



Critical Employment  
Law Issues in  
Independent Schools:  
A Two Day Seminar

Presented By:  
Venable LLP Independent  
School Law Attorneys  
**Caryn Pass &  
Heather Broadwater**

June 21-22, 2012  
Washington, DC



# Critical Employment Law Issues in Independent Schools

VENABLE INDEPENDENT  
SCHOOL LAW PRACTICE  
*WISE IN THE  
SCHOOL WORLD*

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**Thursday, June 21, 2012**

- |          |  |
|----------|--|
| 8:00 AM  | <b>Breakfast and Onsite Registration</b>   |
| 8:45 AM  | <b>Welcome and Overview of Sessions</b>  |
| 9:00 AM  | <b>Ties that Bind: Establishing the employment relationship; strategies for creating a legally sound foundation</b><br>Presenter: Caryn G. Pass, Attorney, Venable LLP                               |
| 10:30 AM | <b>Break</b>   |
| 10:45 AM | <b>Facebook, Twitter, Blogging, Texting &amp; YouTube: Employee behavior and appropriate boundaries in the world of social networking</b><br>Presenter: Heather J. Broadwater, Attorney, Venable LLP |
| 12:15 PM | <b>Lunch – Open Questions and Answers</b>  |
| 1:15 PM  | <b>FLSA Boot Camp: Legal compliance in the compensation of employees and granting of leave</b><br>Presenter: Heather J. Broadwater, Attorney, Venable LLP  |
| 2:45 PM  | <b>Break</b>   |
| 3:00 PM  | <b>Follow the Paper Trail: Encouraging performance improvement while ensuring legally compliant employee departures</b><br>Presenter: Caryn G. Pass, Attorney, Venable LLP                           |
| 4:30 PM  | <b>Q &amp; A</b>   |
| 5:30 PM  | <b>End of Day</b>  |

THE VENABLE INDEPENDENT SCHOOL LAW PRACTICE REPRESENTS INDEPENDENT SCHOOLS NATIONWIDE ON ALL LEGAL MATTERS INCLUDING EMPLOYMENT AND STUDENT ISSUES, GOVERNANCE, BENEFITS, LITIGATION, CONSTRUCTION AND THE CREATION OF CONTRACTS, POLICIES AND OTHER DOCUMENTS NECESSARY TO CREATE A SAFE ENVIRONMENT CONSISTENT WITH A SCHOOL'S CULTURE AND MISSION.

## Friday, June 22, 2012

- 8:00 AM      **Breakfast**
- 9:00 AM      **Building a Better Employee Handbook: Capturing  
the new trends and employment challenges**  
Presenter: Heather J. Broadwater, Attorney,  
Venable LLP
- 10:45 AM    **Break**
- 11:00 AM    **Report Card Time: Conducting an HR Audit**  
Presenter: Caryn G. Pass, Attorney, Venable LLP
- 1:00 PM      **Working Lunch – Question and Answer**



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# TAB 1



## Critical Employment Law Issues in Independent Schools:

**Ties that Bind:** Establishing the employment relationship, strategies for creating a legally sound foundation

Venable Human Resources Seminar 2012  
caryn pass and heather broadwater, presenters



## Notes

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## ■ The Hiring Process

- Recruiting and selecting the best candidate for the job

- Making an offer to, negotiating with, and entering into an employment relationship with the selected candidate

- Obligation to monitor the employee's behavior and performance

- Ending the employment relationship by mutual or unilateral decision

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## Notes

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- 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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[illegible]

- **Discrimination**

- Disparate Treatment
- Disparate Impact
- Prima Facie case required

- Quid Pro Quo
- Hostile Work Environment
- Not a General Civility Code

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- **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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## Notes

[illegible]

- **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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- **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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- **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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## Notes

[illegible]

- **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?

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- **Ensure Consistency in Hiring Process**

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## ■ EEO/ADA Statement

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- **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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[illegible]

- **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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## Notes

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- 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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- **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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- **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.

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- **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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- **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**

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- **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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- **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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- **Education**

- **Job history**

- ## ■ Volunteer History

- ## ■ Employment Authorization (I-9)

- Be careful how you ask and when

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- **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**

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[illegible]

- 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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## Notes

[illegible]

- 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
- Identify School year (2012-2013)
- Define term “contract year” or “academic year”

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[illegible]



- 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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- 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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## Notes

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- 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
  - Housing removal

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- 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

- 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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- 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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[illegible]

- consistent with other school documents
  - Handbook, evaluation process
  - loan documents
    - tuition for teachers attending classes, housing purchase, computer advance, tuition remission
- contingent upon background check results for new employees
- 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

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- oral contracts

- offer letters

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## Employment Contract Elements

## Potential Vulnerabilities

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

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TAB 2


Slide 1

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## Slide 3



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### Independent School Constituents

- who are we trying to reach?
- who is trying to reach us? (do we want them to reach us?)
- how would they answer the same questions about?
  - cell phone
  - computer ownership
  - internet use
  - primary means of communication

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### The “Social Media Bandwagon”



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### **Social Media\* and the Independent School**

- Admissions
- Development
- Faculty
- Facilities
- Finance & Administration
- Human Resources

\*Including web-based technologies

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### What are the Reasons for Using Social Media?

- communication method for current generations
  - accepted form of interaction
    - e.g. access and use of cell phones
  - increased engagement
  - new world of possible interactions and experiences
- second nature for next generation of leadership
  - cutting edge now is old hat to new leadership
  - increased engagement
  - collaboration
- business tool(s)
- constituent expectations
  - global connections



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## What are the Reasons for Caution?

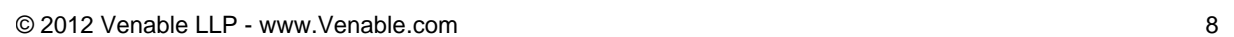
- need to protect the school
- needs to protect various constituencies
  - students, faculty, staff, parents, donors, alumni, applicants for enrollment, applicants for employment
- dynamic landscapes
  - technological landscape
  - legal landscape

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## Social Media in the School


In Schools


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## Slide 10



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### Social Media Nightmares

- bullying, harassment, discrimination
  - between employees, between students, between employees and students/parents
- harm to reputation (of school, of students, of employees...)
- inappropriate contact between employee and current or former student
- inappropriate contact between students and outsiders
- identity theft
- access to private information
- invasion of 'the copyright police'

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# Common Issues: Boundaries with Students

- Facebook friends
  - “friending” current or former students on personal account
    - student exposed to possibly inappropriate or personal information
    - inappropriate contact and solicitation
      - librarian soliciting recent alum through chatroom
    - employees vulnerable to allegations
  - current student access through shared contacts
  - teacher has access to student page and implied obligation to act on information obtained
    - e.g., teacher “official use” twitter account still exposed teacher to students’ personal “tweets”

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## Slide 12

## Common Issues: Boundaries with Students

- cell phones / home numbers
  - when is use appropriate
  - calls vs. texting vs. e-mailing
  - local laws on use of communication devices while driving
  - assumptions / pressure created by how and when we communicate
- personal email (student or employee)
  - secrecy / monitoring / tracking
- nature of activities
  - e.g. "gaming" - teacher participation and encouragement of student allegedly resulted in addiction of student

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# Common Issues: “Private” vs. “Public” Conduct

- actions of teacher inconsistent with educator standards
  - websites
    - creation of inappropriate website
    - nature of after school employment
    - activity in existing websites (promotion of violence)
  - Google search results
    - information reflecting poor decision making
- Facebook
  - posting by self or others
- YouTube postings
  - posted by employee or others
- employees making “official” representations on behalf of the school or representations that are attributed to the school

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## Slide 14



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### Common Issues: “Outside” Relationships

- can be more obvious and more of an issue because of social media
- teacher’s personal relationship with select parents resulted in preferential treatment of student
  - emailing parents from personal address
  - friending parents
  - providing cell phone number
  - posting pictures
- challenges
  - employees who also are parents of students
  - balancing expectation for accessibility and cooperation with need for boundaries

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## Common Issues: Privacy

- establish expectation of privacy
  - policies describing rights and appropriate expectations
  - liability to school for demanding waiver of privacy rights
    - student abducted after access to picture on website
- was privacy expectation reasonable?
  - school posts student grades on website
- did school have valid cause to invade privacy
  - claims teacher was visiting child pornography sites during school day
- was the nature of the intrusion reasonable in light of the cause
  - balancing test

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## Common Issues: Student Privacy


- actions resulted in dissemination of confidential information or access to “protected information”
- student information
  - school or individual employee’s use of photos, images and student work without permission resulted in dissemination of private protected information
    - school use
      - obtain written permission from parent
      - website, promotional materials, newspaper and other media, facebook page
    - employee precluded from using such information for personal use
  - school monitoring resulted in breach of student privacy
    - webcam
      - installing webcam on student laptops without knowledge of family
    - student emails (school or personal)
  - school’s ability to investigate reports of abuse
    - search of lockers, cars, backpacks, personal laptops, cell phones?
    - demand for passwords or other access

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## Common Issues: Employee Privacy

- website
  - mandatory inclusion of pictures, phone numbers, educational history
  - potential claim of privacy or negligence
- employer access to
  - emails and websites visited
    - notify employee of privacy expectation
  - care to secure private financial and medical information of employee
    - social security number
    - salary
    - medical information

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## Common Issues: Official Use

- actions of school resulted in dissemination of confidential information
  - general 'rules'
    - photos and likeness on promotional materials, websites, Facebook should be authorized
    - giving and other contact information should be authorized
    - parent contact data should not be distributed or sold for solicitation purposes
- Facebook and twitter
  - GREAT CAUTION IN POSTING
  - official representation by school
- email
  - permission from email recipient
    - provide opt out language, assure removal
- website and promotional material clear and honest
  - i.e. students playing lacrosse when school lacks team
- register with state agencies if soliciting donations through email or other electronic communications

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## Policy Considerations

- acceptable / appropriate use of school property (including technology)
- acceptable / appropriate use of personal property (including technology) of employees and students
- acceptable / appropriate representation of or conduct on behalf of school
- general standards of behavior
  - professional
  - personal
    - “off duty”
    - “off campus”
    - “private” vs. “public” conduct

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## Policy Considerations

- notification of behavioral expectations
  - what school expects from
    - students, teachers, parents, community
  - expectations of privacy
- boundaries
  - appropriate relationships
    - teacher/student/recent alum/parents
  - school's culture and philosophy

A black and white photograph showing the silhouettes of a group of about ten people standing together on a circular, reflective platform. The platform appears to be part of a larger architectural structure, possibly a globe or a large clock face, with lines radiating from the center. The background is a bright, overexposed sky.

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## Policy Considerations

- balancing risks and benefits in context of school culture and constituent expectations
  - consider experiences of all users
  - consider mission and culture of the school
  - consider risk tolerance and what is at stake


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## Slide 22




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### Policy Considerations

- what is the right approach for our school?
  - general ban ('you can't use any social media')
  - specific ban ('you can't use these sites')
  - specific permission ('you can only use these sites')
  - general permission ('you can use any sites')
  - general guidelines with specific examples of permitted and prohibited conduct/sites; and
    - mechanism for approval; and/or
    - mechanism for monitoring

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## NLRB Issues Guidance...Again

June 15, 2012  
**NLRB Report Examines Employer Social Media Policies**  
by Celeste Blackburn, NLRB Editor

For a detailed chronology of "Management's" Facebook posts, click on the link below. For a detailed chronology of "Employees' Facebook posts, click on the link below.

On May 30, the National Labor Relations Board (NLRB) issued a report on employer social media policies that other employee activity on Facebook. The NLRB found the employer, *Wal-Mart Stores, Inc.* (Wal-Mart), violated the National Labor Relations Act (NLRA) by requiring employees to post on Facebook.

**Social Media and Section 7:**

Section 7 of the NLRA grants all employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." This includes the right to discuss wages and working conditions with co-workers.

**Acting General Counsel releases report on employer social media policies**

May 30, 2012

**Contact:**  
Office of Public Affairs  
202-273-1000  
[publicaffairs@nrlr.gov](mailto:publicaffairs@nrlr.gov)  
[www.nrlr.gov](http://www.nrlr.gov)

NLRB Acting General Counsel Leta Stetter Swenson today issued a report on social media cases brought to the agency, this time focusing exclusively on policies governing the use of social media by employees.

The [Concise Management Report](#) details seven cases involving such policies. In six cases, the General Counsel's office found some problems of the employer's social media policy to be lawful. In the seventh case, the entire policy was found to be unlawful.

Provisions are found to be unlawful when they interfere with the rights of employees under the National Labor Relations Act, such as the right to discuss wages and working conditions with co-workers.

The report, with its specific examples of various employer policies and rules, will provide

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## Assess Policy as it Applies to Different “Venues”

- websites
- email
- YouTube
- Facebook
- Twitter
- cell phones
- blogs
- texts
- instant messaging
- Skype
- emerging sites, media, and devices


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### Implementing a Comprehensive Approach

- establish standards and create policies
  - is this something we can explain and stand behind?
  - do we explain and uphold this?
- employee handbook
  - code of conduct
  - use of student images
  - technology and proper use
  - discipline and termination provisions
- employment contracts
  - grounds for termination
  - standards of behavior

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## Slide 26



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### Implementing a Comprehensive Approach

- enrollment contract
  - student code of conduct
  - grounds for discipline
  - impact of removal on tuition
  - notice to college and university of discipline
- IT
  - portal access policy
  - security policy
  - e-commerce policy
  - monitoring of emails/ web site usage

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Slide 27



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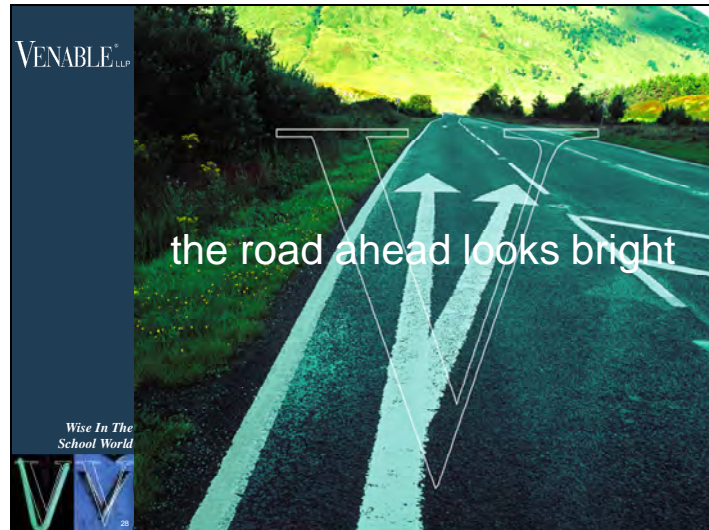
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Slide 28



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## Slide 29

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TAB 3

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Critical Employment Law Issues in Independent Schools:

**FLSA Boot Camp:  
Legal Compliance in the Compensation of Employees and  
Granting of Leave**

Venable Human Resources Seminar 2012  
caryn pass and heather broadwater, presenters



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## Slide 2



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### Governing Law

- Fair Labor Standards Act (FLSA)
  - Federal law
  - State law may be similar, more restrictive, less restrictive, or non-existent
  - Enforced by the Department of Labor
  - Audits of employers based on
    - Industry
    - Complaint
    - National DOL Attention

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## Slide 3



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### Employee Classifications

- Two Classifications
  - Overtime eligible (non-exempt)
    - Entitled to overtime pay (one and half times the regular rate of pay) for hours worked over forty in a workweek
    - Paid hourly
    - Salaried employees can be overtime eligible
  - Non-Overtime eligible (exempt)
    - Paid the same amount regardless of number of hours worked
    - Must meet certain requirements to be exempt from overtime pay

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## Slide 4



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### FLSA 3 Part Test for Non-Overtime Eligible Status

- Salary Level
  - Paid at the minimum rate
- Salary Basis
  - Paid the same amount each week
- Job Duties
  - Meet the classification guidelines

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## Slide 5

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## Salary Level

- Minimum salary for exempt employee now \$455 per week (\$23,660 per year)
- “Highly Compensated Employees” exemption - total annual compensation of \$100,000 or more (must include at least \$455 per week paid on a salary or fee basis) and regularly perform at least one of the duties in the standard exemption tests

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### Salary Basis

- Employee regularly receives a predetermined amount of compensation each pay period
- Amount cannot be reduced because of variations in the quality or quantity of the employee's work
- With certain exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked
- Teachers NOT subject to salary basis pay

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## Slide 7



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### Job Duties

- Actual job duties and responsibilities performed by employee
- Factors also considered:
  - Job title
  - Job description
    - Make sure the person actually performs this work
- Review regularly since responsibilities change

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## Docking from Salary

- Can dock in whole day increments
  - except for FMLA and other exceptions
- Reasons docking is allowed
  - Voluntarily absent for personal reasons
  - Used up sick and vacation leave
  - Disciplinary suspension
  - Major safety violations

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## Slide 9



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### Executive

- Paid on Salary Basis of at least \$455/week
- Primary duty
  - managing the School, or managing a customarily recognized department or subdivision of the School
- Direct
  - two or more other full-time employees or the equivalent
- Must have authority to hire or fire other employees
  - suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight

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## Executive

- “Particular weight”
  - Whether it is part of the employee’s job duties to make such recommendations
  - Frequency with which such recommendations are made, requested, and relied upon
  - Should pertain to employees regularly under supervision
  - Does not have to be ultimate decision maker
  - OK that higher level manager can override
- Primary duty
  - The principal, main, major or most important duty of employee
  - Based on all the facts of particular case, with major emphasis on character of job as a whole
  - Not required to spend more than ½ time on exempt work


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This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and extend across the width of the page. There are no margins, text, or other markings on the paper.



