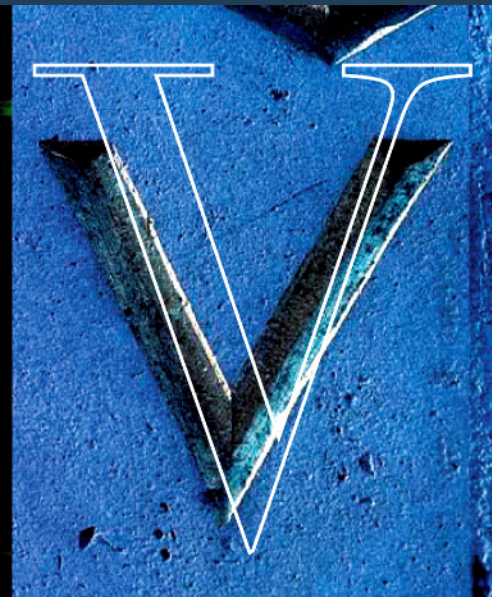


VENABLE[®]_{LLP}

independent school hr group
employment law update

november 18, 2009

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Topics

- Issues in the New Economy
 - Employment Agreements
 - Separation/Severance Agreements
 - Independent Contractors
 - Employment Classification
- New Laws
 - Americans with Disabilities Act Amendments Act of 2008
 - GINA
 - American Recovery Reinvestment Act (COBRA)
 - FMLA Military Leave
 - Red Flags Rules
 - New Form 990 Policies
 - Lilly Ledbetter Fair Pay Act
- New Issues in Employee Benefits
 - Housing Loans/Forgiveness of Debt
 - 457(f) and 457(b)
- Other Hot Topics
 - Release of Documents
 - Social Networking
 - E-Signatures



ISSUES IN THE NEW ECONOMY



employment agreement

- no expectation for contract in subsequent year
- types of changes
 - termination of employment
 - modification of job responsibility or assignments
 - reduction in hours, change in number of hours, schedule of hours or days worked
 - elimination, reduction or modification of supplemental projects
 - reduction in salary
 - furlough or lay offs
- basis for employment change
 - change in curriculum
 - student enrollment
 - change resulting from financial status of school
 - reorganization or change in program
 - elimination of position



employment agreement cont'd

- total discretion of school
 - benefits and salary terminate upon last day of employment or amended based on eligibility if reduction in hours
- force major
- reference to other documents
 - handbook
 - evaluation process
 - loan documents
 - tuition for teachers attending school
 - housing purchase
 - computer advance



severance/separation agreements and release of claims

- utilization
 - termination for cause
 - reductions in staff
 - retirement plans
- benefits
 - assists employees with transition
 - eases the pain
 - obtain waiver of claims
- drawbacks
 - cause suspicions of wrong doing on part of school by employee
 - benefit of consistent use
 - encourages participation by lawyer
 - costly to employer



severance/separation agreements and release of claims

- consideration
 - payment in exchange for release of claims

 - severance payment
 - taxable income
 - terminate and pay through payroll
 - calculation
 - based on fixed amount per years of service
 - flat rate for all employees
 - determined by position held

 - health insurance
 - place on COBRA
 - make premium payments
 - in full
 - consistent with present practice
 - duration of severance payment or other period of time

 - payout of vacation

 - forgiveness of debt



severance/separation agreements and release of claims

- waiver of claims
- confidentiality
- use of photos and images
- non disparagement
- format
 - informal letter
 - less enforceable
 - less intimidating
 - full legal document
 - more effectively enforced
 - encourages consultation with legal counsel
 - intimidating



independent contractors

- common use
 - coaches, substitutes, fundraisers
 - seasonal employees
 - camp, special programs
 - background checks
 - child labor laws and work permits
 - written agreements
 - unemployment compensation
- closer scrutiny by irs
- concerns
 - insurance coverage
 - liability for inappropriate contact with student
 - 403(b)
 - tax exposure
 - unemployment compensation claims



independent contractors

- test
 - limited supervision
 - ability for profit
 - use of own equipment
- if independent contractor
 - written document outlining agreement
 - responsible for taxes
 - responsible for insurance
 - not eligible for unemployment
 - not eligible for workers compensation



exemption classification

- exempt vs non exempt
 - closer scrutiny by wage and hour
- who is exempt?
 - paid on salary basis
 - paid same amount each week regardless of number of hours worked
 - administrative, executive or professional
 - teachers, administrators, division and department heads
 - deductions from salary
 - use of sick and vacation pay
 - FMLA



exemption classification cont'd

- non exempt
 - paid on an hourly basis
 - paid fixed amount for each hour worked
 - paid overtime at one and one half times the regular rate of pay for all hours worked over 40 in a work week
 - regular rate includes all remuneration received by an employee
 - count all time worked by employee
 - working one or more jobs at school
 - tracking of attendance
 - watch for
 - development and admissions staff
 - assistant to head of school
 - classroom assistants
 - business office employees



