

VENABLE[®]_{LLP}

independent school law update

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NJAIS

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overview rules

- Worrying is not Permitted:
 - Most mistakes are made when panic sets in

- Legal Issues are just a matter of Risk Management
 - Best plan is to set up systems prior to confronting the “challenge/opportunity”
 - Handbooks, evaluation tools, contracts

- Operating within your Culture is Essential to effective legal risk management
 - Risk Adversity will also impact on the strategy
 - How much do you want to avoid risk?



the legal framework

- Federal laws
 - Laws passed by the federal government
 - Title VII, ADEA, FMLA

- State laws
 - Laws passed by the states
 - Criminal Background Checks, Child abuse reporting, transcript release, attendance reporting

- Federal and State case law
 - Decisions by courts interpreting the laws



executive contracts

- More complex
 - Status of industry leadership
 - “sophistication” of candidates
 - 990 reporting
- Hot button issues
 - Setting compensation
 - Term
 - “separation” issues
 - Additional benefits
 - Life and/or disability insurance
 - Tuition remission
 - Housing, car, cleaning, sitting support
 - Deferred compensation



Compliance with Rebuttable presumption

- Form 990
 - 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)
 - describe the process
- Rebuttable presumption process should include:
 - Independent body
 - Approval of transaction by independent board, or committee thereof
 - Comparability data
 - Reviewing comparable data
 - Documentation of decision
 - Documentation of process and decision in minutes or other records



457 (b) and 457 (f) overview

- increasingly used in head of school contracts
- highly compensated eligible
- non qualified deferred compensation
- different than 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 \$16,500.00
 - 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



Student privacy

- Breach of Student's Privacy Rights
 - Providing copies of student records without permission or without proper requirement from a valid subpoena
 - Teachers and other school professionals who speak with lawyers and other “experts” without consent or permission
- Establish a clear policy:
 - who speaks with lawyers, specialists and other outside resources related to students.
 - outside “experts” aren’t aware of their legal and ethical obligations.
 - responding to subpoenas.
- Assumption should be no documents distributed without VALID subpoena.



Tuition agreements

- Parent impact
 - reevaluating costs and demanding more
 - breaking enrollment contracts
 - challenging school programs and actions
 - bringing personal turmoil and litigation to school
 - contacts from attorneys
 - subpoenas issued to school employees
 - disputes over decision-making, records, conferences, and access
 - omitting information from applications
 - crossing boundaries



tuition agreement components

- tuition obligation
 - deadlines
 - date for return of agreement
 - date for first installment
 - date for termination of contract without consequences
 - enforcement of time lines
 - enforcement language
 - attorney's fees
 - compliant with state law
 - tuition obligation exists regardless of ability to fill seat
 - consistent enforcement or waive right to enforce



tuition agreement cont'd

- provide flexibility to school for change
 - school can make changes at sole discretion
 - change in curriculum, programming, student teacher ratio, respond to needs of school
- force major
- signatures
 - both parents signature
 - parties responsible for tuition
- parent misbehavior
 - ability to expel child for behavior of parent or other adults associated with child attending school



tuition agreement cont'd

- divorce and custody issues
 - costs of legal fees, teacher time charged to parent
- student parent handbook references
 - be certain to make consistent
- failure to satisfy financial obligations
 - transcripts held
 - next year contract held
 - notice to transfer school
 - attendance of student stopped till tuition current
- tuition insurance
 - know limits
 - careful to avoid fraud
 - built into contract



Hot Handbook issues

- student parent handbook
 - discipline defined
 - parent behavior
 - reference to changes in sole discretion of school
- employee
 - evaluations
 - termination and change in status
 - benefits



independent contractors

- independent contractors
 - coaches, substitutes, fundraisers
 - seasonal employees
 - camp, special programs
 - closer scrutiny by irs
 - liability
 - inappropriate contact with students
 - Taxes
 - unemployment compensation issues
 - if independent contractor
 - written document outlining agreement
 - responsible for taxes
 - responsible for insurance



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
 - assistant to head of school



hiring process

- hiring policy
 - develop a hiring policy that is used for all hiring decisions.
 - make sure
 - consistently used
 - consistent with what actually happens
 - “buy in” from all parties
 - better not to have a policy than to have a strict policy that the school doesn’t follow
- employment application
 - every applicant completes application prior to interview
 - even, and especially if:
 - a resume is submitted
 - applicant comes to school via a search firm
 - if interview is conducted by phone, job fair or other off campus option consider when application completed



hiring process cont'd

- employment application
 - sacred document
 - only person who writes on the application is the applicant.
 - maintained in the personnel file if the applicant is hired.
 - application should ask:
 - is there any additional information we should be aware of that if discovered while you were employed would reflect discredit upon the School? If yes please describe
 - I understand that false information; omissions or misleading information or misrepresentations given in my application or during the interview process may result in a refusal to hire, or discharge in the event of employment.



hiring process cont'd

- reference checks
 - similar questions asked of each reference
 - place reference check calls to names not provided by the applicant
 - maintain a form noting:
 - who was phoned
 - date and time
 - whether a contact was made
 - nature of discussion
- some methods to consider for reference checks:
 - supervisors above reference provided
 - reference checker's counterpart
 - ask the reference for names of people
 - personal references
 - friends/contacts at the applicant's school that may know the applicant.
 - "Is this individual eligible for rehire?"



