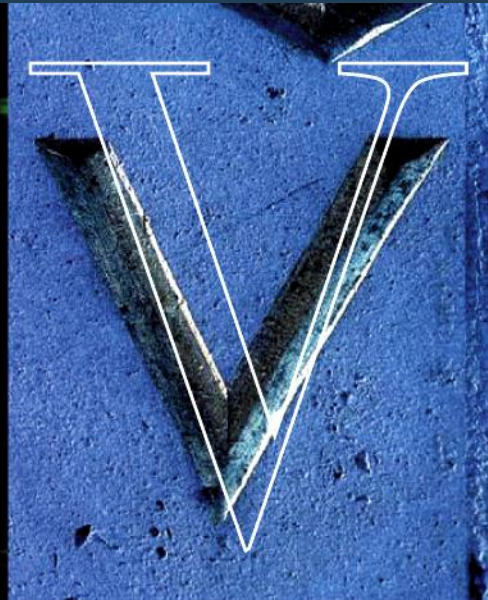
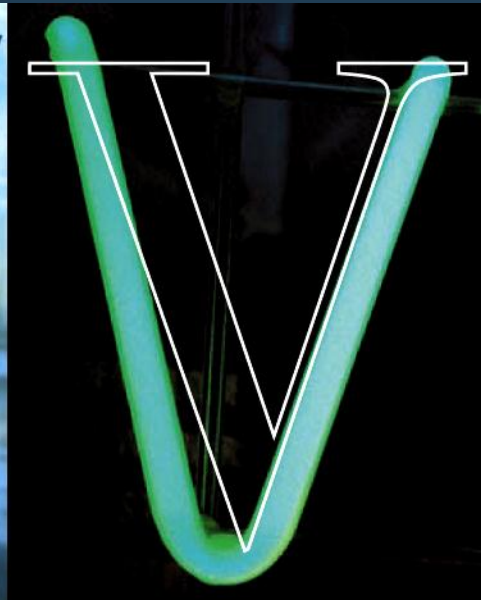
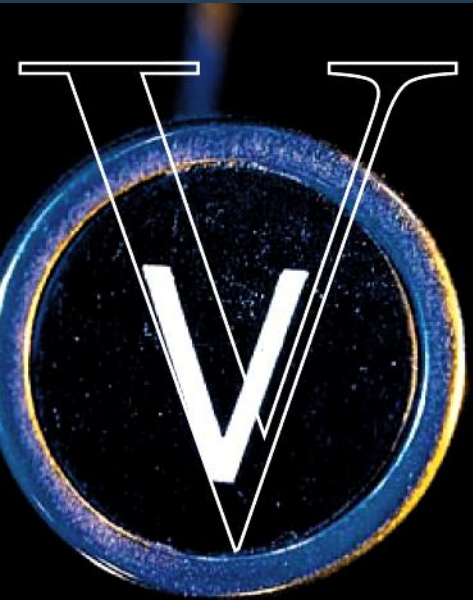


VENABLE[®]_{LLP}

Creating a Legally Sound Employee Relationship

SAIS annual conference 2011
caryn pass and heather broadwater



Points of Legal Exposure

- **The Hiring Process**
 - Recruiting and selecting the best candidate for the job
- **Entering the Employment Relationship**
 - Making an offer to, negotiating with, and entering into an employment relationship with the selected candidate
- **Supervising and monitoring the Employee**
 - Obligation to monitor the employee's behavior and performance
- **Termination Process**
 - Ending the employment relationship by mutual or unilateral decision

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Relevant Federal Laws

- Title VII of the Civil Rights Act
- The Pregnancy Discrimination Act
- The Equal Pay Act
- The Age Discrimination in Employment Act
- The Americans with Disabilities Act

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Title VII of the Civil Rights Act

- **Discrimination**
 - Disparate Treatment
 - Disparate Impact
 - Prima Facie case required
- **Harassment**
 - Quid Pro Quo
 - Hostile Work Environment
 - Not a General Civility Code