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## Executive

- Management
  - Includes (but not limited to) activities such as:
    - Hiring and training
    - Setting rates of pay
    - Planning and directing work
    - Evaluating
    - Handling complaints
    - Disciplining
    - Allocating work
    - Determining how and with what tools and resources work will be performed

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## Administrative

- Paid on Salary Basis of \$455/week
- Primary duty
  - Must be the performance of office or non-manual work directly related to the management or general business operations of the School; and
- Employee must:
  - Exercise discretion and independent judgment with respect to matters of significance

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## Administrative

- “Directly related to management or general business operations”
  - Work directly related to assisting with the running or servicing of the School
- “Exercise of discretion and independent judgment”
  - Involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered
  - Must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources

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## Administrative

- Factors considered
  - Has authority to formulate, affect, interpret management policies or operating practices
  - Carries out major assignments
  - Performs work that affects business operations to substantial degree
  - Can commit employer to matters that have significant financial impact
  - Has authority to waive or deviate from established policies
  - Provides expert advice
  - Investigation and resolution of matters of significance

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## Administrative In Educational Establishments

- Paid on a salary basis or fee basis of \$455/week or not less than entry level teacher
- Primary Duty
  - Performing administrative functions directly related to academic instruction or training in the educational establishment
  - Performing work related to the academic operations and functions of the school

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## Professional

- Paid on a salary basis or fee basis of not less than \$455/week
- Primary duty
  - must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment
- Advanced knowledge
  - in a field of science or learning and must be customarily acquired by a prolonged course of specialized intellectual instruction


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## Professional

- “Work requiring advanced knowledge” –
  - Is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment
  - Distinguished from work involving routine mental, manual, mechanical or physical work.
- Uses advanced knowledge to
  - Analyze, interpret or make deductions from varying facts or circumstances.
- Cannot be attained at the high school level

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## Professional Exemption: Teachers

- Not required to pay on a salary basis
- Must pay at least \$455/week or on fee basis
- Primary Duty
  - Teaching, tutoring, instructing or lecturing in the activity of imparting knowledge in an educational establishment
  - Examples: academic teacher, kindergarten teacher, teachers of the gifted or disabled.

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## Computer Professionals

- Employed as computer systems analyst, computer programmer, software engineer or other similarly skilled worker in computer field and
- Primary duty consists of:
  - Application of systems analysis techniques and procedures
  - Design, development, testing and modification of computer systems or programs or machine operating systems
  - Combination of above
- Does NOT include:
  - Manufacture or repair of hardware and equipment
  - Work highly dependent upon or facilitated by use of computers and programs

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## Overtime Eligible Employees

- Overtime must be authorized by supervisory
- For exceptional requirements of an emergency or temporary nature
- Still paid overtime if unauthorized work over 40 hours in a workweek
- Overtime should be assigned in a fair and reasonable manner
- Supervisors must ensure compliance

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## Compensatory Time

- Time off that would normally be worked in a workweek to control and avoid overtime costs
- Available to overtime eligible staff only
  - May be requested in advance of the workweek and must be approved by the supervisor
- Compensatory time granted on an hour-for-hour basis
- Must be used in the same workweek – cannot be banked or stored for future use

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## Fee Pay

- Non-overtime eligible employees may be paid on a “fee basis” rather than on salary basis under the following conditions
  - Paid an agreed sum for completing a single job that is unique, not ongoing
  - Compensation is fixed regardless of time to complete the work
  - Compensation is not less than \$455 per week during the period of time the work is conducted

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## Meals and Breaks

- Unpaid breaks must be “duty-free” and at least thirty minutes
  - If not “duty-free” must be paid
- Department heads can establish rest periods for overtime eligible employees of up to 15 minutes for each four-hour work period
- Rest periods of less than thirty minutes are paid work time

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## Breastfeeding rest period

- Employees who are nursing must be provided with reasonable break time to express breast milk after the birth of the child as long as break does not unduly disrupt operations
- Schools must make reasonable efforts to provide employee with a private location – not a restroom – for nursing and/or expressing breastmilk

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## On-call Time

- Not paid time if employee is unrestricted
  - i.e., employee can leave the premises and carries a beeper/phone
- If overtime eligible employee is required to be in a specific location waiting for an assignment, then they are “engaged to wait” and must be paid for on-call time

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## Recordkeeping

- Overtime eligible employees must fill out time sheet that reflects ALL hours worked each day
  - No “volunteering” to do your job
  - Record vacation, sick, paid time off, other types of leave
- Supervisors responsible for reviewing timesheets before submitting them to payroll
  - “spot-check” timesheets periodically
- Nonovertime eligible employees should submit timesheets recording any exceptions to regular workweek on time sheets and submit semi-monthly

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## Calculating Overtime

- Based on 40 in workweek
- Based on hours actually worked
  - Not just paid, i.e., sick leave or vacation
- Calculated on Regular rate of pay
  - Hourly rate vs. regular rate of pay
- Working more than one job at different rates
  - Higher rate or weighted average

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## Safe Harbor

- Employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints
- Failure to reimburse can result in loss of exemption for all employees in the same job classification working for the same managers responsible for the improper deduction
- Distributing policies in writing helps establish a “clearly communicated policy”

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Slide 29



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Family and Medical Leave Act

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## Family and Medical Leave Act

- Federal FMLA provides up to 12 weeks of family and medical leave per 12 month period
- Federal FMLA provides up to 26 weeks of military family leave in a 12 month period
- New regulations for Federal FMLA issued
  - Updated regulations effective January 2009
  - Further updates in 2010

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## FMLA Issues to Watch

- Interplay with sick leave, vacation, short-term disability and long-term disability
- Failure to provide notice and/or designate leave
- Types of claims
  - Retaliation
  - Discrimination
  - Interference with FMLA rights
  - Failure to provide notice that resulted in harm to individual
  - Failure to restore
- Employers as individuals can be named in complaints

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## Federal FMLA Covered Employees

- Must be employed by a school with 50 or more employees in a 75 mile radius of the place the employee works
- Employee must have worked at least 1,250 hours during the previous 12 months prior to the request for leave
  - Work at different institutions counts
- 12 months need not be concurrent
  - Separate periods of employment are counted (if break in service does not exceed seven years)
  - Military leave counts as time worked
- Full time teachers are deemed to have met the requirement
  - If a full time employee completes the first school year they become eligible for leave even if the “contract” is a 10 month contract

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## FMLA Leave Provides

- Job Security
  - Must hold position
  - Employee entitled to return to same or equivalent job
  - May fill position temporarily until employee returns
  - Can eliminate job if would have done so even if employee not out on leave
- Unpaid leave
- Benefits
  - Employer must continue to receive benefits during the leave
  - Health insurance must continue as if the employee was still working
- No loss of benefit or seniority accrued prior to the start of the employee's leave

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## Federal FMLA – Reasons for Leave

- for the birth of a son or daughter, and to care for the newborn child;
- for the placement with the employee of a child for adoption or foster care, and to care for the newly placed child;
- to care for an immediate family member (spouse, child, or parent — but not a parent "in-law") with a serious health condition; and
- when the employee is unable to work because of a serious health condition

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### 'Family Member'

- Spouse (including husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage)
- Child (including child of domestic partner if employee is in loco parentis relationship to the child)
- Parent

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## 'Serious Health Condition'

- An illness, injury, impairment, or physical or mental condition that involves:
  - any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or
  - a period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
  - any period of incapacity due to pregnancy, or for prenatal care; or
  - any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
  - a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,
  - any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

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## Not Serious Health Condition

- Under ordinary circumstances, the following are not deemed serious health conditions, and therefore do not qualify for FMLA leave:
  - Routine physical examinations, eye examinations or dental examinations
  - Treatment that includes taking over the counter medications such as a cold, ear ache, headaches (sinusitis may be covered if prescription drugs are taken)
  - Cosmetic treatments unless complications occur
- Treatment for substance abuse does count as FMLA though the absence as a result of the use of the substance does not count

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## FMLA to Care for Family Member

- Encompasses both physical and emotional care
- Includes providing basic care such as medical, hygienic or nutritional needs or transportation to the doctor
- May be used to relieve other family members or to serve as care while arrangements are changing
  - Case of employee who wanted intermittent leave to be home with her mother when hospice nurse came to administer pain medications

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## Certification

- Employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider
- Must allow the employee at least 15 calendar days to obtain the medical certification

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## Intermittent Leave

- FMLA may be taken on intermittent or on a reduced leave schedule if taken for sick family member or due to employee's own serious health condition
  - Must be supported by medical certification
- Intermittent leave
  - Taken in separate blocks of time due to a single qualifying event
- Reduced leave
  - Reduces usual number of hours worked per week
- Must be available to employees to take except for birth or care of a child or placement of a child and then it is at the discretion of the school
  - Must be consistent in the application to avoid claims of discrimination
- Work out a schedule that does not interfere with School's needs or can transfer employee temporarily to alternate position with same pay and benefits

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## Special Provisions

- Leave to care for a newborn child or for a newly placed child must conclude within 12 months after the birth or placement.
- Spouses employed by the same employer may be limited to a combined total of 12 workweeks of family leave for the following reasons:
  - birth and care of a child;
  - for the placement of a child for adoption or foster care, and to care for the newly placed child; and,
  - to care for an employee's parent who has a serious health condition.

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## Military Leave Entitlement

- Under Federal Military FMLA an eligible employee may take leave for the following reasons:
  - To address certain qualifying exigencies arising out of the fact that the spouse, or a son, daughter or parent of the employee is on 'covered active duty' (or has been notified of an impending call or order to covered active duty) in the Armed Forces
    - Up to 12 workweeks of leave in a 12-month period to address military caregiver leave to care for a son, daughter, parent, or next of kin who is an injured or ill servicemember or veteran
    - Up to 26 workweeks of leave in a 12-month period
- During a single 12-month period, an eligible employee is entitled to a combined total of 26 workweeks of leave for qualifying exigencies and military caregiver leave.

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## 'Qualifying Exigency'

- Short-term deployment
- Attending certain military events
- Arranging for alternative childcare
- Addressing certain financial and legal arrangements
- Attending certain counseling sessions
- Rest and recuperation
- Attending post-deployment briefings
- Other activities agreed to by school and the employee

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## 'Covered Servicemember'

- Definition
  - A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list for a 'serious injury or illness'; or
  - A veteran who is undergoing medical treatment, recuperation, or therapy, for a 'serious injury or illness' and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

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## 'Serious Injury or Illness'

- Injury or illness that was incurred by the servicemember in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating
- A veteran with an injury or illness that was incurred by the servicemember in the line of duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) that manifested itself before or after the member became a veteran

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## Employee Obligations

- Eligible employees seeking to use FMLA leave may be required to provide:
- 30-day advance notice of the need to take FMLA leave when the need is foreseeable;
- notice "as soon as practicable" when the need to take FMLA leave is not foreseeable ("as soon as practicable" generally means at least verbal notice to the employer within one or two business days of learning of the need to take FMLA leave);
- sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons (the employee need not mention FMLA when requesting leave to meet this requirement, but may only explain why the leave is needed); and,
- where the employer was not made aware that an employee was absent for FMLA reasons and the employee wants the leave counted as FMLA leave, timely notice (generally within two business days of returning to work) that leave was taken for an FMLA-qualifying reason.

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## Employer Notice Obligations

- post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA;
- include information about employee rights and obligations under FMLA in employee handbooks or other written material; or
- if handbooks or other written material do not exist, provide general written guidance about employee rights and obligations under FMLA whenever an employee requests leave; and
- provide a written notice designating the leave as FMLA leave and detailing specific expectations and obligations of an employee who is exercising his/her FMLA entitlements.
  - Regulations list what must be covered in notice

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## FMLA and Other Leave Benefits

- Runs concurrently with other leaves
  - Like an Umbrella
  - Both paid and unpaid leave
  - Including but not limited to sick leave, vacation, workers compensation, short term and long term disability
- Employees may choose to use, or employers may require the employee to use, accrued paid leave to cover some or all of the FMLA leave taken.
- Employees may choose, or employers may require, the “substitution” of accrued paid vacation or personal leave for any of the situations covered by FMLA. The “substitution” of accrued sick or family leave is limited by the employer's policies governing the use of such leave.

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## "Maternity Leave"

- Is there such a thing as "maternity leave?"
  - Leave for medical condition of pregnancy and recovery therefrom = Medical leave
  - Leave for birth of child and post-birth bonding = Family leave
  - Leave to care for a newborn child with a serious health condition = Family Leave

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## Counting FMLA Leave

- “12 month period”
  - the calendar year;
  - any fixed 12-month "leave year" such as a fiscal year, a year required by State law, or a year starting on the employee's "anniversary" date;
  - the 12-month period measured forward from the date any employee's first FMLA leave begins; or
  - a "rolling" 12-month period measured backward from the date an employee uses FMLA leave
- Holiday that falls within a full week of FMLA leave counted as FMLA
- Leave during Christmas / winter holiday or other time when employees not expected to report to work is not counted as FMLA
- Summer break not counted as FMLA for instructional employees
- Can track FMLA in less than whole day increments for non-overtime eligible employees

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## Instructional Employees Intermittent Leave

- If an instructional employee requests intermittent leave for a serious health condition of employee's family, covered servicemember, or employee's own serious health condition and
  - Leave is foreseeable based on planned medical treatment and
  - Period of absence is more than 20 percent of working days during a particular duration, then
- School may deny use of intermittent leave and require instructional employee to
  - Remain absent for a period of planned treatment or
  - Temporarily transfer to an alternative position

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## Instructional Employees Leave Near the End of the Academic Year

- If instructional employee begins leave more than five weeks before the end of the term, the school may require the employee to continue taking leave to the end of the term if:
  - The leave will last at least 3 weeks;
  - The employee would return to work during the 3 week period before the end of the term
- If the employee begins leave
  - for a purpose other than the employee's own serious health condition, and
  - during the five week period before the end of the term,
  - the school may require the employee to continue taking leave until the end of the term if:
    - The leave will last more than 2 weeks, and
    - The employee would return to work during the 2-week period before the end of the term

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## Instructional Employees Leave Near the End of the Academic Year


- If the employee
  - begins leave for a purpose other than the employee's own serious health condition
  - during the three-week period before the end of the term, and
  - the leave will last more than five working days,
  - the employer may require the employee to continue taking leave until the end of the term
- If an employee is required to take leave until the end of an academic term:
  - only the period of leave until the employee is ready and able to return to work shall be counted against the employee's FMLA leave entitlement
  - any additional leave required by the employer to the end of the school term is not counted as FMLA leave
- Employer must:
  - maintain the employee's group health insurance and
  - restore the employee to the same or equivalent job including other benefits at the conclusion of the leave

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## Instructional Employees Tracking FMLA Use

- Summer Vacation
  - Leave taken for a period that ends with the school year and begins the following semester is considered leave taken consecutively rather than intermittently
  - The period during the summer vacation when the employee would not have been required to report for duty is not counted against an employee's FMLA leave entitlement
    - ex: If teacher is out the month of May, and school ends at the end of May, the leave stops and starts again when school begins in September
- Employees on FMLA at end of school year are entitled to the same benefits they would have received had they not been out on FMLA

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Slide 55



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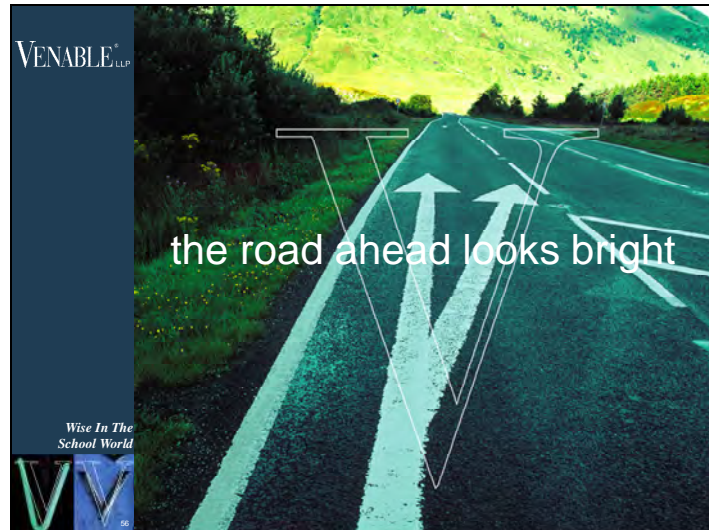
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Slide 56



