



## ARE GOVERNING BOARD MEMBERS EMPLOYEES?

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ACHRO/EEO Newsletter, July 13, 2010

Every community college district has budget problems this year. Due to the statewide budget crisis, community colleges are forced to scrutinize how revenue is spent. A district's correct categorization of all people it employs is a crucial matter that has important implications on a budget. In such an examination, a district might want to determine whether its governing board members are employees that are entitled to receive benefits afforded to all employees.

District governing boards are composed of members elected by the community. These boards hold meetings open to the public at regular intervals and makes decisions regarding various aspects of managing the district. Board members typically receive a small stipend and, thus, engage in outside employment, which is their primary source of income. Although board members are responsible to the college district, they do not report to anyone and do not have a supervisor.

California law does not include a definition of "employee" that applies in all situations. Rather, the definition of "employee" depends on the context. While given individuals, such as governing board members, may be treated as employees for specific purposes, they may not be considered employees under the general umbrella of California law. There is no statute stating that board members are employees, even though, for example, Board members are treated as employees for purposes of withholding income tax from the stipends they are paid. Thus, whether board members are employees may be more a function of any statute defining them as employees.

### A. Definition of Employee

Neither the California Labor Code nor the Education Code defines the term "employee" for all purposes. Rather, whether someone is an employee depends on the context on which it is being defined.

#### 1. The Education Code and the EERA

No statute in the Education Code defines board members as employees. With respect to defining "employee" under the Educational Employee Relations Act (EERA), the Act specifically excludes the governing board members from the definition of employees. (Gov Code § 3540.1.) A "public school employee" is "any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees." (*Id.*) Under the EERA, the governing board is a "public school **employer**." (*Id.*)

#### 2. Contexts in Which Elected Officials are Treated Like Employees

There are some statutes that treat elected officials as employees for the purpose of the specific statutory scheme. For example, under both California and federal law, elected officials are considered employees for tax withholding purposes. (See 26 U.S.C. § 3401(c) and Cal. Un. Ins. Code § 1279.) Thus, payroll taxes must be withheld from officials' salary. Elected officials and board members working in their official capacity are also employees for the purpose of obtaining workers' compensation coverage. (Cal. Labor Code § 3351.)

However, these definitions are purposely broad and are intended to cover a wide range of employees. Tax laws are intended to bring revenue to the state and are intentionally inclusive. Similarly, the purpose of workers' compensation insurance is to provide benefits to injured workers. Only workers who are independent contractors are not covered.

(*Gonzalez v. Workers' Comp. Appeals Bd.* (1996) 54 Cal.Rptr.2d 308; see also Cal. Labor Code § 3351 (granting coverage to volunteers.))

### **3. Contexts Where Elected Officials are not Defined as Employees**

Notwithstanding the above statutes, elected officials are specifically excluded from the definition of employee in many instances. For example, the federal ADEA definition of "employee" specifically excludes elected officials. (29 USC § 630(f).)

Elected officials are also not considered employees under the Brown Act. Government Code section 54957 excludes elected officials from the definition of employee. Section 54957 grants an exception to the Brown Act's requirement of holding open sessions for personnel matters. The public entity may discuss personnel matters involving employees in closed session unless the employee requests an open session. However, section 54957(b)(4) states that employee "shall not include any elected official." Thus, when public officials are involved, the agency must hold an open meeting.

From 1976 through 1993, the definition of employee only excluded "persons appointed to an office by the legislative body of a local agency," except for specified nonelective positions. The Attorney General found that despite this apparent different treatment of appointed and elected officials, the legislature meant to treat all officials as excluded from the definition of employee. (59 Cal.Opp.Atty.Gen. 266.)

Notably, the California Constitution exempts board members from civil service. (Cal. Const., Art 7, § 4.) This means board members do not share the features that are the hallmarks of civil service; i.e. civil service examinations, permanent and probationary statuses, and periodic performance evaluations. The Government Code dealing with personnel in the State civil service defines "employee" as a person "legally holding a position in the State civil service." (Gov't. Code § 18526.) Section 18520 states that the definitions of that chapter govern, "[u]nless the context requires otherwise." Thus, for the purpose of the state's civil service, a person may be exempt from the civil service and not an employee, yet treated as an employee in certain contexts. (See *Slivkoff v. California State University and Colleges* (1977) 69 Cal.App.3d 394, 401-402.)

#### **B. Are Governing Board Members Entitled To Employee Benefits?**

Health insurance is certainly a topic on the forefront of debate. Coupled with budget problems, districts are forced to negotiate the rising costs while explaining the decrease in services. Thus, it is important to determine whether a given worker is entitled to employee benefits, such as health insurance. To answer this question, the district must look to the language of its policy or plan. Different plans may vary widely in definitions of eligibility. Under some plans, a subscriber may be eligible depending on the district's definition of eligibility requirements. In this scenario, even if the district does not have a written definition or contract requiring it to provide board members with coverage, if it has a longstanding practice of covering them, the district is probably required to continue doing so.

Other plans may limit coverage to full time employees or employees working a specified amount of hours. If this is the case, the board members may not work the minimum hours per week, which would exclude them from coverage under the plan. If the health plan is silent on the issue, the district would not be prevented from giving the members coverage. However, since board members are likely not considered employees, it is unlikely that a district *must* provide them with coverage. This same analysis may be used for other benefits granted under a group plan, such as retirement benefits or life insurance.

While the district is not required to provide benefits, the board itself can elect to give itself coverage. Government Code section 53201 provides that "The legislative body of a local agency, subject to conditions as may be established by it, may provide for any health and welfare benefits for the benefit of its officers, employees, retired employees, and retired members of the legislative body."<sup>[1]</sup> Thus, a governing board is authorized to provide health and welfare benefits for its members. (62 Ops.Cal.Atty.Gen. 126.) This includes granting benefits to the student member. (*Id.*) The statutes do not specify a procedure for providing benefits and the board members may act in any way that is consistent with its rulemaking powers. (76 Ops.Cal.Atty.Gen. 91.)

**C. Board Members are Not Employees**

In significant ways that define an employment relationship with a public agency, the members of a district's governing board are not employees. They do not earn a salary or wage and typically hold full time employment separate from acting as board members. The members do not hold any tenured or permanent status and are not subject to the evaluation processes applicable to employees. They are elected officials and hold their position until another candidate takes their place. Further, the Government Code specifically states that board members are not employees. The members are further excepted from the definition of employee under the Brown Act.

Although the board members are treated as employees in certain contexts, this does not compel the conclusion that they are employees of a district. As Government Code section 18520 illustrates, the board members may not be employees, yet be treated as, or derive benefits of being an employee. Thus, while board members are employees for the purposes of withholding taxes and receiving workers' compensation benefits, they are not employees.

Board members are not employees of the district. There is no dispositive definition of "employee," but while board members may be treated like employees for some purposes, they are specifically excluded from being employees in many relevant situations. If a district is concerned about granting board members health, insurance coverage, or a similar benefit, it should look to the language of the policy or plan. If there is no definition of "employee" in the insurance plan or policy, the question is more difficult to answer, but it is most likely that board members would not be employees for purposes of the plan. However, even though it is likely that board members would not be considered employees for this purpose, the board may elect to provide this benefit for its members.

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[1] This section actually provides more support for the proposition that Board members are not employees. If the members were employees, there would be no need for a provision of law allowing a board to provide its members with health benefits.

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