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The Pregnancy Discrimination Act

- **Prohibits discrimination on the basis of pregnancy and pregnancy-related conditions**
 - Amendment to Title VII
 - Check state law
- **Covers all areas of employment**
- **Applies to private employers with 15 or more employees**
- **Common issues**
 - Timing of discipline / termination decisions
 - Leave

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Age Discrimination in Employment Act (ADEA)

- **Prohibits discrimination on the basis of age against any individual who is 40 years of age or older**
 - Check state and local laws – may protect < 40 years
- **Applies to employers with 20 or more employees**
- **Covers all aspects of employment**
- **Common issues:**
 - Hiring / Promotions
 - Benefits
 - Terminations / Severance Agreements

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Americans with Disabilities Act (ADA)

- **Prohibits discrimination against qualified individuals with disabilities in employment**
- **Requires Reasonable Accommodation**
 - Including the hiring process
- **Applies to private employers with 15 or more employees**
- **Covers all areas of employment**

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Hiring Process

■ Goals

- Find the Best Candidate to Fill the Position
 - Faculty/staff as selling point for institution
 - Consistent with mission and culture
- Minimize Unhealthy Turnover
 - Costly
 - Lack of consistency to parents and students
 - Affects reputation in the teaching world

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Hiring Process

- **Potential Claims**
 - Negligence (Hiring/Retention/Supervision)
 - Student/employee/other was harmed because school failed to meet its duties to screen, monitor, and supervise
 - Discrimination/Failure to Hire
 - Applicant was not hired because of membership in protected category
 - Failure to Accommodate
 - Applicant was not given fair opportunity to compete for job because disability was not reasonably accommodated
 - Fraudulent Inducement/Misrepresentation
 - School failed to deliver on promises to applicant, who left secure job or passed opportunity based on promises

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Negligence

- **Responsibility to create safe environment for students**
 - Higher duty for schools
 - Applies to physical and psychological well-being
- **Must take reasonable steps to avoid harm**
 - “Had the school only_____, my child would not have been harmed.”
- **State Obligations**
 - Floor or ceiling?



Discrimination/Failure to Hire

- **Ensure Consistency in Hiring Process**
 - Everyone treated the same
 - Application completed by EVERY applicant
 - Same information collected on all
 - Same tests at each stage
 - Helps show that hiring decision was based on legitimate factors and not a protected category

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Failure to Accommodate

- **EEO/ADA Statement**
 - Informs applicants that accommodations are available
 - Tells how to request accommodation
- **Offer Reasonable Accommodations**
 - Interactive Process
- **Avoid Assumptions Regarding Abilities**
- **Limit Questions to Whether Able to Do Job With or Without Reasonable Accommodation**

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Fraudulent Inducement/Misrepresentation

- **Same Message Delivered to Every Applicant**
- **Avoid Making Promises –**
 - Describe What Is, Not What Might Be
- **No BAIT and SWITCH**
- **No One Has a Promise of Lifetime Employment**

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Hiring Policy

- **Develop Policy That Fits Your School**
 - Be realistic
- **Include a Standard Employment Application**
- **Do Not Include the Hiring Policy in the Handbook**
 - Handbook applies to already hired
 - “Hiring Policy” is combination of operating procedure and policy

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Interview Process

- Only ask questions that are relevant to the decision to hire
- Assumption is that all information collected is used
- Notes may be taken on an “interview form” or other document but not on the original application
- Make sure to train anyone that conducts interviews regarding what questions can and can not be asked
- Remember, part of the process is to get to know the applicant, which often leads to informal style and additional information – be careful

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Background Checks

- **Reference Checks**
 - Make sure to conduct the same amount on each applicant that reaches a given stage
 - Make certain that notes are taken of the attempts to make contacts as well as the information received, even if just name, rank, and serial number
 - Listen closely to the answer
 - I can't give a reference on advice of counsel
- Consider asking others
 - Reference checker's counterpart at another school
- Ask, "is he/she eligible for rehire?"

