



DANNIS WOLIVER KELLEY

Attorneys at Law



AB 1353'S PROBATIONARY PERIOD FOR NON-MERIT CLASSIFIED EMPLOYEES DWK'S Answers to Frequently Asked Questions

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AB 1353 (Chapter 542) shortens the probationary period for classified employees in non-merit districts to no more than six months or "130 days of paid service," whichever is longer. The new law amends Education Code section 45113, effective January 1, 2020, unless there is in place prior to that date a collective bargaining agreement that conflicts with the new law. If so, the new law will not take effect in the school district until after the expiration or renewal of the collective bargaining agreement.

Administrators in non-merit districts are asking questions about AB 1353. Before heading out for the holidays (or after the holidays), please review DWK's responses to the following questions.

EFFECTIVE DATE FOR IMPLEMENTATION MAY VARY

Q: If the parties have a collective bargaining agreement (CBA) in place that is renewed for three years or less prior to January 1, 2020, when does the new law take effect?

A: If the CBA contains a provision specifying a probationary period for classified employees that is more than six months, then the new law takes effect upon the expiration or renewal of the CBA. If there is no conflict between the CBA and the new law (i.e., the CBA is consistent with the six months/130 days requirement, or the CBA does not address the length of the probationary period), then the new law is effective on January 1, 2020.

Q: What if the parties have a "living contract" that allows either party to reopen the CBA at any time? If so, then what is the effective date to implement the new law?

A: If the CBA has a term or duration provision, then that will govern the effective date of the new law. If there is no expiration date, then by law, the negotiated CBA cannot exceed three years. Therefore, the maximum delay in the effective date of the new law would be January 1, 2023. If there is no CBA conflict with the new law, the effective date is January 1, 2020.

APPLICABILITY TO NON-REPRESENTED EMPLOYEES

Q: Are classified employees that are not covered by a CBA (e.g., confidential employees, and classified supervisors and management), subject to the new law?

A: Yes, the new law will apply to confidential employees, classified management employees and classified supervisors not covered by a CBA.

Q: If there is a conflicting CBA in effect for represented classified employees, will the new law still take effect on January 1, 2020 for unrepresented classified employees?

A: No. If there is a conflicting CBA applicable to represented employees, then that CBA's expiration date will serve as a marker for the effective date for all classified staff, both represented and unrepresented. Notably, the new law does not limit its applicability to only those classified employees covered by a CBA.

The new law, at section 45113 subdivision (h), provides:

(h) To the extent that this section as amended by Assembly Bill 1353 ... conflicts with a provision of a collective bargaining agreement entered into by a public school employer and an exclusive bargaining representative before January 1, 2020, ... [then] the changes made to this section by Assembly Bill 1353 of the 2019–20 Regular Session **shall not apply to the school district** until expiration or renewal of that collective bargaining agreement.

REMAINING PROBATIONARY PERIOD AS OF JANUARY 1, 2020

Q: If a classified employee was hired before January 1, 2020, and is still probationary after January 1, how long is remaining probationary period?

A: This issue is not directly answered by the new statute. We believe the best interpretation is to continue the employee's original probationary period, but not to exceed the longer of six months or 130 paid service days from the effective date of the statute. For example, if the employee was hired in November 2019, in a district where the law takes effect January 1, 2020, and the probationary period at that time was one year, then the remaining probationary period on January 1, 2020 would be the longer of six more months or 130 days of paid service.

PAID SERVICE INCLUDES HOLIDAYS AND VACATION, BUT NOT SICK LEAVE

Q: Does the probationary time period in which a classified employee is in paid status include paid holidays and vacation time?

A: Yes, but this issue is not addressed in the new law. The new law in many ways mirrors requirements already applicable to merit districts. In *CSEA v. Compton Unified School District* (1985) 165 Cal. App. 3d 697, the court scrutinized this issue as applied to merit districts and held that "paid service means the time period in which a classified employee is in paid status, that is, is paid for a particular day due to work, vacation time, or a statutorily designated holiday." (Id. at 701.) Such is not the case, however, with leaves or absences related to illness, industrial accident or pregnancy. (Id.) In *Hernandez v. Rancho Santiago Community College Dist.* (2018) 22 Cal. App. 5th 1187, the court construed a probationary community college employee's absence due to a work-related injury. The court held that the college "could have deducted from [the employee's] probationary period the extended period of time she was away from work due to her work-related injury."

AN MOU OR BOARD POLICY IS NOT A CBA

Q: What if confidential employees' or classified managers' probationary periods are addressed by an MOU?

A: An MOU is not a collectively bargained agreement with an exclusive representative. MOUs addressing non-represented classified employees do not delay the effective date of the new law.

Q: What if our board policy specifies a probationary period for classified employees of one year?

A: Board policies should be reviewed and amended, as necessary, to comply with the new law. A board policy that conflicts with AB 1353 will not be controlling after January 1, 2020.

PROMOTIONAL PROBATIONARY PERIODS AND DISCIPLINE

Q: May the probationary period for a promotional position exceed six months or 130 days?

A: No. Section 45113 provides, in part, "A permanent employee who accepts a promotion and fails to complete the probationary period for that promotional position, shall be employed in the classification from which the employee was promoted." Although not addressed in AB 1353, we believe the promotional probationary period will also be subject to the new six months/130 days maximum.

Q: For discipline purposes, what about conduct that occurred prior to the employee becoming permanent?

A: Section 45113 states that no permanent classified employee may be subject to discipline for any conduct that occurred prior to the employee becoming permanent. Once the law is effective, the look back period will be no more than six months or 130 days of paid service, whichever is longer.

NEXT STEPS AND PRACTICAL TIPS

Q: What should districts do now to comply with AB 1353?

A: Review classified CBA(s) to determine whether there is probationary period language that conflicts with the new law. If so, determine the expiration date of the CBA(s) and the effective date of the new requirements. Discuss the new law and implementation issues with the classified bargaining unit's exclusive representative and others impacted by the new law (non-represented classified managers, supervisors and confidentials), to prepare for a smooth transition. Consider negotiating an MOU between the district and union so that there is a shared understanding as to implementation of the new requirements.

If you have questions about AB 1353 and other related compliance issues, please do not hesitate to contact a member of DWK's Labor, Employment and Personnel Practice Group.



Danniss Woliver Kelley (DWK) is a full service education law firm focused on serving and providing legal representation for California public school districts, county offices of education, community colleges and other educational organizations. Established in 1976, DWK is one of the largest women-owned law firms in the country. The firm's areas of practice include: Board Ethics, Transparency and Accountability; Business and Property; Charter Schools; Construction; Labor, Employment and Personnel; Litigation; Public Finance; and Students and Special Education. DWK provides preventive, practical and cost effective legal counsel on key issues surrounding your core mission—the education of students.