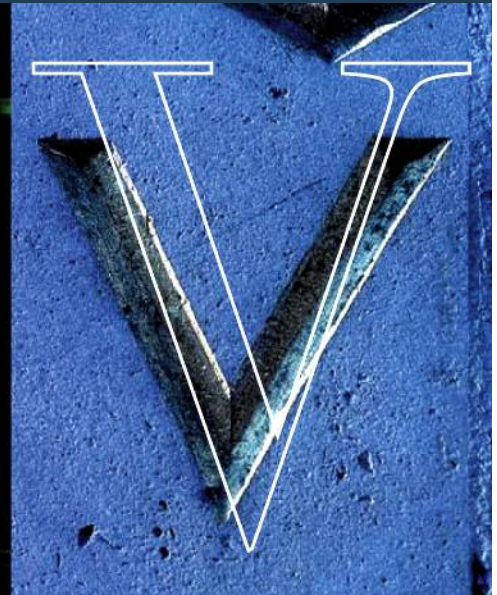
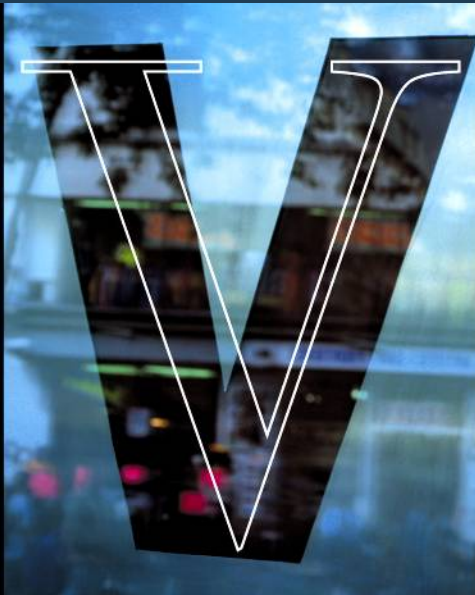
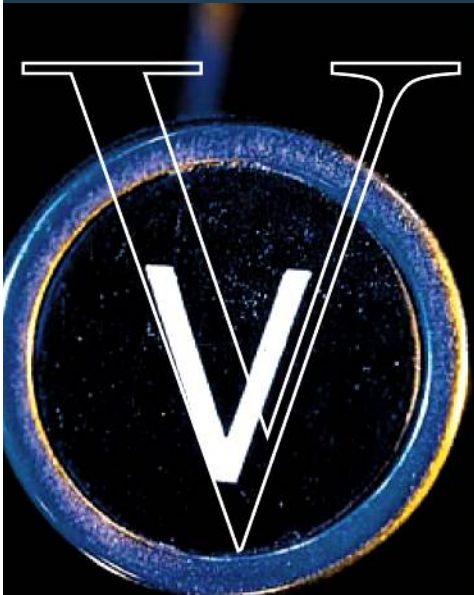


VENABLE[®]_{LLP}

encouraging improvement while ensuring legally
compliant departures

SAIS annual conference 2011
caryn pass and heather broadwater





employment status

- employment-at-will
 - termination without reason?
 - do schools ever terminate without reason?
 - schools have a reason to terminate
 - need to document the reason and tell employee
 - employees can always bring a law suit
 - will need reason to defend in case of law suit
- employment agreement
 - counter to “employment at will” concept
 - establishes fixed period of term
 - establishes rules and expectations
 - establishes reasons for termination
 - protects school



potential legal claims

- breach of contract
 - 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

- discrimination
 - school terminated as a result of employee’s protected category or considered protected category when making employment decision
 - Sex, age, race, national origin, religion, disability
 - state: sexual orientation
 - other: military status, pregnancy
 - employee files charge of discrimination with EEOC
 - States termination as a result of protected category
 - School must establish reason for termination
 - Tell “story” of why school took action
 - Important to have written support for reason and process used by school



legal framework

- breach of 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.
- retaliation for bringing a claim or alleging harassment
 - ie: sexual harassment claim
- intentional infliction of emotional distress
 - school's behavior caused emotional distress
- misclassification of exempt status
- misclassification of independent contractor
- failure to accommodate
 - employee was entitled to retirement, school failed to accommodate and terminated employee
- failure to provide FMLA
 - termination without providing FMLA
 - because employee took FMLA
 - failure to hold employee's job open during FMLA