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Slide 57



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TAB 4

Slide 1

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Critical Employment Law Issues in Independent Schools:

Follow the paper trail: encouraging improvement while  
ensuring legally compliant departures

Venable Human Resources Seminar 2012  
caryn pass and heather broadwater, presenters



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## 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

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# 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

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## 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

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## Slide 5



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### 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

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## Slide 6



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### 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

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## 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

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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
- Identify School year (2012-2013)
- Define term “contract year” or “academic year”

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### 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
  - Housing removal

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### 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
- contingent upon background check results for new employees
- 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

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### 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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## employment contract elements

### Potential Vulnerabilities

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

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## 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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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

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### 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

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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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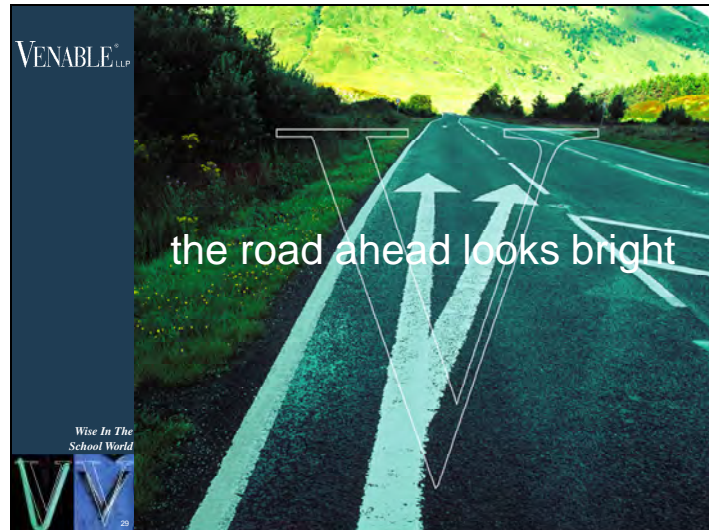
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Slide 30



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## PRE-DISMISSAL CHECK LIST

Employee Name \_\_\_\_\_ Department \_\_\_\_\_

Manager \_\_\_\_\_ Date \_\_\_\_\_

	YES	NO
1. Do I have ALL the facts recorded accurately?	<input type="checkbox"/>	<input type="checkbox"/>
2. Have I documented all facts and action?	<input type="checkbox"/>	<input type="checkbox"/>
3. Have I assembled the records?	<input type="checkbox"/>	<input type="checkbox"/>
• Performance (production) records. (Keep examples of unsatisfactory work products <u>that have been discussed</u> with the employee.)	<input type="checkbox"/>	<input type="checkbox"/>
• Attendance record.	<input type="checkbox"/>	<input type="checkbox"/>
• Performance review records, reflecting candid appraisals.	<input type="checkbox"/>	<input type="checkbox"/>
• Discipline and warning records.	<input type="checkbox"/>	<input type="checkbox"/>
• Special action records.	<input type="checkbox"/>	<input type="checkbox"/>
4. Is my decision based on facts, not inference, suspicion or emotion	<input type="checkbox"/>	<input type="checkbox"/>
5. Has the employee fully understood the job requirements behavior standards?	<input type="checkbox"/>	<input type="checkbox"/>
6. Does the employee know exactly where he/she has fallen short in job performance or behavior standards?	<input type="checkbox"/>	<input type="checkbox"/>
7. Has the employee received at least one warning of possible dismissal?	<input type="checkbox"/>	<input type="checkbox"/>

Where serious misconduct is involved, immediate suspension, pending investigation, may be justified. Examples: drinking or drunkenness on duty, dishonesty, theft, immoral or indecent conduct, fighting, insubordination, violation of secrecy rules, sabotage.

☐☐

8. Has the employee had sufficient time and opportunity to correct the condition that led me to take this action?

☐☐

9. Has the employee had a full hearing?  
Have I considered the employee's point of view?  
Have personal difficulties or special, mitigating circumstances been taken into account?

☐☐  
☐☐  
☐☐

10. Where the situation warrants, has consideration been given to transferring this employee?

☐☐

11. Am I sure that discharge will come as no surprise to the employee?

☐☐

12. Is dismissal in this case consistent with past practice?

☐☐

13. Would the company be able to justify treatment of this employee if he / she claims discrimination or unjust dismissal?

☐☐

14. Would a jury conclude that our treatment of this employee was unquestionably fair?

☐☐

15. Has this decision been discussed with and approved by appropriate levels of higher management?

☐☐

16. Am I prepared to handle this dismissal tactfully and objectively?

☐☐

17. Have I scheduled the dismissal interview at a time that will eliminate or minimize the employee's personal contact with other employees before he / she leaves the premises?

☐☐

18. Have I made arrangements to notify the employee in private?

☐☐

19. Have I arranged for the final paycheck and am I prepared to explain the amount?

☐☐

20. Do I know what group insurance the employee has and am I able to explain what will happen to it after dismissal?

☐☐

21. Is the personnel Department prepared to conduct a careful exit interview?

☐☐

22. Have I decided what restricted statements will be made to other employees concerning this person's discharge?

☐☐

## **15 Questions to Ask Before Firing**


1. What policy or procedure did the employee violate? Was it published? If so, where? Is there a specific policy?
2. Is the rule stated in a way that is easy to understand?
3. Is the rule violated reasonably related to the orderly, efficient, and safe operation of the business?
4. If other employees have violated this rule, did they receive similar disciplinary action?
5. Has the company done anything to support a reasonable belief that the action proscribed was condoned in the past?
6. Can the company prove that it deals with violations of this rule in a consistent fashion?
7. Has this employee been warned previously for a violation of this rule? Has the employee had time to correct the problem?
8. Has this employee received a final warning for violation of this or any other published rule?
9. Was the incident that triggered the final warning carefully investigated prior to disciplinary actions?
10. Is there a record showing the steps taken to correct this employee's improper actions prior to serious disciplinary action?
11. Have similar written records been kept and similar steps been taken by the company to correct the improper actions of other employees?
12. Have I considered the severity of the offense, the employee's record, and length of service to decide the proper discipline?
13. Did the employee offer any excuses or mitigating circumstances to justify the action in the instance?
14. How soon after the act in question will discipline be administered?
15. Have I asked these questions before dismissing the employee?
  - a. Will termination be a surprise to the employee?
  - b. Has the dismissal be approved by upper management?
  - c. Will the termination discussion be done in a private setting?
  - d. Can I explain insurance and benefit conversions?
  - e. Who should be there?

**TAB 5**

**VENABLE<sup>®</sup>LLP**

Critical Employment Law Issues in Independent Schools:  
**Employee Handbooks**

Venable Human Resources Seminar 2012  
caryn pass and heather broadwater, presenters



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## Slide 2



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### The Role of the Employee Handbook

- Reflect the Culture and Personality of the School
- Communicate the School's Rules and Expectations of Employees
- Demonstrate the School's Dedication and Commitment to Compliance with Both Federal and State Laws

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## Slide 3



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### The Role of the Employee Handbook

- Employee Handbooks
  - Policies and information pertaining to the employment relationship
- Other Documents
  - Processes
  - Procedures

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## Slide 4



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### Policy Groupings

- Introduction
- Workplace Policies
- Workplace Conduct
- Compensation and Benefits
- Employee Leave
- Separation from Employment
- Employee Acknowledgment

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## Slide 5




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## Issues to Consider

- Interaction with Contracts
- Off-the-shelf Handbook vs. School Specific
- Flexibility
- Accountability
- Administrative Burden

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## Slide 6



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### Introduction

- Welcome
- About this Handbook
- Brief History of the School
  - School Mission
  - Philosophy
  - Objectives Statement(s)

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**Standard Workplace Policies and Procedures**

- Equal Employment Opportunity
- Employment Authorization
- Persons With Disabilities
- Policy Against Harassment
- Policy Against Sexual Harassment
- Drug Free Workplace
- Confidentiality
- Personal Information
- Personnel Files
- Mandatory Reporting of Child Abuse

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## Other Workplace Policies

- Open Door Philosophy
- Hours of Work
- Introductory Period
- Conflicts of Interest
- Policy Against Nepotism
- Personal Belongings and Employee Privacy
- Modifications to School Property
- Safety
- Security
- Visitors

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## Slide 9



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### Other Workplace Policies

- Use of School Vehicles
- Emergency Procedures Policy
- Exposure Control Plan
- Contagious Infections
- Emergencies and Inclement Weather
- Professional Development
- Advanced Degree Notification
- Performance Appraisals
- Background Checks

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## Workplace Conduct


- Standards of Professionalism
- Discipline
- Employee Conduct
- Attendance and Punctuality
- Personal Dress and Appearance Standards
- No Solicitation or Distribution
- Business Equipment and Electronic Privacy
- Computers, E-mail, and Internet Policy
- Use of Campus Facilities
- Workplace Tobacco Use

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## Compensation and Benefits

- Employment Classifications
- Meals and Break Periods
- Pay Process
- Overtime Pay and Authorization
- Benefits Overview
- Continuation of Benefits (“COBRA”)
- Workers’ Compensation Insurance and Procedure
- Educational Assistance

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## Slide 12



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### Leave

- Holidays
- Vacation
- Sick Leave
- Personal Leave
- Family and Medical Leave
- Sabbaticals

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## Leave

- Leave of Absence
- Jury and Witness Duty Leave
- Military Duty Leave
- Voting Leave
- Bereavement Leave
- Parental Leave

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## Separation From Employment

- Termination of Employment
- Return of School Property
- Eligibility to Apply for Re-employment
- Verification of Employment

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## Employee Acknowledgment

- Non-contract Employees
- Contract Employees

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## Implementing and Maintaining

- Review by Counsel
- Train Managers
- Prepare Employees
- Apply Consistently
- Periodically Review and Update

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Slide 17



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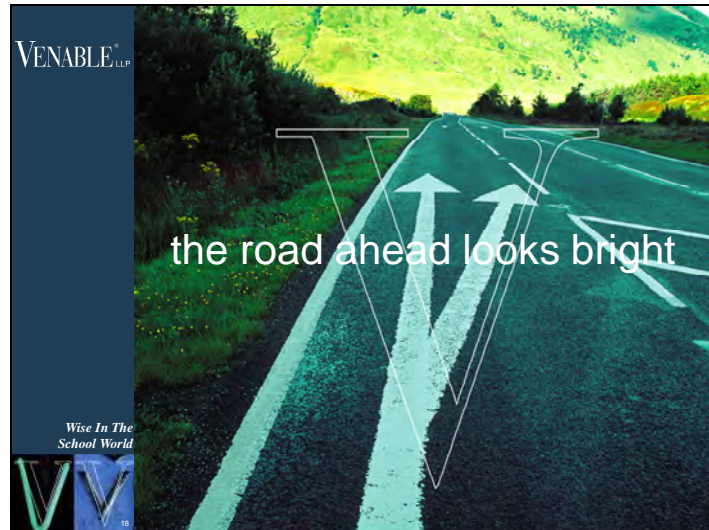
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Slide 18



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## Slide 19



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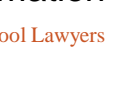
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TAB 6

Slide 1

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Critical Employment Law Issues in Independent Schools:  
**Report Card Time: Conducting an HR Audit**

Venable Human Resources Seminar 2012  
caryn pass and heather broadwater, presenters



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## Recruiting

- ☐ Sources used to obtain applicants who promote diversity
- ☐ Advertisements/Announcements include EEO language
- ☐ Contract recruiter contract includes anti-discrimination clause
- ☐ Standard employment application used with all applicants
- ☐ Written policy limits duration applications will be active
- ☐ Document purge policy applies to applications

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## Applications

- ☐ Employment-at-will language
- ☐ Applicant certification statement
- ☐ Notice and permission to check references and verify information
- ☐ FCRA compliant release for CRA provided checks
- ☐ ADA accommodation language
- ☐ EEO statement
- ☐ Do not ask (also applies to interviews):
  - ☐ Sex or sexual orientation
  - ☐ Age or dates that would disclose age
  - ☐ Weight or height unless BFOQ

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## Applications

- ☐ Do not ask (also applies to interviews):
  - ☐ Marital status (single, married, divorced, or maiden name)
  - ☐ Whether pregnant or planning on children
  - ☐ Whether must make child care arrangements
  - ☐ How will be getting to work
  - ☐ Age (except for child labor law compliance purposes)
  - ☐ Military status (unless relevant to ability to perform work)
  - ☐ General questions about arrest records
  - ☐ Religious affiliation (unless BFOQ)
  - ☐ General state of health
  - ☐ National origin or citizenship
  - ☐ Attitude about labor organizations

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## Interviews

- ☐ Interviewers are trained on conducting interviews
- ☐ Interviewers are trained on general employment laws
- ☐ Written guidelines or script for interviewing
- ☐ Review what notes are kept and how they are kept
- ☐ Do not have I-9 completed prior to job offer
- ☐ Do not specify which of the acceptable documents must be provided for I-9
- ☐ Ensure realistic job preview

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## Conducting Background Checks

- ☐ Notice and Authorization in accordance with FCRA and State/Local equivalents
- ☐ Check references with former employers
  - ☐ Make sure have permission
  - ☐ Make notes of attempts, even if no response received
  - ☐ Ask probing questions and LISTEN to responses
- ☐ Check criminal background
  - ☐ For all states lived in within 7 years (check state law)
  - ☐ Look at CONVICTIONS and PENDING only – not arrests

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## Conducting Background Checks

- ☐ Credit Check
  - ☐ Use only when relevant to position
- ☐ Internet Check - “Google” top candidates
  - ☐ Make sure have right person
  - ☐ Disregard information about protected categories
  - ☐ Print results
- ☐ Follow the FCRA carefully
  - ☐ Pre-adverse action notices and adverse action notices required if information relied on in making adverse decision –
    - ☐ EVEN IF INFORMATION NOT NEGATIVE
    - ☐ EVEN IF NOT SOLE DETERMINANT

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## New Hire Paperwork

- ☐ Offer letter
  - ☐ Check wording of salary information
  - ☐ Include employment-at-will language
  - ☐ Note that benefits are subject to change
  - ☐ Note that nothing else has been promised
- ☐ I-9 (top part first day, remainder within 3 days)
- ☐ W-4/State and Local equivalents
- ☐ Employment contract (faculty)
- ☐ Benefits enrollment forms
- ☐ Employee handbook
- ☐ Special policies (drug test, confidentiality, etc.)

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Slide 9

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## Employee Contracts

- ☐ At Will/For Cause
- ☐ Salary
- ☐ Benefits
- ☐ Identification of Position/Duties
- ☐ Term of Contract
- ☐ Renewal
- ☐ Discipline/Termination
- ☐ Modification/Amendment
- ☐ Full Integration
- ☐ Force Majeure

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## Independent Contractors

- ☐ Analyze each relationship individually before classifying as independent contractor
  - ☐ Behavioral control
  - ☐ Financial control
  - ☐ Relationship of the parties
- ☐ Utilize written document setting forth relationship and expectations
- ☐ Contractor must agree to conduct background checks and I-9 verification

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## Employee Handbooks

- ☐ Must have:
  - ☐ Acknowledgment
  - ☐ Equal Employment Opportunity Policy
  - ☐ Policy Against Harassment
  - ☐ Policy Against Sexual Harassment
  - ☐ Policy on Persons With Disabilities
  - ☐ Family and Medical Leave Act policy (50 or more employees)
  - ☐ Reference checks


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## Employee Handbooks

- ☐ Must have:
  - ☐ Employment Authorization
  - ☐ Wage and Hour
  - ☐ Open Door
  - ☐ Paid Time Off
  - ☐ Privacy
  - ☐ Use of business equipment (including computers, voice mail, telephone, e-mail, faxes and copiers)
  - ☐ Leave Without Pay
  - ☐ Professional conduct
  - ☐ Discipline
  - ☐ Personnel files/personal information

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## Employee Handbooks

- ❑ Avoid:
  - ❑ Employment at will statement
  - ❑ Policies impracticable to follow
  - ❑ Promises/guarantees of employment
  - ❑ Promises of elaborate procedures
  - ❑ Policies inconsistent with culture
  - ❑ Including procedures or procedure-like details
  - ❑ Formatting that interferes with clarity
  - ❑ The words “permanent” and/or “temporary”
  - ❑ Voluminous handbook

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## Job Descriptions

- ☐ List functions in descending order of importance
- ☐ Include analysis of relative time weight of tasks
- ☐ Include MENTAL as well as PHYSICAL processes
- ☐ Describe responsibilities, rather than method of performing
- ☐ Describe physical requirements in ADA compliant manner
- ☐ Describe essential functions

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## Job Descriptions

- ☐ Include working conditions (temperature, exposure to elements, etc. – whether good or bad)
- ☐ Include and explain required interpersonal skills
- ☐ Minimum educational level necessary for satisfactory performance
- ☐ Avoid:
  - ☐ Generalities
  - ☐ Vague terms
  - ☐ Jargon
  - ☐ Sexist, ageist, or similarly problematic language
  - ☐ Non-essential functions that could block hiring of person with disability

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## Personnel Files


- ☐ No employee access (unless inconsistent with state law or school culture)
- ☐ Limit access to staff with legitimate business reason
- ☐ Ensure security and confidentiality
- ☐ Keep I-9s separate
  - ☐ Re-verify I-9s as needed
  - ☐ Audit I-9s periodically
- ☐ Keep separate medical files
- ☐ Maintain updated beneficiary forms
- ☐ Establish list of items included in the file
  - ☐ Application? Employment agreement? Disciplinary documents? Evaluations? Notes from parents?