hiring process cont'd

- credit checks
 - only if information is relevant to position
 - applicant in the Controllers office
 - access to school funds or donor money
 - be careful to conduct such checks if required or recommended for insurance purposes, as part of due diligence.
 - determine standard of acceptable and unacceptable results



hiring process cont'd

- Criminal Background Checks
 - primary obligation to create as safe a workplace and school as possible
 - Higher duty of care
 - FBI check not comprehensive
 - Not everything makes its way to the FBI database
 - compliance with state law is floor not ceiling
 - pedophiles utilize network to gain access to minors
 - consistent policy on which applicants required to submit to criminal background checks
 - develop pre-screening rejection criteria
 - be prepared to take immediate action if the background check comes back with specific types of convictions.
 - notify applicant of criminal background check obligation
 - receive the applicant's authorization for the check



hiring process cont'd

- “Criminal” Background Checks
 - Local/State check – 7 years residence
 - Federal Check – 7 years
 - Crime Guard
 - Driving Record
 - Social Security Locator
 - Sex Offender Registry
- News Media Check
 - Maintain copies of findings
- Internet Check
 - “Google” the applicant
 - Maintain copies of findings
- Verification of Education and Prior Jobs
 - verify education and prior jobs.



employment agreement

- who receives
 - faculty, staff, administrators
- written document
 - form it takes
 - letter, agreement
- employment at will
 - inconsistent with term agreement
- fixed term
 - term beginning and end
 - july 1 to june 30
 - 1st day of school to day before school starts
 - 1st day of school to last day of school
 - consider
 - unemployment
 - continuation of insurance
 - starting payment before school starts



employment agreement cont'd

- no expectation for contract in next year
- ability to change employment status
 - termination, modification, reduction in hours
 - basis for employment change
 - change in curriculum; student enrollment; change resulting from financial status of school; reorganization or change in program
 - total discretion of school
 - reduction in salary, furlough
 - benefits and salary end upon last day of employment or amended based on eligibility if reduction in hours
 - tuition remission



employment contract cont'd

- force major
- reference to other documents
 - handbook
 - evaluation process
 - loan documents
 - tuition for teachers attending school
 - housing purchase
 - Issues with deferred income
 - computer advance



employee termination issues

- Wrongful Termination
 - Termination based on protected categories (age, race, sex, national origin, disability, religion, other state laws)
 - Employee alleges that termination was as a result of their protected category
 - School must defend the action by establishing the reason for the termination
 - Opposite of “employment at will”
- Failure to follow established policies and procedures outlined in handbook
 - Employee alleges that he/she was not aware of the performance issues and was not provided with evaluations, growth plans etc.
- Contract issues
 - Schools generally provide teachers with contracts, offer letters or some other form of agreement
 - Benefit to School; failure to provide a contract serves as “termination”
 - Without a contract that expires at a fixed term, the employee is automatically assumed to have a job for the following year



termination strategies

- Continue to use Contracts, Offer letters or Agreements
- Clearly state in the document:
 - The term of the agreement (school year)
 - Under what conditions the contract could be ended prior to the end of the term
 - How the Handbook and other documents impact the employment relationship
- Review Handbooks and other policies to assure the school's compliance or change the document
- Hold document performance discussions with staff



severance and separation agreements

- assists employees with transition
- may cause suspicions of wrong doing on part of school by employee
- severance, payment or benefits provided in exchange for release
- options
 - payment of salary
 - based on fixed amount per years of service
 - flat rate for all employees
 - determined by position held
 - continuation of insurance coverage
 - Cobra
 - Check plan if active continuation



e documents (PAY ATTENTION)

- general
 - only beneficial if legally binding
 - only binding if in compliance with federal and state laws
 - easy tracking
 - Sustainability
- documents
 - applications, enrollment documents, recommendations
- only binding if
 - policy outlining method and practice for obtaining and storing executed agreements
 - must be drafted in compliance with federal and state laws
 - must be implemented consistent with school's technology



document retention and destruction

- parents increasingly requesting access to admissions documents
 - custody battles
 - failure to admit cases
- DO NOT RELEASE WITHOUT SUBPOENA
- schools must create a policy addressing retention and destruction of documents
 - include admissions director in the decision making
 - what time period are admissions records kept
 - why do we maintain documents
 - helpful to administrators; if student's performance is inconsistent with application information
 - how long are documents maintained
 - what documents are maintained
 - where do we keep them



red flag

- 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



Teacher interactions with students

- meeting alone with student
 - closed door classroom (special concern of counselors)
 - school library
 - public area (ie: Starbucks)
- employee/parent
 - drives group of students (including own child) to movies
 - communication with parents in child's class
 - same or different standard
- driving student home alone
 - following school event
- attending student party
 - parents present
 - only students present
 - alcohol available
 - graduation (holiday party)



Social networking impact liability exposure

- Facebook
 - friends on Facebook
 - students
 - parents
 - fellow employees
 - Facebook page
 - reference your school or other schools
 - reference students by name
 - reference
- Utube
 - use of student photos
 - obtained in school activities
 - obtained outside of school activities
 - internet games
 - playing with students



Social networking cont'd

- email communication
 - type of email
 - school email
 - personal email
 - nature of communication
 - school vs not school related
 - student interaction (dating concerns)
 - homework
 - baseball scores
- cell phones
 - personal numbers
 - type of communication
 - calls
 - text



Questions?



contact information

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