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Background Checks

- **Only note information that is relevant and does not reveal protected category**
 - Example of what to not record: great applicant if she didn't have so many small kids at home.



Credit Checks

- **Must be job related**
- **Make sure to check with insurance provider to determine if it is mandatory**
- **New FCRA provisions**
- **May be limited by State law**

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Criminal Background Checks

- **What is necessary to assure the safety of the students?**
 - Is a \$45 criminal history check worth the time and money?
- **Is it the basic standard of care?**
- **Set point in process where all applicants who reach that point will be subject to check**
- **Must comply with the FCRA**
- **Must notify the applicant**
- **Offense must be job related to be used as basis of employment decision**
- **Check against the resume to assure consistency**



Internet Check

- **Each applicant should be subject to a basic internet screening**
- **Keep result printout**
- **Make sure to confirm identity if information is found**
- **Some media coverage appears that may not be criminal but doesn't show good judgment**
 - Is there any additional information the school should know that, if discovered, would cause embarrassment to the institution?

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Check Offender Registries

- **Some states have sexual molester offender registries**
- **Some are thorough - some are not**
- **Various other web sites are on the web**
- **Important to consistently run and print out findings**
- **Often these sites track closer than the criminal records since there is a strong interest in the protection of children**

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Other Verifications

- **Education**
 - Amazing how often applicants lie on the resume about education
- **Job history**
 - May want to do a verification of time worked, position held and salary earned. Just to confirm
- **Volunteer History**
 - May cause more problems than solutions but has served as grounds for helpful information
- **Employment Authorization (I-9)**
 - Be careful how you ask and when



Hiring Process “Rules”

- **Have a hiring process that fits your culture – and follow it!**
- **Be thorough and consistent**
- **Limit inquiries to relevant factors**
- **Don’t write on the original application or resume**
- **Include applicant certification statement**
- **Conduct thorough background checks (including criminal and reference checks) following the FCRA**
- **Conduct an internet check**
- **Train interviewers, especially on questions they can/can’t ask**



Employment Contracts

With Written Contract

- Fixed term of service that automatically ends
- Makes us “renew the pain”
- Establishes standards of performance and behavior
- Identifies standards for termination
- Consistent with public schools

Without Written Contract

- Employee serves at-will for indefinite ongoing period
- Must take action to end employment
- Can terminate at any time with or without notice or reason*

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Employment Contract Elements

- Employment At-Will language?
- Salary and Benefits
- Establish salary rate per pay period (or hourly rate for non-exempt), representing an annualized salary of _____
- Identification of Position/Duties
- Reserve the right to change, supplement, or remove assigned responsibilities at any time, at the school's discretion.
- Term of Contract
- Identify the academic year and start date, and impact on pay and insurance coverage

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Employment Contract Elements

- Expiration and Renewal
 - Contracts should end at the termination date and the school and employee may enter a NEW contract for any following year
- Force Majeure
 - Describe the effect on the contract of a natural disaster or other catastrophe
- Termination Provisions
 - Description of terminable standards
 - Insubordination, dereliction of duties, poor performance, violations of policy and procedure
 - “Actions that would reflect discredit upon the School”
- Pay provisions

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Employment Contract Elements

Optional Terms

- Severance
- Notice of termination
- Confidentiality
- Non-competition
- *Arbitration of disputes*
- Housing (especially process if employment terminates prior to end of contract)

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Employment Contract Elements

Potential Vulnerabilities

- Employee's voluntary termination
- Non-competition / non-solicitation
- No subsequent duty
- Standards for termination
- Inconsistencies within the contract
- Inconsistent enforcement of contract'
- Inconsistencies with handbook
- Extra "rights" created by handbook

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Questions?

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