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## Document Destruction and Retention

- ☐ Is there a document retention/destruction policy?
- ☐ What is in the policy?
- ☐ Check record retention periods for compliance
- ☐ What is covered:
  - ☐ Employee benefit plans and records
  - ☐ Recruitment, application and hiring process records
  - ☐ Payroll records
  - ☐ I-9 forms and supporting documentation
  - ☐ Handbooks
  - ☐ Emails and other electronic communication

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## Wage and Hour Compliance

- ☐ Require approval for overtime
  - ☐ Response when violation
- ☐ Require approval or notification when work through scheduled unpaid meal
- ☐ Calculate overtime on REGULAR RATE OF PAY
- ☐ Check pay stubs for required information
- ☐ Verify that each person classified as exempt meets the applicable tests for exemption (Federal and State)
  - ☐ Salary level, salary basis, job duties
  - ☐ Maintain a list of exempt positions
- ☐ Define and communicate the workweek and “overtime”

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## Payment issues

- ☐ Payment policies for travel time
- ☐ Payment for time spent on call
- ☐ Practice for overtime worked without permission
- ☐ Calculation of overtime worked in two pay rates
- ☐ Track all hours worked by non-exempt employees
  - ☐ Method for tracking of time
- ☐ Establish pay periods
- ☐ Final payment of wages
- ☐ Docking from pay checks

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## Leave

- ☐ Review FMLA documents
  - ☐ Notice to employee of FMLA rights
  - ☐ Certification of Health Care Provider
  - ☐ Letter to employee who failed to submit certification
  - ☐ Letter notifying employee of exhaustion of FMLA
- ☐ Check process for triggering FMLA notices
- ☐ Review overlap of FLMA, STD, LTD, Workers Comp, Sick Leave, and Parental Leave
- ☐ Review “maternity leave” policies for sex discrimination
- ☐ Review conditions for unpaid leaves of absence

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## Performance Management

- ☐ Have a written performance appraisal instrument
- ☐ Have a written performance appraisal procedure
- ☐ Train raters
- ☐ Conduct periodic classroom evaluations
- ☐ Have raters explain sudden drops in ratings
- ☐ Have an appeal process for employees dissatisfied with rating
- ☐ Treat appraisals as confidential

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## Discipline

- ☐ Are employees aware of workplace standards?
- ☐ Are employees aware of consequences?
- ☐ Are employees warned when they violate standards?
- ☐ Train managers on delivering disciplinary action
- ☐ Is there a process for identifying problems before they grow out of control (such as absenteeism)?

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## Preventing Harassment

- ☐ Conduct harassment prevention training (faculty/staff and students)
- ☐ Include anti-harassment and anti-retaliation policies in employee, student, and parent handbooks
- ☐ Do employees (and students/parents) know procedure for reporting and are those procedures easy to follow?
- ☐ Is there more than one person who receives complaints?
- ☐ Are supervisors trained on how to handle complaints?
- ☐ Are complaints and investigations documented?
- ☐ Is staff trained on handling student-to-student harassment?
- ☐ Is there a follow-up process?

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## Termination

- ☐ Are there checks and balances in the termination decision-making process?
- ☐ Is the Business Officer and/or legal counsel consulted before terminations?
- ☐ Are there written termination procedures?
  - ☐ Do they address what is communicated to students/parents/staff?
- ☐ Have an exit checklist to ensure all steps covered
  - ☐ Obtaining property, giving final pay, HIPAA and COBRA notice, etc.
- ☐ Check state requirements on final pay
- ☐ Check state requirements on unused vacation
- ☐ Conduct exit interviews
- ☐ Is severance contingent upon a release of claims?

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## Separation Agreements

- ☐ Policy establishing severance
- ☐ Regularly utilized?
- ☐ Short or long version
- ☐ ADEA provision
- ☐ When provided:
  - ☐ Performance issues
  - ☐ Reduction in staff
  - ☐ Other issues

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## Benefits and taxable treatment

- ☐ Housing
  - ☐ Head of School
  - ☐ Other employees
- ☐ Tuition Remission
- ☐ COBRA notice process
- ☐ 457(b) & (f) policy and compliance
- ☐ 403 (b) plan compliance
- ☐ Education Assistance Plans
- ☐ Laptop purchase policy
- ☐ Housing or other loans
- ☐ Child Care
- ☐ Moving Expenses
- ☐ Employee Referral Bonuses

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## Responding to Reference Checks

- ☐ Limit who is authorized to respond to reference checks
- ☐ Verify release of information by employee/former employee
- ☐ Respond only to written requests
- ☐ Respond only in writing and keep a copy for file
- ☐ Limit response to:
  - ☐ Name
  - ☐ Position
  - ☐ Dates of employment
  - ☐ Compensation (if specifically approved to provide)
- ☐ Letter of reference – not recommendation
- ☐ Mortgage/financial applications
  - ☐ No promises of ongoing employment

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## Governance & Fiscal Issues

- ☐ Gift Receipt Policies
- ☐ Whistleblower Policies
- ☐ Conflict of Interest Policy
- ☐ Reimbursement and check request procedures
- ☐ Intermediate Sanctions and Rebuttable Presumption compliance
- ☐ Comparable salary assessment
- ☐ Investigations of allegations of discrimination
- ☐ Grievance Procedures

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## Compliance procedures

- ☐ Method for evaluating ADA obligations
  - ☐ Reasonable accommodations
  - ☐ Interactive process
  - ☐ Standards for establishing essential functions
- ☐ Method for determining applicability of USERRA
- ☐ Method for determining applicability of HIPAA

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## Insurance Coverage

- ☐ Review of insurance policy for adequate coverage dollar amounts
- ☐ Review of insurance coverage for adequate language
  - ☐ i.e. right to select own attorney
- ☐ Review of insurance coverage to determine what policies school has and what school needs
  - ☐ EPLI, D&O, Social Media Bullying,
- ☐ Review policies to determine what types of claims are covered by the plans
  - ☐ Discrimination and wrongful termination claims

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Slide 31



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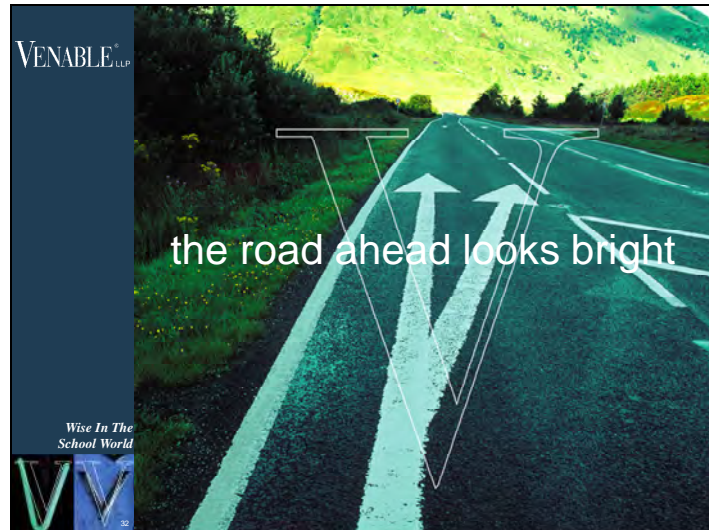
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Slide 32



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Slide 33



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**Caryn G. Pass****(202) 344-8039 cgp@venable.com**

TO:

**Independent School Participants**

FROM:

Caryn Pass, Esq.

Heather Broadwater, Esq.

Venable LLP Independent School Law Practice

RE:

**Independent School Law Report Card**

Date:

**June 21, 2012**

As Independent Schools prosper and develop the need to assure compliance with best practices takes on higher priority. With the increasing number of Schools facing leadership transitions, it is a prudent time to review the school's practices and procedures to assure compliance with both Federal and State laws. In preparation for the search or arrival of a new Head of School, Boards have begun to initiate the practice of conducting a thorough and complete review and assessment of the operations of the institution as it relates to legal issues. Creating an environment grounded in best practices assists in establishing a positive transition for the new Head and alleviates the need to address challenges that may prevent the Head from focusing on the more critical goals at hand.

When reviewing practices and procedures it is imperative that the school act consistently with its culture and mission to achieve sustainability through building best practices. As experts in the Independent School industry, the Independent School law practice at Venable is well versed in the operations of educational institutions. We stay apprised of various federal and state laws that apply to schools, and we are committed to implementing the necessary measures that will allow schools to avoid legal troubles and focus on its educational mission. First and foremost in the review is the consideration of Board governance issues. Since the Board is the oversight entity of the institution there must be sound documents and procedures in place. Often Boards either fail to review the numerous documents relevant to good governance or are unaware of the countless challenges that may arise without proper procedures.

The objective of the Independent School Law Review is to identify whether the school is in compliance with federal and state law, and gather information to determine areas of weakness or non-compliance. We consider whether practices and policies create a structure that allows the School to operate at maximum efficiency. We also consider whether the School is positioned to allow it to take full advantage of applicable defenses under federal, state, and local laws and to ensure compliance with best practices in Independent School. To give you an idea of the information we would need to gather and the topics we would address, we have created a checklist of items that we would review during our first visit, which is attached to this letter.

## Independent School Law Report Card

### Page 2

After we have obtained the necessary information, we will provide a Report Card, which is an evaluation of where current policies stand with respect to legal compliance and best practices. We would then work with the members of your team to design a strategy that specifically addresses the needs of your school. The strategic plan would be designed with consideration of the areas of weakness that are identified during our assessment, the priorities and needs of the school, future goals of the school, budget, and timing. Our recommendation would also be mindful of the fact that certain documents and policies interact and build upon one another, and require attention at different times of the academic year. For example, while an updated employee handbook is a crucial document, it is unwise to rollout a new handbook to staff prior to providing a training session to the administrative staff that must “enforce” it. Likewise, if the existing teacher contracts incorporate certain provisions of an existing handbook, this may pose a problem in implementation.

Since policies and practices do not become out of date overnight, they should not be updated overnight. If the goal is to ensure that the school is meeting best practices, this can only be achieved if changes are made in a thoughtful and integrated manner with careful attention to all the details. What we find to be most helpful is to create a list of priorities and a timeline for completing the work. Since time and funds are not unlimited, these two factors must be calculated into the timeline for completing the proposed projects. Not only does this allow for a more effective and thoughtful process but it avoids the “shock” that sometimes occurs with change. Once we have a better understanding of the current status of the areas identified for improvement, we can build the plan of action.

Included in the plan is the recommendation for the method and manner of introducing the new or revised documents, practices and procedures to the school’s “constituency” (faculty, staff, parents, students, board as appropriate). Communicating change in the proper manner is the secret to assuring that it is accepted and embraced. Also included in the plan are the training and coaching of faculty and staff, (as relevant) to make certain that there is an acceptance and understanding of the changes being made. No policy or procedure is worth having if faculty and staff are not trained on implementation and compliance with the policies. As part of our assessment, we consider, whether and what type of training is needed to obtain the best result from new policies and practices. If needed we provide training sessions on various topics such as sexual harassment prevention, employee evaluations and discipline, FMLA compliance, effective hiring and interviewing techniques, and many more

We hope this memorandum assists you in gaining a better understanding of the Report Card process. Please do not hesitate to contact us if you require any additional information.

### School Law Report Card Checklist

**I. Governance**

- By law, charter and article of incorporation review
- Audit committee creation
- Conflict of Interest and Codes of Conduct
- Gift receipt policies
- Governance best practice and board consultation
- Whistleblower policies
- Policy and process procedures for Board
- Creation of Committee descriptions and design of best practice
- Training and presentations for proper governance
- Intermediate sanctions compliance
- Minutes and maintenance of Board documents
- Proper procedures and practices during Board meetings

**II. Insurance Coverage**

- Review insurance coverage for adequate coverage amounts
- Review insurance coverage for adequate language inclusion
- Review insurance coverage for adequate policies

**III. Executive Support**

- Head contract review
- Deferred compensation advice
- Comparable salary assessment
- Intermediate sanctions and rebuttable presumption compliance
- Tuition remission
- Housing compliance issues

**IV. Document Compliance, Maintenance and Retention**

- Document Retention/Destruction Policy
- Review of Sarbanes-Oxley Act Compliance
- I-9 Records
- Individual Personnel Files Maintenance
- Contents Review
- Length of Time Retained
- Payroll Information
- Recruitment, Application and Hiring Process Records
- Employee Benefit Plan Records

## Independent School Law Report Card

Page 4

- Affirmative Action Plan Compliance Records
- Workplace Injury Records
- Termination and COBRA Compliance Records

### **V. Information Gathering**

- Description of any pending employment –related litigation, including allegations
- Total number of employees, Full time, Part time, Faculty, Staff
- Total Number of Students

### **VI. The Hiring Process and Related Issues**

- Review of Recruitment
- Employment Application
- The Interview Process
- Is there a written hiring and interview procedure?
- Is there a standard applicant evaluation form?
- Are colleagues trained on interviewing skills?
- What records are maintained that identify the sex, race, age, national origin, disability, or other protected status?
- A review of pre-employment inquiries that may appear benign, but implicate legal issues
- I-9 Employment Verification Process
- Review of any Testing Done as Part of the Hiring Process
- Aptitude or Skill Testing
- Polygraph
- Drug/Alcohol Testing for Bus Drivers
- Reference Checking Procedure
- Fair Credit Reporting Act Compliance
- Criminal Background Checks
- Offers and Rejections of Employment
- Review of Employment Agreements
- New Hire Reporting Requirements
- New Hire Orientation Process

### **VII. Performance Evaluations and Training for Supervisors on Conducting Evaluations**

### **VIII. Discipline and Discharge**

- Review of Policy and Process
- Review Discipline Forms



**IX. Compliance with Americans with Disabilities Act (ADA)**

- Review Job Descriptions
- Review Process for Determining Reasonable Accommodation
- Review Available Leave Policies to Ensure Compliance with ADA

**X. Compliance with Family and Medical Leave Act (FMLA)**

- Review FMLA Notice Letter
- Review Procedure for Designating Leave as FMLA
- Review Procedure for Requesting Medical Certification, Re-certification, and Fitness for Duty
- Coordination of FMLA, Workers' Compensation, Short-term Disability, and Other Leave Policies

**XI. Review of Employee Handbook/Faculty and Staff Policies**

- Review for Compliance with Applicable Federal, State, and Local Laws
- Ensure that Handbook Reflects School's practices, policies, and culture
- Review At-Will Employment Language
- Review Acknowledgment Form
- Acceptable Use Policies and Use of Technology

**XII. Compliance with USERRA**

**XIII. Determine Applicability of HIPAA and Review Compliance**

**XIV. Review of any other benefits offered to employees**

- Tuition reimbursement/remission
- Child care
- Attendance at conferences and seminars
- Credit union
- Moving expenses
- Food services, meals
- Employee assistance program
- Relocation assistance
- Employee referral bonuses

**XV. Assessment of Handling of Internal Employee Complaints**

- Complaint Procedure
- Communication of Procedure to Employees
- Investigation Process
- Resolution of Complaint
- Action Plan to Prevent Recurrence

**XVI. Wage and Hour Practices**

- Exemption Status and Overtime Calculation
- Identification of all positions treated as “exempt” from overtime obligations under the FLSA
- Review lawful basis for treatment as exempt
- Review of any salary deductions of exempt employees, and any other deviation from compensation
- Review any additional types of payment provided to exempt colleagues
- Review the method of overtime computation for non-exempt colleagues
- Review calculation of non-exempt employees’ regular rate of pay
- Review of any bonuses, and their treatment in the computation of overtime payments to hourly employees
- Review of the method used to track hours worked and breaks taken by non-exempt employees
- Review of the method of calculation utilized to determine overtime compensation for a colleague working more than one job or shift at different rates of pay
- Review of the method of calculation used to determine overtime for colleagues who work on the sixth or seventh day of the week
- Review of procedures for overtime authorization, and for payment of overtime work not authorized
- Review of payment policies for travel time, time spent on-call, and time that non-exempt employees are required to be on the premises during hours they are not regularly scheduled to work

**XVII. Other Key Wage Issues**

- Review of the pay period, and pay dates following close of pay period
- Review of any independent contractors utilized by the School, including the nature of any agreement used with independent contractors that set forth the relationship
- Identify any positions where male colleagues receive different pay from females for reasons other than seniority, merit, or a system measuring productivity
- Review of the method used for the payment of final wages to an employee separated from employment by termination or resignation (including any deductions made from final paychecks and the timing of payment)
- Review of the policy regarding the payment of earned but unused vacation and sick leave upon termination, whether compensatory time-off offered
- Identify and assess all reasons for the docking of amounts from pay checks
- Review whether colleagues receive an itemized statement of deductions
- Review whether direct deposit offered

**XVIII. Separation from Employment**

- Review of any written termination policy and procedure
- Termination Process

Independent School Law Report Card

Page 7

- Use of Releases and Separation Agreements
- Employment Reference policy
- Policy and process for payments to terminated and resigning employees
- Severance Pay Policy
- Exit Interview and Procedures Policy
- Procedures for Return of School Property

**XIX. Student Issues**

- Student handbook policies
- Admissions document review and revisions
- Enrollment Contracts
- Disciplinary and honor code policies
- Permission slip and emergency forms
- Due process (honor code procedures) prior to suspension or discipline
- Academic dishonesty
- Theft investigations
- Internet and email policies
- Appropriate role of school in custody and domestic issues
- Drug and alcohol policies and discipline
- Accommodation of learning disabilities
- Acceptable Use Policies and the proper use of technology
- Reporting requirements for abuse

**XX. Benefits Review**

- 403(b) plans
- 457 (b) or (f) plans
- Cafeteria Plans
- Tuition Remission Plans
- Education Assistance Plans



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our experience

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#### VENABLE SNAPSHOT

Over 500 lawyers nationally

Representing clients nationwide

Practicing in over 100 disciplines

Offices across the country

#### VENABLE INDEPENDENT SCHOOL LAW TEAM

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## INDEPENDENT SCHOOL LAW

Venable's Independent School Law Practice represents schools nationwide. Well-versed in the impact culture has on the health and sustainability of the industry, Venable's Independent School Law Practice provides advice consistent with a school's mission and culture. Representing schools of all size, denomination, philosophy and location, the firm provides assistance in the ever-increasing challenges facing independent schools.