Relevant documents

- Hiring process
 - How thorough is the vetting
 - References and background checks
 - Employment contract
- Policies/handbook
 - Evaluation
 - What is the process, is it reasonable, described, implemented
 - Discipline and termination
 - Clearly states consequences of counter productive behavior or actions
 - Code of conduct
 - including acceptable use policy and use of technology



performance improvement process

- create process that assists improve conduct or creates grounds for dismissal
- employee has right to know school's concern
 - often managers believe they instructed employee
 - how can employee improve if not aware of problem
- consider how school would describe the process to a court or agency
 - has school established a convincing “story”
- document process used to improve conduct
 - track discussions with as much detail as possible
 - time and date of discussion and general overview
 - Document instructions and discipline in writing

performance management tools

- formal written performance evaluation / appraisal
 - should be consistent with culture and followed
 - failure to comply with evaluation and appraisal process creates claim for failure to comply with established rules
- Coaching
 - Communicate performance concerns or issues and discuss methods of improvement
- Counseling
 - Inform employee of continued problems with performance or other behavior and explain that failure to improve may lead to discipline
- Disciplining
 - Provide consequence of employees failure to address issue or discipline for issue of egregious nature
 - Clearly notify employee of consequences of failure to improve or repeated behavior
- Terminating
 - Create termination strategy and implement

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performance management tips

- deliver the truth – even if unpleasant
- be tactful and respectful, but clearly inform employee of problems
- give detail of problem
 - “Employee is Unresponsive” vs “employee fails to reply to parents’ emails within 24 hours of receipt:
- constructive criticism, not micromanaging
- consistency matters
 - Manner of delivery
 - Strictness of standards
 - Consequences of performance / conduct
- ACT on behavior
 - continued discussions and written discipline without consequences negates process

separation agreements

- upside
 - assists employee in transition
 - provides insight into employee's intention
 - gain release of claims from employee
- downside
 - may cause suspicions of wrong doing on part of school by employee
 - set pattern of payout on termination
- long vs short version
 - consistent use of document
- release of claims
 - “consideration”
 - school “buys” employee's right to bring legal claim
- 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)

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separation agreement provisions

- Establish consideration
- Establish claims employee is releasing
 - Discrimination, contract, state and federal laws
 - Age (40 or older) – 21 days to consider, 7 days to rescind, right to speak with legal counsel
- Confidentiality
- Communication with employees, students, families
- Return to school and school property
- Non disparagement
- Use of photos
- Return of property
- Reference
- Unemployment challenge
- Date by which document must be returned or null and void

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employment agreement

- who receives
 - faculty, staff, administrators
- benefits and detriments of written contract
 - renew the pain
 - sets out basic rules
 - establishes standards of performance and behavior
 - establishes fixed term of service that automatically ends
 - allows for specific standards for termination
 - opportunity to provide flexibility to make changes
 - consistent with public school
- written document
 - letter v. agreement
 - any document that establishes commitments is a contract regardless of form

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term

- fixed term
 - establish beginning and end
 - July 1 to June 30
 - 1st day of school to day before school year starts
 - 1st day of school to last day of school
 - consider
 - unemployment insurance
 - continuation of insurance benefits
 - starting payment before school starts
 - 10 month vs. 12 month contract
 - no expectation of contract next year
 - contracts should end at the termination date and the school and employee may enter a NEW contract for any following year
- contingent upon background check results for new employees

salary and benefits

- salary
 - describe salary/pay rate per pay period that represents annualized salary of ____
 - check state wage payment laws
 - establish that salary ends on last day worked
 - look out for pay disparity claims
 - Lilly Ledbetter
 - coordinated effort to crack down on gender discrimination in pay by DOL, DOJ, and EEOC
- benefits
 - provide general description of benefits school offers
 - describe impact on benefits if employee is terminated prior to end of contract term
 - vacation, sick leave, and other paid time off