NEW LAWS



americans with disabilities act amendments act (adaaaa)

- americans with disabilities act
 - prevents employment discrimination based on a disability
 - employers cannot discriminate in employment decisions based on disability
 - does an employee have a disability
 - if the employee has a disability is he or she able to perform the
 - essential functions of a job
 - with or without a reasonable accommodation
 - reasonable accommodation does not create an undue hardship on the employer



impact of ADAAA

- expanded definition of disability → more employees protected
- focus
 - less on “disability” inquiry
 - more on interactive process and provision of reasonable accommodations
 - whether the employee could perform the essential functions of the job with or without a reasonable accommodation
- if impairment would substantially limit a major life activity in its active state
 - episodic impairments protected
 - conditions in remission protected
- few cases will be dismissed for inability to establish disability



recommendations to schools

- review and update ADA policies and practices
- look out for new regulations at end of November 2009
- focus on
 - reasonable accommodation procedures
- maintain
 - records of requests made
 - interactive process
 - accommodations denied and/or provided
 - evidentiary back-up for each decision
- train on ADA's requirements for human resources professionals and managers/supervisors
 - how to identify when a request for accommodation has been made
 - who to contact when a request has been made



genetic information and non discrimination act

- GINA
- test to determine risk for developing a specific disease or disorder
- prohibits the use of genetic information in employment decisions
- employees fear having a genetic test or participating in research studies that examine genetic information will result in adverse employment or limitations or denial of health coverage
- motivation is to avoid chilling effect on testing



american recovery and reinvestment act of 2009

- government covers 65% percent of cobra insurance premiums of eligible employees
- if employer provides payment of premiums as part of severance or other agreement off set does not begin until employee is fully responsible
- employer submits forms for reimbursement of balance of premium amount (claim on credit on form 941)
- must give notice to all employees regardless of whether employee is eligible for reimbursement
- schools should revise cobra notices



fmla military leave

- military caregiver leave
 - eligible employee
 - spouse, son, daughter, parent, or next of kin of a covered service member
 - take up to
 - 26 workweeks of FMLA leave
 - in a single 12 period
 - to care for the service member who became seriously ill or injured while on active duty
 - recently expanded to include
 - care for a veteran undergoing treatment for a serious illness or injury incurred on active duty for up to five years after separation from military service
 - care when the family member suffered from a preexisting serious injury or illness that was aggravated by his or her active duty service in the military



fmla military leave con'd

- Qualifying exigency leave
 - eligible employee to take up to 12 weeks of FMLA leave in a 12-month period
 - “qualifying exigency”
 - short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, additional activities where agreed to by the employer and the employee.
 - recently expanded:
 - available to employees whose family member is in a regular component of the Armed Forces (not just reservists and national guard).
 - available to family members of those called to covered active duty (duty during the deployment of a member of the armed forces to a foreign country under a call or order to active duty)



red flags rules

- new statute
- must have written policy by November 1 (now date is June 1, 2010)
- intended to protect against identity theft
- must identify areas that may be “red flags” for possible exposure
- areas of concern for schools
 - credit for payment of tuition
 - unless full tuition paid before school starts
 - financial aid accounts
 - accounts for books, uniforms other supplies
- must oversee service providers



form 990 questions regarding policies

- questions regarding policies are a new addition to the form 990
- questions indicate the importance of self-regulation and transparency
- schools must have policies and procedures in place by the end of the 2008 tax year to be able to answer “yes” to new Form 990 questions



conflict of interest policy

- form asks whether the school has a written conflict of interest policy
 - officers, directors, and key employees required to *disclose annually* interests that could give rise to conflicts
- “Key employee” definition
 - \$150,000 test
 - Employee had reportable compensation of more than \$150,000
 - Responsibility test
 - Employee had or shared organization-wide control or influence similar to an officer, director, or trustee
 - or
 - Employee managed or had authority or control over at least 10% of the organization’s activities
 - Top 20 test
 - Employee one of “top 20” highest paid