Our lawyers work as partners with clients, advising them on a number of levels as they seek not only to respond to a client's current legal issues, but also to identify potential problems before they arise. Our attorneys are a team of skilled, experienced professionals. Our clients rely on our great breadth of experience and sound legal judgment for assistance in achieving solid and practical solutions to their legal problems and challenges. Extensive and regular interactions with independent schools provide the practice with the ability to track and to understand the nuances specific to independent schools and allows for the development of best practices. Lawyers in the Independent School Law Practice regularly speak at state and national meetings on selected topics and provide in-school training.

Working closely and constantly with independent schools, the members of the independent school law team understand the unique characteristics and concerns of independent schools. When complex legal issues arise, Venable's prominence as a full-service, national law firm allows us to call upon the support of colleagues and combine their deep knowledge of their particular areas of practice with our knowledge of independent schools to provide integrated advice and support. The broad range of legal areas covered by the firm includes:

#### Proactive and Preventive Strategies for Creating Positive Work Environments

Proactive and preventive actions are the best way to avoid liability and create a positive and productive work environment for school employees and learning environment for students. Assisting schools with creating policies, procedures and strategies is a cornerstone of the practice. An essential element in the process is the hiring of qualified and safe employees. To assist with these goals, the practice works with schools on the following:

- Employee handbooks
- Faculty and staff employment agreements
- Sick, vacation, and short-term and long-term leave policies
- Hiring policies

- Employment applications
- I-9 compliance
- Reference checks and other vetting options
- Interview procedures
- Effective criminal background screening procedures
- Medical screening procedures
- Orientation procedures

### Managing the Workforce

The Independent School Law Practice assists schools to establish sound strategies for addressing workforce challenges while maintaining legal compliance with the many regulations and laws impacting independent schools. The practice regularly assists schools with:

- Counseling and advisory assistance with employee matters
- Suspension and termination procedures
- Performance evaluations
- Managing employment discrimination claims
- Affirmative action plans
- EEO-1 compliance
- Evaluation and design of benefits programs
- Internet and email use
- Job descriptions
- FMLA compliance
- Personnel files and record maintenance
- Faculty grievance procedures
- Transportation and driver policies
- Drug-free workforce policies
- Union oversight and labor contract negotiations
- Worker's Compensation compliance
- Exempt vs. non-exempt classifications
- Proper overtime payment calculation and tracking of hours
- Payroll process compliance

### Retirement and Health Benefits Review and Compliance

In the area of employee benefits, retirement plans, and executive compensation planning, Venable's Employee Benefits and Executive Compensation Group has particularly deep knowledge about the specialized rules that apply to the retirement and compensation plans sponsored by independent schools. We work closely with our clients to ensure that their retirement programs meet all compliance requirements and partner with our clients and their consultants to help them evaluate whether they should migrate from traditional retirement programs to more contemporary solutions. Of added value, we also structure deferred compensation plans and other innovative programs that are designed to supplement retirement savings so that independent schools can attract and retain their key employees. We provide support and legal guidance with respect to issues including:

- Section 403(b) plans
- Section 457(b) and 457(f) plans
- Health Insurance, Life Insurance and other benefit plans
- Short-Term and Long-Term Disability plans
- Cafeteria plans
- Education Assistance plans

- HIPAA compliance
- Split-dollar life insurance

### Head of School Contracts and Compensation

The drafting and design of the Head of School's contract and compensation have taken on added importance with the expansion of laws affecting remuneration. School leaders face fiduciary exposure in the form of intermediate sanctions and other institutional and personal penalties for noncompliant compensation and benefits transactions. Venable's lawyers are well-versed in the drafting and design of Head of School contracts that incorporate the best practices in addressing incentivizing administrators providing the most beneficial tax impact for both the head and the school. Other issues addressed are:

- Head of School contracts
- Deferred compensation advice
- Comparable salary assessment
- Intermediate sanctions and rebuttable presumption compliance
- Tuition remission programs
- Housing and loan programs
- Tax treatment of benefits
- Transition planning
- Executive severance programs
- Evaluation and compensation tools
- Head of School search and selection strategies
- Succession planning

### Student Issues

Members of the Independent School Law Practice have extensive experience assisting schools to navigate the challenges raised by the student body. With the Internet and social media playing increasingly significant roles in the lives of children, the Practice has assisted in the creation of policies and procedures that set sound boundaries and consequences and has worked with schools to ensure that discipline and other actions are upheld in times of challenge. Areas covered include:

- Applications for admissions
- Admissions procedures
- Enrollment documents
- Student handbook policies
- Disciplinary and honor code policies
- 24/7 conduct policies
- Permission slips, emergency forms and foreign travel documents
- Due process (honor code procedures) prior to suspension or discipline
- Academic dishonesty policies
- Theft investigations
- Internet and email policies
- Appropriate role of school in custody and domestic issues
- Drug and alcohol policies, detection and discipline
- Accommodation of learning disabilities
- Reporting child abuse or neglect
- Counselor and teacher confidentiality issues
- Uncooperative parents and guardians
- College reporting obligations
- Transcript and school document release policies



### Interpretation of Disability Laws

Laws preventing discrimination on the basis of disability and requiring accommodations for disabled individuals apply to schools with respect to not only their employees, but also their students and possibly others participating in school programs. Following the Americans With Disabilities Act can be a complicated process. The possible coverage of laws governing students with learning and other disabilities makes this process even more challenging when it applies to students. The Independent School Law Practice has assisted schools in the issues associated with students, employees and other individuals in the school community including:

- Admission of students with learning disabilities
- Undue burden determination
- Reasonable accommodation
- Facilities and program access
- Training of supervisors and administrators in ADA requirements

### Sexual and Other Forms of Harassment

For employees and students to perform at their highest potential, their learning and teaching environments must be free from harassment. The members of the Independent School Law Practice work with schools to create proactive policies to prevent unlawful harassment and procedures to address allegations of harassment. In addition to conducting extensive training on this topic, the Practice also provides:

- Policies and procedures for reporting sexual harassment
- Prevention programs and training
- Investigations of claims
- Guidance on confidentiality and privacy obligations
- Disciplinary notices
- Document creation and maintenance

### Faculty and Staff Tenure, Sustainability Issues, Reductions in Staff and Retirement Plans

Venable has extensive experience helping schools develop a workforce that best serves school needs. This experience includes developing and communicating performance incentives, procedures for evaluating and mentoring faculty and staff, and, programs allowing for early retirement. Examples of work performed in this area are:

- Appointment, promotion and tenure
- Termination procedures
- Disciplinary procedures and implementation
- Grievance procedures
- Reduction, rightsizing and downsizing
- Severance agreements
- Housing loans
- Housing eligibility
- Early retirement programs
- Mentoring and extended educational support
- Incentive programs
- Tuition remission programs
- Education assistance programs



## Accreditation

Venable has extensive experience in helping schools navigate the legal issues examined in the accreditation process. The Independent School Law Practice also assists schools with the drafting and revision of materials necessary for presentation during an accreditation committee's visit including:

- Governance procedures
- Compliance with state and federal laws
- Matters associated with best practices in the industry

## Social Media, Technology, Electronic Communications, Privacy and E-Commerce

Social media and technology have become pivotal resources as well as pivotal challenges in the independent school world. How students, employees and the school use social media and technology is a source of liability exposure if the legal implications are left unconsidered. Venable assists in the limitation of liability by counseling schools regarding:

- Drafting and reviewing Acceptable Technology Use policies applicable to students and employees
- Use of school space by third parties for movies
- Review of Safety and security issues
- Use of school and personal equipment, networks and programs
- Compliance with privacy obligations
- Drafting email disclaimers
- Reviewing use of Social Media for marketing and development
- Ensuring enforceability of online enrollment agreements
- Drafting of e-commerce procedures
- Ensuring compliance with state solicitation laws

## Governance

As part of our practice in independent school law, Venable advises clients – including administration and trustees – on the full range of governance-related matters, including:

- Sarbanes-Oxley compliance
- By-law review and design
- Fiduciary duty review
- Audit and auditor selection process
- Compliance with duty of care, loyalty and obedience requirements
- Confidentiality requirements
- Board minutes, procedures and meeting policies
- Charter and Articles of Incorporation drafting and review
- Audit committee policy design
- Governance best practices
- Board consultation and training
- Document retention and destruction policies
- Whistleblower policies
- Intermediate sanctions compliance
- Conflict of interest policies
- Committee structure design

### **Non-Profit Tax, Financing, and Investments**

We provide support and legal guidance with respect to every major tax and benefit issue affecting independent schools, including, but not limited to:

- Charitable planned giving and bequests
- Estate planning and fund-raising planning
- Investment strategies and compliance requirements
- Non-profit tax status and issues
- Financial aid programs and tax implications
- Unrelated business income tax planning and structuring
- IRS and state tax defense and audit support
- Banking, lending and loan issues
- Form 990 reporting, disclosure and compliance
- Church status evaluation

### **Charitable Giving and Wealth Management**

We provide support and legal guidance with respect to designing giving plans, strategies and methods for assisting schools approach donors with creative giving options. In addition the practice provides the following support:

- Charitable planned giving and bequests
- Estate planning and fund-raising planning investment
- Gift giving and donor obligations

### **Contract Reviews, Drafting and Negotiations**

Independent schools execute countless contracts and agreements every year, often without having these documents reviewed recently, if ever, by counsel. Unfortunately, many schools do not realize the rights, responsibilities and liabilities that are created based on what these documents say and fail to say. An agreement that, in its brevity, is assumed to retain maximum flexibility for a school may have the unintended effect of waiving rights the school otherwise would have had. We review, revise, draft and assist in the negotiations of the various contracts and agreements that schools enter into including:

- Food service, cleaning service, technology purchase and support, and other service contract review
- Use of facility and subcontracting process and contract review
- Insurance plans and coverage assessments and review
- Contract dispute resolution

### **International and Local Partnerships and Student Travel**

With increasing frequency, independent schools are partnering with schools internationally. Whether developing an affiliation with another domestic or foreign entity or establishing a standalone institution, schools considering international programs must be mindful of the new legal issues posed by such programs. These include the protection of the School; the compensation, benefits, and taxation of employees working outside the United States; the safety of students and faculty; and the applicability of the laws of the country or countries in which the program will operate. In addition, as schools increasingly sponsor trips and study abroad programs they must clearly define the rules and liability exposure of each party. Venable has assisted numerous schools in the

consideration of the following:

- International tax implications
- Safety and security issues
- Contracts and agreements
- International trade and establishment compliance
- Enrollment and employment agreements
- Co-venture creations
- Student travel policies and forms
- Relationship branding

### **Business Matters**

Basic business matters and obligations are a critical part of a school's operations. Venable lawyers are well-versed in the business operations of independent schools and have provided assistance with:

- Review and preparation of business and vendor contracts
- Red Flag policy drafting and compliance
- Truth in Lending compliance
- Facility use agreements
- Management of investments and endowments
- Collection of tuition and other debts
- Evaluation, interpretation and assessment of insurance coverage amounts
- Reviewing of Directors and Officer insurance coverage
- Banking, loans and financial institution relationships
- Intellectual property issues pertaining to copyrights, trademarks and patent infringement

### **Real Estate, Construction and Building**

Venable's highly respected real estate practice assists independent schools with complex commercial real estate transactions, including aspects such as:

- Purchase and sale of buildings and property
- Zoning, special exception and conditional use approvals
- Environmental assessment approvals
- Site location identification
- Relations with neighbors
- Maintaining safe campus
- Land use assessment and approvals
- Construction and building contracts
- Construction and building defect and error resolution
- OSHA review and compliance
- Asbestos review and compliance
- Architect contracts
- Performance management support
- Mechanic's liens
- All facets of green construction and certification
- General Contractor contracts

### **Intellectual Property and Technology Transaction**

The creation of curriculum, technology programs, apps, and other writings can prove to be a valuable asset to a school. Institutions are increasingly considering alternative revenue sources. In addition, a

school's name, logo and branding can be subject to theft unless protected. We represent clients in all aspects of intellectual property law protection, including trademarks, patents, copyrights, domain names, technology licensing and transactions, trade secrets, and antitrust and unfair competition. Other work performed in this area includes:

- Copyright protection of logos, branding and slogans
- Technology licensing
- Program, curriculum and written works protection
- Joint venture branding protection

#### **Insurance Coverage and Risk Management**

Venable attorneys successfully counsel clients in a range of insurance matters including property and casualty, health and benefits, Directors and Officers, and other relevant plans. The type of services provided include:

- Advice on insurance coverage and claims procedures
- Advocacy on coverage of claims
- Assessment of policy coverage and financial limits and appropriate amounts of coverage
- Review of Directors and Officers insurance policy
- Review of Liability insurance policy and assistance with compliance with plan requirements
- Evaluation of buildings and grounds safety
- Assessment of driver and vehicle licensing obligations and policies
- Travel and foreign trip coverage
- Student athletic risks and policies
- Medical provider liability exposure

#### **Regulatory Compliance and Legislative Advocacy**

While independent schools advocate and articulate the need to operate independently, schools remain subject to certain state and local regulatory obligations. Venable has the ability to assist in ensuring the compliance with these laws while sustaining the independence of the institution by reviewing:

- Legislative and governmental issue advocacy
- Vouchers
- State and federal financial assistance
- FERPA compliance
- State licensing obligations

#### **Environmental and Energy Affairs**

Venable's work with independent schools in the area of air quality and other environmental hazards has served to limit potential liability as well as ensure the safety of students, faculty and other members of the school's community. The ability to develop strategies and solutions to environmental challenges has proven invaluable in areas such as:

- Addressing issues of hazardous materials and systems found in older buildings
- Assisting in resolving hazardous materials and air quality legal issues during the renovation process
- Responding to concerns raised by local and state agencies
- Creating safety audits and advising on the current state of the law

## Litigation

While the goal is to avoid litigation there are times when, for a variety of reasons, litigation is the only option. Venable's team of litigators have a proven track record in vigorously defending our schools while still working to resolve conflicts when it is in the best interest of the school. As a benefit to schools, the firm is able to represent them through their insurance providers when coverage is available, which serves as a significant cost savings. Venable's skilled litigators assist schools both with defending against legal claims and with bringing claims to assert schools' legal rights. These include:

- Defense of wrongful discharge claims
- Construction disputes and enforcement litigation
- Wage and hour litigation
- Student discipline challenge defense
- General personal injury liability defense
- Property and neighbor disputes
- Board challenges and litigation
- Enrollment contract disputes
- Insurance enforcement litigation

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## Caryn G. Pass

Partner

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### AREAS OF PRACTICE

Labor and Employment  
Regulatory

### INDUSTRIES

Education  
Government Contractors  
Nonprofit Organizations and  
Associations  
Hospitality and Lodging

### BAR ADMISSIONS

District of Columbia  
Ohio

### EDUCATION

J.D., Case Western Reserve  
University School of Law, 1985  
B.A., University of Maryland, 1982

### MEMBERSHIPS

National Business Officers  
Association  
National Association of  
Independent Schools  
American Bar Association

As a partner with the nationwide law firm Venable LLP, Caryn Pass represents independent schools throughout the country. She advises educational institutions on a wide range of issues facing her clients in these ever-changing times. The foundation of her practice is the philosophy that effective legal counsel must be consistent with a school's culture. She works collaboratively with her clients, actively joining their team to make certain she is intimately familiar with the school's operations, mission and environment. As a practitioner to schools nationwide, Ms. Pass brings a wide range of experience to the table. Extensive and daily interaction with independent schools provides her with the ability to track trends and patterns and understand the nuances specific to independent schools. This advantage promotes the development of best practices.