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position and duties

- identification of position/duties
 - full time/part time
 - support mission and philosophy of the school
 - address tasks such as dismissal line, playground duty, back to school nights
 - reserve the right to change, supplement, or remove assigned responsibilities at any time, at the school's discretion

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modification and termination

- modification/termination
 - establish basis for modification/termination of contract prior to the end of the contract term
 - change in curriculum; student enrollment; change resulting from financial status of school; reorganization or change in program
 - insubordination
 - dereliction of duties
 - poor performance
 - violations of policy and procedure
 - actions that would bring disrepute upon the school
 - potential impact on salary, benefits, and hours
 - impact on tuition remission and loans
 - discretion of the school

conflict of interest

- conflict of interest
 - employee agrees to serve in the best interest of the school

 - outside employment that is inconsistent with position or could negatively impact reputation of the school

 - individual employment with school families
 - tutor, counselor, other educational services that could be a conflict
 - during the school year? with prior approval?

 - should be consistent with general conflict of interest policy of the school

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force majeure

- force majeure
 - describe the effect on the contract of a natural disaster or other catastrophe

 - salary may be suspended or contract terminated with no additional pay or benefits

 - school year may be extended, weekend classes, distance learning or other modifications with no additional salary

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other issues

- student privacy
 - employee agrees to respect and protect the privacy rights of students and their families
 - pictures, videos, other images, lists, personal information
- qualifications
 - employee warrants that he/she has all qualifications, certificates, credentials and licenses required for the position and will keep them current

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other issues

- consistent with other school documents
 - handbook
 - evaluation process
 - loan documents
 - tuition for teachers attending classes, housing purchase, computer advance, tuition remission
- optional provisions
 - severance
 - consider impact on obtaining waiver and release of claims
 - notice of termination
 - ie: 30 day notice
 - confidentiality/noncompetition
 - review state laws, difficult to enforce
 - arbitration of disputes
 - does not always cost less
 - review state laws

unintended contracts

- oral contracts
 - establish who can make promises and who can make revisions to the employment agreement
 - train faculty, staff, and administrators involved in the hiring/firing process
- offer letters
 - even with at-will language, employee can claim breach of contract

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reduction in force/early retirement selection process

- create census
 - name, tenure, age, sex, race, position, salary
- create wish list
- identify
 - employees with defensible performance concerns
 - areas in need of right sizing
 - skills of employees in areas identified in need of right sizing
- compare censuses to wish list and other criteria
- identify candidates
- determine discrimination and contract exposure



reduction in force

- types of change
 - termination, reduction of hours, modification or change in assignment
- basis for action
 - performance
 - adequate written documentation
 - procedure under contract, handbook
 - seniority at school
 - cleanest but not most effective
 - may raise claims of discrimination based on age
 - needs of school
 - change in organization
 - change in curriculum or programs
 - change in enrollment

reduction in force plans cont'd

- considerations
 - beloved employee syndrome
 - panic impact
 - on part of
 - teachers
 - current parents
 - prospective parents
 - donors
 - support of board
 - good governance challenges

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early retirement

- overview
 - less popular this year
 - lower participation
 - can't force participation
- create censes terms of plan
 - who is eligible?
 - years of service
 - age
 - weighted age or weighted years of service
 - how long is plan offered?
 - one year? two years?

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early retirement cont'd

- benefit options
 - salary
 - paid out over time or in lump sum
 - calculated based on years of service
 - amount of time per year
 - bands of time
 - » 1 to 5 years; two weeks pay
 - » 5 to 10 years; four weeks pay
 - health insurance
 - continue to pay premiums through COBRA
 - continue to pay premiums via active insurance
 - pay for fixed period of time or till 65
 - consider time limits

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early retirement cont'd

- deferred compensation
 - certain payments may be placed in the 403(b) plan
 - salary payments deferred over time
 - avoid tax treatment of payments
- written document
 - obtain release from employee
 - outline benefits which serve as consideration

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the road ahead looks bright

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