conflict of interest policy

- schools must describe whether they regularly and consistently monitor and enforce their conflict of interest policy
 - board should review disclosures of potential conflicts when reviewing agenda items prior to board meetings
 - board should affirm that no conflicts of interest exist, or that rebuttable presumption process was followed, in minutes and/or board resolution
- form 990 asks whether the organization followed the procedures for the rebuttable presumption in setting compensation (for the Head of School and other officers or key employees of the school)
- form 990 asks schools to describe the process
- rebuttable presumption process should include:
 - approval of transaction by independent board, or committee thereof
 - reviewing comparable data
 - documentation of process and decision in minutes or other records



whistleblower policy

- maintain a written whistleblower policy
 - more expansive than Sarbanes Oxley Act:
 - SOX imposes criminal penalties for retaliating against those who report a suspected federal offense to a law enforcement agency
 - IRS encourages organizations to have a policy for handling employee complaints and protect employees who report any suspected financial impropriety or misuse of assets
 - policy should apply to employees and volunteers
 - helps Boards and senior officials become aware and address issues before serious harm is done to the school



document retention and destruction policy

- maintain a written document retention and destruction policy
- more expansive than Sarbanes Oxley Act:
 - SOX makes it a crime to destroy documents to prevent their use in an official proceeding
- IRS encourages organizations to have a policy for document integrity, retention, and destruction.
- Policy should include:
 - Period of time to retain documents (including electronic documents)
 - When it is permitted to destroy a document
 - Prohibition on destroying documents when an investigation is pending



lilly ledbetter fair pay act of 2009

- impacts retention period for documents related to discrimination claims
- changes statute of limitation for bringing claim of discrimination in compensation
- ledbetter case required employee to file claim 180 days after pay setting decision
- act changes time line to 180 days from paycheck that delivers discriminatory compensation regardless of when the discrimination began



NEW ISSUES IN EMPLOYEE BENEFITS



housing loans and forgiveness of debt

- housing loans
 - arms length agreements
 - in writing
 - secured by collateral (house)
 - fair market interest rate
 - repayment method
 - deduction from pay roll
 - if termination prior to satisfaction
 - forgiveness of loan over years of service
 - may be considered taxable income upon agreement of loan



457 (b) and 457 (f) overview

- increasingly used in head of school contracts
- highly compensated eligible
- non qualified deferred compensation
- different then 403(b)
- Non compliance exposes school/administrator to substantial tax liability
- both plans should
 - be in writing
 - drafted by experts in ERISA



457 (b) details

- 457(b)
 - deferred income up to legal maximum
 - 2009 - \$16,500.00
 - either school or employee can contribute but maximum combined amount is \$16,000.00
 - property of employee unless school closes then becomes assets of school
 - employee takes funds upon departure
 - individual program can be employee or school directed
 - can be drafted to include other highly compensated



457 (f) details

- 457(f)
 - deferred income without limitation on amount
 - only employer contribution allowed
 - must have “substantial risk of forfeiture”
 - employee forfeits contributions made in his behalf in the plan if he leaves prior to end of employment agreement.
 - lack of clear risk of forfeiture results in full amount of contribution to income tax upon commitment to employee
 - i.e.; \$20k for 5 years without risk results in full \$100k subject to income tax in 1st year of agreement
 - upon satisfaction of risk, funds must be distributed and treated as taxable income



OTHER HOT TOPICS



release of documents

- privacy rights
 - employees
 - students
- communication with lawyers
 - no direct communication
- release of documents
 - only pursuant to subpoena
 - only documents specifically requested
 - document retention and destruction essential



social networking

- schools should have written policies regarding the use of social networking sites
 - friends with students on facebook, myspace, twitter, friendster, etc?
 - what if teacher has “school” facebook account?
- internet use in general
 - employees represent school at all times and can be held accountable for outside activities and representations on the internet
 - ex. teacher in Georgia “urged to resign” because of a picture on facebook account, resulting in lawsuit
 - employees should have no expectation of privacy
- make sure discipline/grievance process, if any, references internet use/social networking



e documents (PAY ATTENTION)

- benefits
 - easy tracking and maintenance by school
 - sustainability
 - convenient for parents and employees
- documents
 - employment applications
 - tuition agreements
 - employment agreements
 - enrollment applications
- only binding if
 - policy outlining method and practice for obtaining and storing executed agreements
 - drafted in compliance with federal and state laws
 - implemented consistent with school's technology
- if not in compliance with law, unenforceable



Questions?



contact information

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