

# SCHOOL AND COLLEGE LEGAL SERVICES of California

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## LEGAL UPDATE

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December 13, 2013

**To:** Superintendents, Member School Districts (K-12)

**From:** Loren W. Soukup, Associate General Counsel 

**Subject:** **Certificated Leave Replacement – “Differential” Pay and Use of Temporary Employees**  
**Memo No. 30-2013**

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The following question has been recently posed by several of our school district clients regarding “differential” pay to permanent certificated employees:

If a school district decides to hire a temporary employee instead of a substitute when a permanent certificated employee is out on a long-term leave, can the district deduct the temporary employee’s salary from the salary of the permanent employee on leave or are they limited to only deducting the daily substitute rate?

Pursuant to Education Code §44977, when a certificated employee is on leave for an illness or accident and the leave extends past the employee’s accumulated sick leave,

“... [t]he amount deducted from the salary due him or her for any of the additional five months in which the absence occurs shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence...”

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We are aware that some unions have argued that under Education Code §44977 only the daily substitute rate may be deducted from the salary of the employee on leave. This would typically be much lower than the amount paid to a long term substitute or to a temporary employee. Based on a review of the section's legislative history and a relevant PERB decision<sup>1</sup>, the term "substitute" appears to mean the replacement employee, whether they are a substitute or a temporary employee. Under this interpretation, the actual salary paid to the replacement employee, as stated in the code, whether it is the temporary rate or substitute rate, can be deducted from the salary of the employee on leave. While some union representatives have objected to this interpretation they have been unable to produce any legal authority which contradicts our position.

Nevertheless, to help avoid conflict over this issue, it is strongly recommended that districts review and potentially update language to their leave policies and salary schedules setting forth the specific salary for long-term substitutes (i.e. over 60 days) or temporary leave replacements, if those salaries are different than the day-to-day substitute rate. In addition, it is recommended that district leave policies and bargaining contracts clearly authorize the district to deduct the replacement employee's rate of pay, regardless of whether they are categorized as a temporary employee or substitute employee, from the salary of the employee out on leave.

Please contact any of the attorneys in our office for further information regarding this or any other legal issue.

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<sup>1</sup> Oxnard Elementary School District (2004) PERB Decision No. 1728