, and professional personnel, saying:

However, salaries of executive, administrative, and professional employees of employers covered by the Fair Labor Standards Act, as set forth pursuant to Section 13(a)(1) of the Fair Labor Standards Act, as amended through March 1, 1969, in Part 541 of Title 29 of the Code of Federal Regulations, as that part now reads or may be amended to read at any time hereafter, may be paid once a month on or before the 26th day of the month during which the labor was performed if the entire month's salaries, including the unearned portion between the date of payment and the last day of the month, are paid at that time. (For purposes of this letter, FCMAT assumes these executive employees are subject to the FLSA, but does not validate or verify that assumption as part of this specific analysis.)

Education Code Section 45038 also governs when charter school employees are paid. That section reads:

- a. The governing board of a school district or charter school may arrange to pay the persons in positions requiring certification qualifications employed by it, or any one or more of those employees or one or more groups or categories of those employees, in either 10, 11, or 12 equal payments instead of by the school month.
- b. In lieu of the arrangement in subdivision (a), orders for the payment of salary, and payroll orders for the payment of salary and warrants for the payment of salary of employees employed in positions requiring certification qualifications may be drawn once each two weeks, twice a month, or once each four weeks as determined by the governing board.

While this seems to indicate a charter school's certificated teachers and other certificated personnel could be paid monthly, that rule may only apply to those teachers and others holding credentials, and likely does not apply to other noncredentialed teachers (those who are permitted by Education Code Section 47605(1) to provide instruction in a charter's noncore, noncollege prep courses).

Education Code Section 45048 permits any monthly payment to a district's certificated employees to be made on the last day of the month. While Section 45048 is in the same article as Section 45038, Section 45048 does not mention charter schools where it mentions school districts as does Section 45038. While it is possible that Section 45048 would be interpreted to include charter schools, it is unlikely.

Classified employees in merit districts should be paid on the last working day of the month, pursuant to Education Code Section 45166. The payment date of nonmerit system classified employees is less clear, and is not addressed in this Alert. These rules do not apply to charter school classified employees. Section 45166 applies to "any public school system," which is an undefined term. However, an interpretation that it applies to the entire state school system, of which charter schools are clearly a part, is unlikely. Given the mega-waiver from application of most Education Code provisions to charter schools, a charter school wishing to test use of this theory would likely have to first make itself expressly subject to this section.

As to when a charter school's nonexempt staff should be paid, Labor Code Section 204(a) provides in pertinent part:

- (a) All wages ... earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer. ... Labor performed between the 1st and 15th days ... shall be paid for between the 16th and the 26th day of the month ... and labor performed between the 16th and the last day ... shall be paid for between the 1st and 10th day of the following month.

While this provides a good deal of flexibility in payment dates for nonexempt staff, it also is fairly ambiguous. Accordingly, Labor Code Section 204(d) also provides:

- (d) The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

Simplistically, this permits the twice-monthly payments to be made to nonexempt personnel on the 15th and last days of the month. Labor Code Section 204 applies to nonexempt employees but not to a charter's exempt employees.

Education Code Section 45039 permits certificated employees of both districts and charter schools to be paid at the end of each month when paid on a 12-month basis. That section reads:

If the governing board of a school district or charter school arranges to pay persons employed by it in 12 equal payments for the year, it may pay each monthly installment at the end of each calendar month, whether or not the persons are actually engaged in teaching during the month.

Conclusion:

A noncertificated charter school teacher can qualify as a professional, and thus be exempt from certain Labor Code provisions, yet still not be included in the Education Code provisions on payments to certificated charter school employees.

Various charter school legal counsel are advising their clients to pay all personnel, both exempt and nonexempt, twice monthly, likely because exemptions of any charter school employees are unclear under the Labor Code, because it is simple and fair to have similar payment schedules for all employees, and because the risks and costs of fighting the Division of Labor Standards Enforcement (DLSE) on these issues are high.

These twice monthly payrolls include payments on the 15th and last days of the month on the theory that, while Section 204(a) requires payment by the 26th, Section 204(d) indicates the requirements of the section are satisfied if the second payment in the month is made not later than the seventh day following the close of the payroll period. Labor Code Section 204(c) also indicates that employees covered by a collective bargaining agreement may be paid per the terms of the agreement. While charter schools seldom have such agreements, those that do may pay per those terms.

Dependent charter schools, as a whole, are exempt from the various provisions of the Labor Code because they are part of the school district. Independent charter schools, as a whole, are not exempt from those same Labor Code provisions because an independent charter school, or nonprofit operating the school, is not a municipal corporation. This leaves various charter school employees subject to or exempt from the Labor Code sections, depending on their status as exempt or nonexempt employees.

It can be argued that an independent charter's certificated employees could be paid the same as district employees but that would not include noncertificated administration or other professionals, and there could still be a dispute with the DLSE over application of the Labor Code to these employees. FCMAT believes this is why charter lawyers are recommending twice-monthly payments to all employees and why independent charters that are not doing so should consider it.

Additional Assistance

FCMAT encourages LEAs to begin and/or continue this discussion with their legal counsel if approached with how often charter school payrolls should be processed.