Well versed in school law, Ms. Pass advises clients in virtually every type of legal matter. Independent schools enjoy the benefit of interacting with many constituencies including students, parents, employees, trustees, donors, alumni, neighbors and vendors. Ms. Pass assists her clients in navigating these relationships by establishing policies, procedures, strategies and best practices that promote positive working and learning environments while limiting potential liability exposure. A problem-solver and strategic-thinker, Ms. Pass assists schools in achieving their goals in the manner that best meets that institution's needs.

Ms. Pass drafts, reviews and revises documents utilized by independent schools, including teacher and faculty employment contracts, enrollment agreements, and agreements between schools and vendors. She counsels schools in the development of policies related to students, parents, employees and trustees. She ensures due diligence and fiscal oversight by reviewing insurance policies and the adequacy of coverage.

Ms. Pass works on the development and implementation of hiring policies that effectively ensure the recruitment and selection of the highest quality faculty and staff. She also works with schools on wage and hour compliance, counsel and discipline of employees, family and medical leave management, performance evaluation design, and the termination of the employment relationship and the defense of wrongful termination claims. She advises schools in establishing and enforcing harassment prevention programs and in conducting investigations into allegations involving students, employees and other members of the school community. In addition, she counsels schools on student safety, welfare, and discipline issues; student and faculty handbooks; and a variety of day-to-day challenges facing independent schools.

Ms. Pass works with trustees in designing and revising by-laws, assuring Charter and Articles of Incorporation compliance and developing governance policies and competencies. Her extensive experience in resolving conflicts and navigating disagreements among and between trustees, as well as between trustees and the Head of School, has proven beneficial to all parties and invaluable to the health and welfare of the institution.



Ms. Pass is well-known for her commitment to mentoring, supporting and developing the next generation of independent school leadership and has provided extensive assistance in the creation of Head of School transition plans and strategies for positioning the school to receive support and secure the incoming Head's success. She navigates trustees through the search and selection of a School Head and the negotiation of the Head's employment agreement including the intermediate sanctions process, the collection of comparable data and the options for incentivizing and motivating the Head of School.

## REPRESENTATIVE CLIENTS

Ms. Pass has developed one of the nation's leading practices in the representation of independent schools nationwide. Her client base includes both small and large schools; parochial and non-parochial schools; well-established schools with large endowments and newly established institutions; highly structured schools and those "without walls"; schools designed for students with learning style differences and those that educate by other methods; city schools, community schools and schools surrounded by miles of corn fields.

## ACTIVITIES

Ms. Pass frequently conducts presentations and workshops for regional, national and career-specific associations, as well as for clients that are designed to help faculty, staff and trustees avoid liabilities and maintain compliance with the laws impacting independent schools.

She regularly presents at the National Association of Independent Schools' annual conference and the National Business Officers Association annual symposium.

Ms. Pass has presented before many regional independent school associations and works closely with these groups to help establish best practices for independent schools.

## PUBLICATIONS

- February 2012, Ensuring the Safety of All Children: A New Era in Child Abuse Reporting, Independent School Law Alert
- February 2012, A Rabbi, a Priest, a Minister and a Teacher Walk into a Classroom... Who is Covered by the "Ministerial Exception"?, Independent School Law Alert
- February 2012, Will You Be My "Friend"? Legal Challenges in the Changing Social Media Landscape, Independent School Law Alert
- December 16, 2010, So You Want To Be On The Internet ®
- May 2010, Update On Red Flags Rules: Approaching June 1 Deadline, Independent School Law Alert
- May 7, 2010, Social Networking: Unique Challenges for Independent Schools
- October 27, 2009, Maximizing Revenue Opportunities With Free Government Spectrum Licenses, Independent School Law Alert
- October 2009, The "Red Flags" Rule: What Independent Schools Must Know About Complying With New Requirements for Fighting Identity Theft, Independent School Law Alert
- Summer 2009, "Right-Sizing Your School - A Legal Perspective", *NAIS Independent School Magazine*
- January 9, 2009, Independent School Law Alert - New Federal Family and Medical Leave Act and Military Leave Final Regulations Become Effective January 16, 2009, Independent School Law Alert
- November 2008, Independent School Law Alert - The New Form 990: Is Your School Ready?, Independent School Law Alert
- October 2008, Independent School Law Alert - President Signs New Law That Will Expand the Number of Employees Protected by the American with Disabilities Act, Independent School Law Alert
- September 2008, Independent School Law Alert - Preparations Independent Schools



Should Consider Now for the 2008 EEO-1 Report Filing, Independent School Law Alert

- February 2008, Independent School Law Alert - The Benefits and Risks to Schools in Classifying Individuals as "Independent Contractors", Independent School Law Alert
- February 2008, Independent School Law Alert - No Longer Children: What to Consider When Students Reach the Age of Majority, Independent School Law Alert

## SPEAKING ENGAGEMENTS

Ms. Pass frequently conducts presentations and workshops for associations, human resources groups and clients that are designed to help employers avoid liabilities and maintain compliance with employment laws.

She regularly presents at the National Association of Independent Schools' annual conference and the National Business Officers Association annual training institute.

Ms. Pass has presented before many regional independent school associations and works closely with these groups to help establish best practices for independent schools. Ms. Pass has made presentations to several local Society for Human Resource Management groups as well as at the National Society for Human Resource Management's annual conference.

She is regularly quoted in publications where she provides practical advice to employers on topics such as wage and hour, FMLA and other employment matters.

- June 21, 2012 - June 22, 2012, "Comprehensive Review of the Pressing Employment Law Issues Facing Independent Schools"
- March 2, 2012, "Preparing for the Future: Legal Issues in Leadership Succession Planning" at NAIS Annual Conference 2012
- March 2, 2012, "Social Media: What Every School Should Know" at NAIS Annual Conference 2012
- February 27, 2012, "Legal Issues in Technology Innovation: E-Commerce, Internet and Social Media," NBOA Symposium 2012
- February 27, 2012, "Hot Legal Topics in Independent Schools: What the Head Should Know" at NAPSG Annual Meeting
- December 7, 2011, "Drafting Enrollment Contracts for the 2012-2013 School Year" webinar for the North Carolina Association of Independent Schools
- December 1, 2011, "Supervision and Professional Development; Legal issues and Trends" at the Johns Hopkins Graduate Education Program
- November 15, 2011, "The Legal Aspects of Enrollment Agreements," Secondary School Admission Test Board (SSATB) webinar
- November 3, 2011, National Business Officers Association / National Association of College and University Business Officers Tax Forum on School, College and University Nonprofit Tax Challenges
- October 31, 2011, "Governance Issues Facing Independent School Boards" for the Association of Independent Maryland Schools
- October 23, 2011 - October 24, 2011, "Employment Issues in Independent Schools" at the Southern Association of Independent Schools Annual Conference
- October 20, 2011, "Enrollment Contracts: Advice from a Panel of Experts," National Business Officers Association webinar
- July 12, 2011, "Hot Legal Issues in Independent School Admissions" for the Association of Independent School Admission Professionals
- April 13, 2011, Hawaii Association of Independent Schools Conference
- March 7, 2011, Association of Military Colleges and Schools of the United States (AMCSUS) Annual Meeting
- February 27, 2011 - March 1, 2011, 90th Annual Meeting for the National Association of Principals of Schools for Girls (NAPSG)
- February 24, 2011 - February 25, 2011, 2011 National Association of Independent Schools (NAIS) Annual Conference

- February 21, 2011 - February 23, 2011, National Business Officers Association (NBOA) Symposium 2011
- December 7, 2010, Drafting 2011-2012 Enrollment Contracts and Employment Agreements: Hot Legal Issues
- October 1, 2010, Leadership Conference for Heads of School and Board Chairs, Association of Independent Schools of Greater Washington
- June 24, 2010 - June 25, 2010, "Managing Legal Risks for Boarding Schools" at The Association of Boarding Schools' (TABS) conference in Wilmington, DE
- May 3, 2010, "Enforcing a School's Enrollment Contract" at the Florida Independent School Business Officers Conference in Orlando
- April 29, 2010, "Legal Trends in Independent Schools" at the New Jersey Association of Independent Schools' Business Officers Retreat in Lambertville, NJ
- April 27, 2010, "Social Networking: Unique Challenges for Independent Schools" seminar presented by Venable Independent School Lawyers and RCM&D Education Group Consultants
- April 21, 2010, "Social Networking: Unique Challenges for Independent Schools" seminar presented by Venable Independent School Lawyers and RCM&D Education Group Consultants
- February 25, 2010 - February 26, 2010, "Legal Strategies for Navigating Difficult Economic Times" and "Form 990 Fallout; Lessons Learned" at the National Association of Independent Schools Annual Conference
- February 24, 2010, "Dotting the I's and Crossing the T's: Effectively Negotiating the Head of School's Contract" at the National Business Officers Association 2010 Annual Conference
- February 21, 2010, "Effectively Negotiating the Head of School's Contract" at the National Association of Principals of Schools for Girls 2010 Annual Conference in Napa, California
- November 18, 2009, Independent School Employment Law Update
- November 4, 2009, "Form 990 Fallout; Lessons Learned" and "Hot Human Resource Issues Facing Independent Schools" at the Independent Schools Association of the Southwest's November Heads Meeting
- November 2, 2009, "Marshaling Your Resources: The Legal Implications of Cost-Containment Strategies" at the VAIS Annual Conference
- October 28, 2009, "A Legal Review of Admission Policies and Procedures" at the PEJE Admission Community of Practice
- June 29, 2009, "Safe and Healthy: Best Practices for Risk Management in Residential Life" at the Association of Boarding Schools' Risk Management Conference
- June 29, 2009, Caryn Pass to Present at The Association of Boarding Schools' Risk Management Conference
- April 22, 2009, Venable hosts seminar on Best Practices for Non-compete Agreements for Women's Employment Law Networking Group
- April 20, 2009, National Business Officers Association - Issues in Independent School Law
- April 16, 2009, Association of Business Officers of Preparatory Schools
- March 4, 2009, Partnership for Excellence in Jewish Education Financial Management Community of Practice Call "Rightsizing: Responding to the New Economic Trends"
- February 27, 2009, National Association of Independent Schools 2009 Annual Conference
- February 25, 2009, National Business Officers Association 2009 Symposium
- January 14, 2009, "Americans with Disabilities Act Amendments Act of 2008 Seminar," presentation for the Women's Employment Law Networking Group
- May 14, 2008, National Business Officers Association Webinar on "Handbooks"
- May 7, 2008 - May 9, 2008, NYSAIS/CAIS Business Affairs Conference
- April 15, 2008, Association of Independent Maryland Schools (AIMS)

- March 26, 2008, National Business Officers Association Webinar on "Safe Schools"
- February 28, 2008 - February 29, 2008, National Association of Independent Schools 2008 Annual Conference
- February 26, 2008 - February 27, 2008, National Business Officers Association 2008 Symposium
- February 13, 2008, National Business Officers Association Webinar on "Sustainability of Faculty: The Legal Side"
- January 9, 2008, National Business Officers Association Webinar on "Hiring and Employment Contracts"
- December 12, 2007, National Business Officers Association Webinar on "Independent Contractors, Employee Classifications and Exemptions"
- December 4, 2007, Association of Business Officers of Preparatory Schools (ABOPS) Annual Conference
- November 14, 2007, National Business Officers Association Webinar on "Admissions & Enrollment Contracts"
- October 10, 2007, National Business Officers Association Webinar on "Responding to Changing Trends in Faculty and Staff"
- June 19, 2007, National Business Officers Association, Summer Institute at Cushing Academy
- April 26, 2007, Virginia Association of Independent Schools Business Officers Institute
- April 13, 2007, Association of Business Officers of Boarding Schools
- April 12, 2007, Association of Business Officers of Independent Schools
- March 1, 2007 - March 2, 2007, National Association of Independent Schools 2007 Annual Conference
- February 27, 2007, National Business Officers Association 2007 Symposium
- 2007, VAIS Business Managers Conference 2006 - "Critical issues in Employment Laws; A review for Independent Schools"
- 2007, "Trends in Administrators Employment Agreements" for the Association of Business Officers of Independent Schools
- 2006, National Business Officers Association 2006 Symposium
- 2005-2006, NBOA Employment Law Seminar: Critical Issues for Independent Schools
- 2006, The Classrooms Legal Challenges
- 2006, Association of Independent Schools of Greater Washington
- 2006, National Association of Independent Schools 2006 Annual Conference
- 2005, Association of Independent Schools of New England Business Managers Conference 2005 - "Critical issues in Employment Laws; A review for Independent Schools"
- Biotech Industry Organization, BIO HR2001 - "Critical issues in Employment Laws"



## Heather J. Broadwater

Associate

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### AREAS OF PRACTICE

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### INDUSTRIES

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Associations

### BAR ADMISSIONS

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Virginia  
Georgia

### EDUCATION

J.D., Georgetown University Law  
Center, 2003  
M.H.R., University of South  
Carolina, 1996  
B.A., University of South Carolina,  
1994  
*with honors* from the South  
Carolina Honors College

### MEMBERSHIPS

National Business Officers  
Association

As an associate with the nationwide firm of Venable LLP, Heather Broadwater represents independent schools nationwide on a wide array of legal matters. With an extensive background in human resource management, she advises schools on employment issues, and assists schools in managing their relationships with students, parents, trustees, donors, alumni, vendors and other members of the school community.

Ms. Broadwater drafts, reviews and revises contracts utilized by independent schools, including teacher and faculty employment contracts, enrollment agreements, and agreements between schools and vendors. She counsels schools regarding policy development and implementation, recruitment and selection, faculty and employment contracts, employee relations, wage and hour compliance, counseling and disciplinary actions, family and medical leave management, performance evaluation, and termination of the employment relationship. In addition, she advises schools in establishing and enforcing harassment prevention programs and in conducting investigations into allegations involving students, employees and others involved in the school community. She also assists schools with student safety, welfare, and discipline issues; student and faculty handbooks; board governance and by-law issues; the defense of wrongful termination claims; and a variety of day-to-day challenges facing independent schools today.

### REPRESENTATIVE CLIENTS

Ms. Broadwater represents a broad array of clients in one of the nation's leading practices in the representation of independent schools and other not-for-profits. In addition to her representation of independent schools, Ms. Broadwater works closely with national, regional, and state independent school associations to help establish and disseminate best practices for independent schools.

### ACTIVITIES

Ms. Broadwater regularly presents at conferences and events, including chapter events for the Society for Human Resource Management, the National Association of Independent Schools' annual conference, the National Business Officers Association's Annual Symposium, and Southern Association of Independent Schools conference. Ms. Broadwater has also presented before many regional independent school associations. As an advocate of preventive maintenance, she also designs and delivers custom training programs for clients.

### PUBLICATIONS

As an advocate of preventive maintenance, Ms. Broadwater regularly presents at conferences and events, including chapter events for the Society for Human Resource

National Association of  
Independent Schools  
Society for Human Resource  
Management  
American Bar Association

Management, the National Association of Independent Schools' annual conference, and the National Business Officers Association's Annual Symposium. In addition, she designs and delivers custom training programs for clients.

- February 2012, Ensuring the Safety of All Children: A New Era in Child Abuse Reporting, Independent School Law Alert
- February 2012, Will You Be My "Friend"? Legal Challenges in the Changing Social Media Landscape, Independent School Law Alert
- February 2012, A Rabbi, a Priest, a Minister and a Teacher Walk into a Classroom... Who is Covered by the "Ministerial Exception"?, Independent School Law Alert
- February 2012, Compliance with the Truth in Lending Act Obligations in the Drafting of Enrollment Agreements, Independent School Law Alert
- May 2010, Update On Red Flags Rules: Approaching June 1 Deadline, Independent School Law Alert
- October 27, 2009, Maximizing Revenue Opportunities With Free Government Spectrum Licenses, Independent School Law Alert
- October 2009, The "Red Flags" Rule: What Independent Schools Must Know About Complying With New Requirements for Fighting Identity Theft, Independent School Law Alert
- January 9, 2009, Independent School Law Alert - New Federal Family and Medical Leave Act and Military Leave Final Regulations Become Effective January 16, 2009, Independent School Law Alert
- November 2008, Independent School Law Alert - The New Form 990: Is Your School Ready?, Independent School Law Alert
- October 2008, Independent School Law Alert - President Signs New Law That Will Expand the Number of Employees Protected by the American with Disabilities Act, Independent School Law Alert
- September 2008, Independent School Law Alert - Preparations Independent Schools Should Consider Now for the 2008 EEO-1 Report Filing, Independent School Law Alert
- February 2008, Independent School Law Alert - The Benefits and Risks to Schools in Classifying Individuals as "Independent Contractors", Independent School Law Alert
- February 2008, Independent School Law Alert - No Longer Children: What to Consider When Students Reach the Age of Majority, Independent School Law Alert
- September 2006, Preventing Workplace Sexual Harassment, *Rural Telecommunications*
- November 2004, Look at the New Overtime Regulations, *Rural Telecommunications*

## SPEAKING ENGAGEMENTS

- June 21, 2012 - June 22, 2012, "Comprehensive Review of the Pressing Employment Law Issues Facing Independent Schools"
- May 2, 2012, "Legal Issues Webinar: Employee Handbooks" for the North Carolina Association of Independent Schools (NCAIS)
- October 23, 2011 - October 24, 2011, "Employment Issues in Independent Schools" at the Southern Association of Independent Schools Annual Conference
- February 24, 2011 - February 25, 2011, 2011 National Association of Independent Schools (NAIS) Annual Conference
- October 26, 2009, "Top Legal Issues for 2009-10" at the Southern Association of Independent Schools (SAIS) Annual Conference
- October 22, 2009, "Stretching Your Legal Dollars: Preventative Measures to Minimize Legal Exposure" at the North Carolina Association of Independent Schools (NCAIS) Business Officers Conference
- April 22, 2009, Venable hosts seminar on Best Practices for Non-compete Agreements for Women's Employment Law Networking Group
- February 27, 2009, National Association of Independent Schools 2009 Annual Conference

- February 25, 2009, National Business Officers Association 2009 Symposium
- January 14, 2009, "Americans with Disabilities Act Amendments Act of 2008 Seminar," presentation for the Women's Employment Law Networking Group
- May 14, 2008, National Business Officers Association Webinar on "Handbooks"
- April 9, 2008, Heather Broadwater to speak at National Business Officers Association Webinar on "FMLA, ADA, & Protected Groups"
- February 28, 2008 - February 29, 2008, National Association of Independent Schools 2008 Annual Conference
- February 26, 2008 - February 27, 2008, National Business Officers Association 2008 Symposium
- January 9, 2008, National Business Officers Association Webinar on "Hiring and Employment Contracts"
- October 21, 2007, Southern Association of Independent Schools Annual Conference
- June 12, 2007, National Telecommunications Cooperative Association 2007 HRNet Conference
- May 8, 2007, "Hot Legal Issues for Independent Schools" at the Arizona Independent School Business Managers Meeting
- March 1, 2007 - March 2, 2007, National Association of Independent Schools 2007 Annual Conference
- February 27, 2007, National Business Officers Association 2007 Symposium
- 2006, The Classrooms Legal Challenges
- 2006, National Business Officers Association 2006 Symposium
- 2006, Association of Independent Schools of Greater Washington
- 2005-2006, NBOA Employment Law Seminar: Critical Issues for Independent Schools
- 2006, ELI Research
- 2006, National Association of Independent Schools 2006 Annual Conference
- 2003-2006, Institute of Management and Administration
- 2003-2004, Society of Human Resources Management
- 2004, National Grocers Association
- 2004, EAP Data Information Solutions
- 2004, National Business Officers Association
- 2004, Non Profit Risk Management Institute

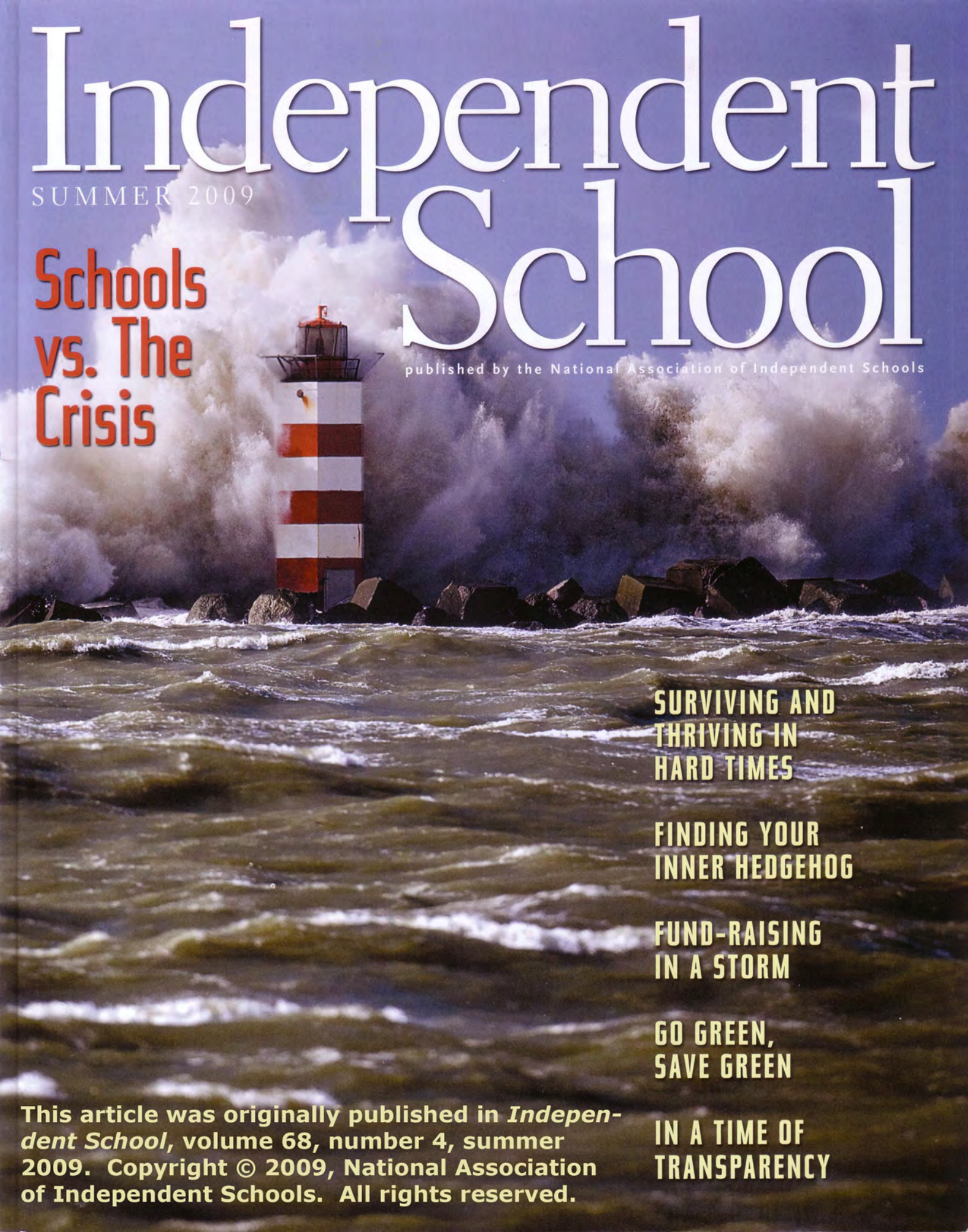




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# Independent School



SUMMER 2009

**Schools  
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**SURVIVING AND  
THRIVING IN  
HARD TIMES**

**FINDING YOUR  
INNER HEDGEHOG**

**FUND-RAISING  
IN A STORM**

**GO GREEN,  
SAVE GREEN**

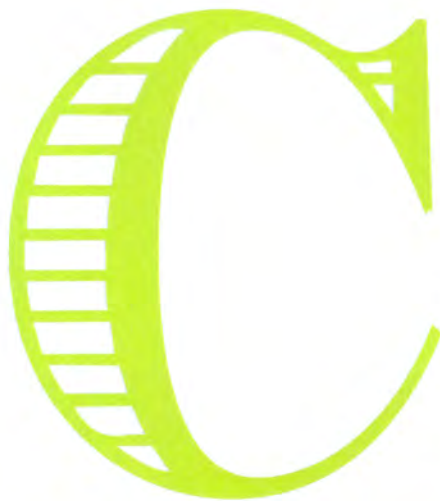
**IN A TIME OF  
TRANSPARENCY**

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# RISING SHINING YOUR SCHOOL

[A LEGAL PERSPECTIVE]



BY CARYN PASS

hallenging financial times necessitate creative yet considered planning. Indeed, this past spring, independent school boards everywhere were busy reviewing and revising multiple budget scenarios designed to allow for, on the one hand, continued growth and development while, on the other hand, ensuring the sound fiscal health of the institutions. We have entered an era when business as usual is no longer acceptable.

Yet, while these are anxious times for independent schools, it's important to remember that they also offer an opportunity to create stronger, more efficient and effective schools. As Albert Einstein observed, "In the middle of difficulty lies opportunity." In particular, difficult finances encourage critical review of school programs and staffing, with schools increasingly contemplating ways to streamline their programs and rightsize the staff — administrators, teachers, and hourly employees.

Of course, decisions of this nature, while critical to the sustainability of the school, expose institutions to the possibility of legal challenge, based on actions negatively impacting employees. While schools can never eliminate the possibility of such suits, there is much they can do to minimize the risk.



## **RISK ASSESSMENT AND PROACTIVE PLANNING**

When reviewing decisions with possible legal significance, schools must first make risk assessments. In other words, they must consider the benefits against the potential risks associated with a decision. Terminating, say, a long-time, but highly ineffective kindergarten teacher may result in a possible charge of age discrimination. However, if the decision is defended by a poor performance review and multiple requests from parents not to have their child in this teacher's classroom, perhaps the benefit of saving the salary of the extra aid to support this teacher, avoiding the fight with parents each year, and obtaining a talented replacement teacher is worth the risk of the lawsuit.

When considering risk assessment, it is often overlooked that culture plays a critical role in the ability to defend against legal claims. A school's culture is a vital component in all decisions, but should be especially considered when making changes to the employee ranks. Compliance with culture does not mean that a school that has never terminated an employee in the past is now prevented from doing so. Compliance with culture is appropriate when determining the process used to make decisions, as well as how the school communicates with employees, students, parents, donors, and others in the community. If school constituents believe the decision was made fairly (meaning consistent with the culture of the school) they are less likely to be angry and consider other avenues of reprisal, such as public opposition or filing a lawsuit. This does not mean that a school without a history of transparency must open its soul to the community; it only suggests that, if community members are comfortable with the process, they may not agree with a particular decision or be happy that the school needed to make it, but they will be less likely to respond with the threat of a lawsuit or oppose the decision.

No one would disagree that the defense of legal challenges wastes countless hours of time and an abundance of financial resources that would

far better serve the education of students. Proactive preparation taken prior to the decision to institute change will help create a comprehensive defense thereby limiting the time and resources in the event of a legal action. More importantly, careful advanced preparation creates a disincentive for the allegedly aggrieved parties from ever considering entering into such a process.

In preparation for rightsizing your school, therefore, it is best to first review school documents relevant to the employment relationship. Documents considered are those that create a relationship between the employee and the school individually — those that establish the rules that apply to all employees, set procedures and policies followed by the school, and describe

school so decisions in the best interests of the school can be implemented.

Many schools include "employment at will" language in their employment agreement. Schools often mistakenly believe that such language safeguards them from a lawsuit and "allows them to terminate an employee for any reason or no reason." The theory of "employment at will" is that a school is not obligated to provide a reason for the termination. However, a terminated employee is still able to respond to the termination with a claim of discrimination, wrongful termination, or breach of contract.

When drafting employment agreements, it is judicious to establish a time frame for the employment period, a clear notice that there is not a promise

**IN PREPARATION FOR RIGHTSIZING YOUR SCHOOL, THEREFORE, IT IS BEST TO FIRST REVIEW SCHOOL DOCUMENTS RELEVANT TO THE EMPLOYMENT RELATIONSHIP.**

and outline benefits and other obligations of the school to the employees.

## **THE EMPLOYMENT AGREEMENT AND OTHER DOCUMENTS**

The employment agreement, offer letter, or other documents drafted as the description of the relationship between the employee and employer are of great significance in the procedure to terminate. For this reason, it is prudent to carefully review the agreements prior to dissemination, but, most certainly, prior to terminating any employee's job. Since many schools will consider downsizing staff in the coming year, it is wise to ensure that these agreements provide maximum flexibility to the

of continued employment following this term, and a clear method for changing the relationship prior to the end of the term. To provide maximum flexibility, the contract should allow for termination or modification of the job prior to the end of the agreement, and the school should retain sole discretion over the decision to change the relationship.

Likewise, the reasons given for such a decision should be broad and within the sole discretion of the school. In addition to performance, reasons could include change in curriculum, organization of the school, staffing needs, or financial considerations. Many schools have included "enrollment" as a reason for dismissing staff



members. While this is a possible factor, it is wise to avoid limiting the reasons to this factor. Enrollment is a subjective decision made at the sole discretion of the school. Exposing the decision to scrutiny by the employee or a court is less than opportune.

It is also helpful to articulate the types of changes that can occur. For example, the school should reserve the right to "terminate the employment relationship or modify the job, hours of work, or schedule of the employee." In addition, the agreement should confirm that, upon termination, all salary and benefits will end upon the last date of employment. Upon modification, benefits will be provided consistent with those to which the employee qualifies.

### THE EMPLOYEE HANDBOOK

The other relevant documents in need of evaluation are the employee handbook and other policies and procedures. Schools should review documents that establish rules in order to make certain that the rules reflect

the practice at the institution and that they provide sufficient flexibility to make employment decisions. Like the employment agreement, the handbook should include language allowing for termination or modification in assignment, hours, or schedule. Likewise, the handbook should confirm that, upon termination, all benefits and salary end and, upon modification, the benefits amend consistent with the eligibility of the employee.

When making the ultimate decision to reduce staff, it is best to establish a strategic plan of action prior to discussing the issue with employees. Remember, employees may raise claims for discrimination, breach of contract, or other possible misrepresentation claims. To better avoid and defend against any such claim, schools must establish nondiscriminatory strategies that are drafted in consideration of the limitations that may be created by various written documents. Reasons for reductions at this point in time will most often be based on the tighten-

ing economy. However, the selection of employees for job termination may be based on a wide range of issues including performance, reorganization of staff, or changes to curriculum. Certainly enrollment may impact the need for these changes, but it is most likely not the only basis. Therefore, when describing the bases, it is helpful to consider and explain all of the reasons such change is being implemented. This provides the school with a wider range of defense in the case of a challenge to one or another of the explanations.

When determining which employees to select for purposes of reduction, there are some general cautionary comments. If terminating a teacher or staff member based on cost savings, and the school bases the selection on the highest compensated employees, it's important to determine if your choices have an adverse impact on employees 40 years old or older. The older, more experienced members of the work force are generally those who are more highly compensated as a result of longevity at school. Review the complete group of employees selected to determine if there is an adverse impact on employees in protected categories. If the decisions are based on performance, make certain to review the written and oral communications with the employee to determine whether support exists to justify the termination.

By their nature, independent school communities are caring and supportive communities. Letting employees go is never easy, and it's particularly hard in an educational environment. But schools can take solace in knowing that downsizing the staff can also be a matter of rightsizing the school — which is to say, adjusting the school to the realities of the economy and sharpening the focus on the school's mission. It is, in other words, an opportunity to make the school stronger for the future.

*Caryn Pass is an attorney at law with Venable, LLP. She specializes in the representation of independent schools.*

ARC


Architectural Resources  
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REPRESENTATIVE CLIENTS

Cincinnati Country Day School  
Deerfield Academy  
Episcopal School of Dallas  
Graland Country Day School  
Greenwich Country Day School  
Groton School  
Holderness School  
Hotchkiss School  
McCallie School  
Milton Academy  
Noble & Greenough School  
Northfield Mount Hermon  
Phillips Exeter Academy  
Portsmouth Abbey School  
St. George's School  
St. Mark's School  
St. Paul's School  
St. Sebastian's School  
The Roxbury Latin School  
Worcester Academy

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Pressly Hall  
Chattanooga, TN

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## **Balancing Technological Power and Peril: Social Media and Independent Schools**

*Prepared for NAIS by Caryn G. Pass, Heather J. Broadwater, and Grace H. Lee<sup>1</sup>*

A “Google” search for “teacher Facebook allegations” yields 580,000 results in .22 seconds. “Student internet bullying” yields 1,980,000 in .21 seconds. “Schools using social media” yields 188,000,000 results in .48 seconds.

These simple searches confirm what independent schools across the country already see: social media can present schools with previously unimagined ways to connect with students, parents, alumni, employees, and other key constituencies. Yet, the proliferation of social media also provides new and easier paths and venues for age-old problems ranging from poor communications sent in haste to violations of boundaries set by policy or even by law.

While social media have existed in various forms for decades, the rights and responsibilities of those communicating via social media, especially with respect to the rights of those to whom their communications pertain, remains an emerging area of the law. Regulators, legislators, and courts have just begun to formulate law and policy that will impact schools’ rights regarding expectations and boundaries for the social media conduct of their students, employees, and other constituencies. With this still-developing landscape, what can independent schools do to harness the power of social media while limiting the potential legal exposure created by social media?

### **Embrace the Permanence of Social Media and its Kin**

First, independent schools must recognize and accept that social media are here to stay. Over the past few years, social media issues in the school setting have become increasingly complex. When Facebook, Twitter, and similar sites primarily were used by a few early adopters for strictly social interactions, many schools gave little thought to how these sites could impact their environment. Before long, schools began seeing occasional issues in which students or employees used social media sites to harass or bully their peers, teachers, or administrators. As the popularity of these sites skyrocketed, schools suddenly faced questions about the appropriateness of interactions or “friendships” between school employees and students, parents, or other employees. Schools also found themselves confronting the question of whether they could or should hold students, parents, and employees accountable for their actions and statements via social media sites accessed after-hours and without the use of school systems.

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The first wave of social media issues in the school environment seemed to temporarily subside as many schools implemented policies prohibiting employees from having social media connections with students and policies holding students, parents, and employees accountable for their social media activities that caused disruptions within the school. As the popularity of social media has grown and its use has become a part of everyday life for so many members of school communities, it also has become increasingly difficult for schools to simply ‘wall off’ social media. Indeed, many educators are enthusiastic about ways that they can use these new tools to engage and challenge students. Similarly, many development and admissions officers are excited about the use of social media to enhance communications with their target audiences. It is clear that interest in and use of social media by students, parents, employees, trustees, and other members of school communities will continue to be strong and growing. While the systems and the equipment will continue to evolve, with new sites and devices competing with or even replacing today’s Twitter and iPads, what will remain is an ever-expanding ability to interact and communicate with one another using technology instead of face-to-face interactions. The potential risks posed by social media similarly will continue to expand and develop. The good news is that the opportunities to harness social media for legitimate educational and operational purposes also will continue to grow.

### **Assess the School’s Culture with Regard to Social Media**

After accepting the permanence of social media, albeit in constantly evolving forms, each independent school should conduct a thoughtful, informed assessment of the risks and rewards of social media use within the context of the individual school’s unique culture and environment. Social media policies are not and should not be “one size fits all.” A policy that may be right for one school could be absolute culture shock for another. A military academy may find that its employees and staff have no objection to a policy that simply forbids communications between employees and students via social media. A school focused on creativity, liberal arts, and freedom of expression might face a minor revolt if it attempted to adopt that same policy. While schools can and should learn from how their peers have addressed social media issues, they must tailor the policies to fit their schools, recognizing that each school is unique.

### **Consider Your Constituents**

Developing a custom approach to social media begins with identifying the school’s constituencies and the expectations they hold. In considering issues related to social media, schools understandably often think first of parents’ expectations that schools will protect the safety and privacy of their students. Schools may become so entangled in trying to find ways to protect students from the harms that may occur through social media that they fail to recognize that the same parents also expect the school to create an engaging learning environment and to prepare students for the realities and tools of modern life – which includes harnessing the power of social media. Similarly, schools may become so focused on the ways that students may misuse social media that they miss opportunities to meet students’ expectations that their independent school will challenge them with the most current technology and tools.

In addition to identifying those constituents with an established tie to the school, such as employees, students, trustees, alumni, and donors, a school also should consider possible

constituencies without a current relationship with the school, such as prospective parents, neighbors, and potential donors. Starting with a list of constituencies and their expectations can help schools better imagine both the risks and rewards associated with the use of social media, and can help the school begin to develop and articulate its own expectations of those same constituencies.

### **Risks and Rewards of Social Media**

Next, a school should consider, within the context of the expectations between the school and the constituent groups, the potential risks and rewards associated with social media use. As noted previously, a few simple internet searches can provide dozens of examples of both the risks and rewards associated with social media use by students and school employees. Risks can include violations of appropriate student-teacher boundaries; improper board involvement in daily school business; sexual or other harassment between students, between employees, or between employees and students or parents; breaches of privacy and confidentiality; cyber-bullying; and even identity theft. Rewards can include encouraging deeper and more frequent communications among students about coursework; enhancing teachers' abilities to evaluate the subject mastery of a student who is shy in class; promoting faster and more accurate communications with parents and other supporters; and keeping students more engaged by employing creative means of presenting course material.

When many schools consider their risks, legal liability is often foremost in their minds. As previously noted, liability and rights associated with social media use is an emerging area of the law. When social media issues first began to arise in the school environment, few, if any, jurisdictions had statutes or regulations requiring schools to take specific actions regarding conduct via social media, unless the conduct triggered a professional's obligation to report suspected child abuse, neglect, or sexual abuse. When schools received allegations that one student or employee had harassed, bullied, defamed, or otherwise harmed another member of the school community via social media, negligence and breach of contract were the two primary sources of potential liability. Under a negligence claim, generally, the person harmed (or his/her parent) would need to establish that the school had a duty to him/her, that the school failed in this duty, that the person was harmed, and that the school's failure to perform its duty caused the harm. For example, if a school learned that a teacher had attempted to set up a sexual encounter with a student via Facebook, but failed to take action, and then the teacher successfully set up an encounter with that student or another, the student harmed could claim that the school had a duty to take action against the teacher, and that its failure to do so caused the harm to the student. As another example with the same facts, if the school's enrollment contract or admissions materials promised a safe and appropriate learning environment and the school failed to take action against the teacher to prevent the harm to the student, the student could bring a breach of contract claim against the school, alleging that it failed to meet its promises under the contract. In some cases, the parent or student might elect against filing a claim because of the potential publicity, but might use the harm as a reason to refuse to pay the tuition and fees required under the enrollment contract. The school would be forced to either forgo the tuition and fees or bring a contract enforcement claim against the family to recover the tuition.

Schools similarly may face negligence claims from employees or other constituents who can argue that the school failed to perform some duty to protect them from a harm that arose through

a person's use of social media. The grounds for such claims are expanding in some jurisdictions, as legislatures and regulatory agencies are creating laws that require schools that fall within the coverage established by the legislation or regulation to establish and enforce anti-bullying policies. Depending on the jurisdiction and the law, the requirements may be mandatory only for public schools. Independent schools may find it prudent to hold themselves to the same standard as their public counterparts, even if not required to do so by the letter of the law. At the same time, agencies, legislatures, and the courts have taken actions that may limit a school's ability to place restrictions on, monitor, or take action in response to social media conduct by students and employees. At least one jurisdiction has ruled that an employer may not take disciplinary action against an employee for off-duty comments via social media, even though the comments were disparaging to the employer and its customers. Indeed, the National Labor Relations Board, at the time of this article, is arguing that such activity is protected speech under the National Labor Relations Act, even when the activity is carried out by non-union employees. While this case did not involve a school, it does raise concerns about a legal tide that seems to be raising the expectation that schools will intervene to protect students, while simultaneously lowering its ability to monitor and address employees' conduct via social media. A school exploring the possible risks and rewards associated with social media should consult legal counsel to review the applicable laws of the school's jurisdiction, as well as to discuss the overall legal landscape and potential legal exposure for the school based on social media use by or affecting its employees and students.

Indeed, the National Labor Relations Board, at the time of this article, is arguing that such activity is protected speech under the National Labor Relations Act, even when the activity is carried out by non-union employees. While this case did not involve a school, it does raise concerns about a legal tide that seems to be raising the expectation that schools will intervene to protect students, while simultaneously lowering its ability to monitor and address employees' conduct via social media. A school exploring the possible risks and rewards associated with social media should consult legal counsel to review the applicable laws of the school's jurisdiction, as well as to discuss the overall legal landscape and potential legal exposure for the school based on social media use by or affecting its employees and students.

### **A Balancing Act: Risks v. Rewards**

Once a school has identified potential risks and rewards, it must weigh those within the context of the constituents' expectations and the school's risk-tolerance. This includes considering not only the potential risks and rewards associated with restricting, allowing, or requiring use of social media, but also the likelihood that those risks or rewards will manifest, and the significance or severity of their impact if they do manifest. For example, a school's creative writing teacher may wish to require each student to assume the identity of and create a Facebook profile for a historic literary figure, for use in interacting via Facebook with other students in their assumed roles. The teacher's expectation is that the students will benefit by being encouraged to learn more about their assigned author and to exercise creativity in trying to assume the author's personality in Facebook interactions with other students. The school must recognize the possibility that a student will use this assumed identity or this mandatory presence on Facebook to bully or harass another student who has been made a captive audience by the assignment. Similarly, once a social media connection like this is established, it could be used by

the teacher to pursue inappropriate contact with a student. While the school may not expect this type of misconduct to occur frequently – or at all – it may conclude that the severity of this conduct, if it were to arise, is so severe that it would override any potential rewards of the social media communication, regardless of how remote the likelihood that it actually would occur.

In identifying potential risks and rewards of the uses of social media, schools can be vulnerable to thinking about these issues in a vacuum – focusing solely on the risks and rewards present in communications via social media and ignoring the potential for the same risks and rewards if the communications were taking place via traditional means instead of social media. A school should be mindful of this potential trap, and should be sure to compare both risks and rewards to those that otherwise would exist without the communication through social media. The assessment of whether to promote or restrict certain uses of social media should consider the relative advantages and disadvantages of communication via social media compared to alternatives. In addition, they should consider whether communicating through social media – or through a particular type of social media versus another – makes it more or less likely that the school will be able to identify, address, or prevent some of the risks that might arise.

Having assessed and weighed the potential risks and rewards, the school also can explore whether there are ways to mitigate the potential risks while minimizing any loss of the potential rewards. For example, if the school likes the idea of challenging students to assume the personalities of historic literary figures but is wary of requiring students to communicate via Facebook, an environment over which the school has virtually no control, the school could explore alternate venues that offer the school more control. The school's own systems may provide an opportunity for a similar experience within a more controlled environment. Students may not have as much enthusiasm for school-controlled media as for outside sites like Facebook. That being said, the 'coolness' factor for outside sites likely fades as adults invade the sites for their own personal use and for school and work purposes. Where the school cannot control the environment, it may be able to establish reporting or monitoring systems. At the very least, a school should ensure that students and other constituents recognize that conduct and reporting policies regarding bullying, harassment, and other similar issues apply to social media, just as they do to traditional communications and interactions.

## **Implementation and Communication**

To ensure that the school's social media policies are effective, the school must communicate the parameters and expectations to members of the school community. While social media issues are a popular topic of discussion, many parents, teachers, and administrators have not given much consideration to the significant opportunities and challenges presented by the use of social media. Additionally, many schools have adjusted their approaches to social media as the technology has become more ubiquitous and attractive as a means of meeting educational or operational objectives. Students, parents, teachers, board members, alumni, donors, and other constituents should understand the school's approach to social media. The manner and content of the communications regarding these parameters should depend on the population. An "acceptable use" policy, either as a stand-alone document or part of an employee handbook, is an appropriate means of communicating with employees about this issue. A simple disclaimer or agreement on the school's Facebook page or e-mail messages through a listserve may be more



appropriate for communicating the relevant aspects of the school's expectations to alumni. For example, alumni may not need to know the school's full policy regarding social media, but should be informed if the school enforces trademark or copyright restrictions on the use of its logo, name, or images. Most importantly, each constituency should know whom to contact in the event of suspected or actual violations of the school's social media policies.

To minimize the potential risks of social media use while also maximizing the potential rewards, schools should not rely solely on reports from others to identify harms arising because of social media. That is, a school should not assume that all communications through social media are appropriate and acceptable simply because no one has complained. Instead, the school should create a framework for monitoring adherence to the established parameters and for identifying potential problems. Again, the appropriate framework will depend on the school's unique culture and relationships with its constituents. The school's framework for addressing social media issues also should include a process for responding to issues when they do arise.

While no school can imagine and prepare for every situation, schools should anticipate and develop plans in advance for how they will handle inquiries or allegations from anonymous sources, parents of students at other schools, and law enforcement, among others. Similarly, many schools have not considered that an allegation of inappropriate social media conduct by a student may come to the school from someone who is not associated with the school, such as the parent of a student at another independent school. For example, an outside parent may contact the school to report that the school's student "sexted" (sent a sexual photo or movie as a text message) their student, or "sexexploited" (threatened to reveal embarrassing information if the student did not engage in certain sexual activity) their student. The fact that the conduct occurred outside the school's property, outside school hours, without use of its systems, and without affecting any of its other students does not necessarily protect the school from liability. If the school fails to take action about the allegation and the student then sexually harasses or otherwise harms one of its students, the harmed student could claim that the school was negligent in not taking action based on the allegations of the outside student.

Unfortunately, many schools also have not given advanced thought to questions like whether to allow police to interview a student and whether to notify parents before allowing police to interview a student. These schools then panic and/or make decisions they regret because they are caught in reactionary mode when a police officer is standing in the head of school's office requesting to meet with a student.

The number and complexity of issues that can arise out of use of social media in the classroom or by members of the school community can make it tempting to simply ignore the whole issue and hope that nothing goes wrong. Experience has shown that these issues are not going away and that failing to consider and plan for them only makes them more difficult to address when they do arise at any given school. A school that has taken proactive steps to create social media policies and processes that fit the school culture and environment will be better able to prevent social media problems and to address these problems when they do arise, while also putting the school in the best position to take advantage of the potential benefits of social media.



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## Ensuring the Safety of All Children: A New Era in Child Abuse Reporting

By Grace Lee, Caryn Pass and Heather Broadwater

In the wake of highly publicized accusations of sexual abuse of students by school employees, and the firestorm of questions and skepticism regarding how school officials responded, independent schools across the country are closely examining their policies and procedures for detecting, reporting and responding to concerns of child abuse. While states have mandatory child abuse reporting laws, most school officials would agree that following the minimum state requirements may simply not be enough. In this new era of child abuse reporting, independent schools must be more vigilant than ever to ensure that they have followed appropriate steps to best protect their students and their schools.

### Reporting Policy

Independent schools should include a clear policy in their faculty and staff handbooks that communicates standards and obligations for employees to report suspected child abuse and/or neglect of a student. The policy should reflect the state's requirements regarding mandatory reporting of child abuse and neglect, and include clear guidance for a faculty or staff member who has reason to suspect child abuse or neglect of a student. The policy should specify that employees must report concerns of abuse or neglect by a child's parent or other adult – including an employee or representative of the school. Most importantly, the policy should identify one or two designated school officials who serve as central points of contact for reports to be received within the school. Officials designated to receive concerns of abuse or neglect should be trained and prepared to assist an employee in making a report to the appropriate state agency or law enforcement. In addition, designated officials should follow any internal procedures established by the school. By collecting concerns and reports to a central point of contact, the school is in a better position to collect and piece together information from various sources that might provide context or relevance to an incident that, on its own, would seem innocuous. The point of contact may also have additional information or insight into a particular family or situation, which helps the school determine a strategy to act in the best interest of the student.

Many states impose individual reporting obligations for any employee of the school, which means that an employee is required to report suspected abuse or neglect directly to the state agency. Employees should be reminded that reporting an incident or concern internally does not alleviate the individual reporting obligation. For example, if an employee cannot make contact with the designated point of contact within a reasonable amount of time, or if the employee chooses to make a report directly to the agency or law enforcement, the policy should allow for the employee to make such direct reports.

### **Internal Reporting Procedures**

In addition to a published reporting policy, independent schools should create internal guidelines for detecting, reporting and responding to allegations of abuse or neglect. As part of the internal reporting procedure, any employee who receives a report of suspected abuse or neglect should immediately notify the Head of School or the school administrator who has been designated to receive such concerns. The administrator should then work together with the employee to report the information to the state agency and/or law enforcement. Before a report is made, the school should consider whether the student is in imminent danger, or will likely be in imminent danger, once the student's parents and/or the accused are informed that a report has been made. If a student would be in imminent danger, the school should determine a strategy to best protect the student, which may include keeping the student at school or seeking assistance from law enforcement. Thoughtful consideration should be given to determine whether the school should notify the parents, or the accused, of the report, and the timing of any call or meeting with the parents. When a report is made, the school should obtain the name and title of the individual receiving the report. Even if an oral report meets requirements under state law, the school should submit a written report. A copy of the report and any notes should be maintained by the school in a separate, confidential, permanent school file.

If the alleged conduct involves an employee or representative of the school, the school should conduct its own internal investigation and take any necessary disciplinary actions including possible termination of employment. The school should carefully consider legal risks and reputational harm that may result from its response to an allegation of misconduct by an employee or representative of the school.

### **Training**

All faculty and staff of the school should receive training to ensure that they understand the school's policy and procedures on reporting suspected abuse or neglect. Employees should also be trained on maintaining appropriate boundaries with students while on and off school grounds. Such training should encourage employees to detect and come forward with any concerns of suspicious behavior.

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## A RABBI, A PRIEST, A MINISTER AND A TEACHER WALK INTO A CLASSROOM... WHO IS COVERED BY THE "MINISTERIAL EXCEPTION"?

By Heather Broadwater, Caryn Pass and Grace Lee

In a recent unanimous decision, the United States Supreme Court squarely applied the "ministerial exception" to bar claims of employment discrimination and retaliation brought by certain employees against religious organizations, including religious independent schools. In this case, a teacher who was fired after threatening to bring a claim of discrimination was deemed to be a "minister" and, thus, not protected by anti-discrimination laws. Based on the principles of separation of church and state, and the First Amendment rights of religious entities, the Supreme Court's decision strengthens the ministerial exception and provides religious schools with broader protections against claims of workplace discrimination and retaliation.

### Background

On January 11, 2012, the Supreme Court issued an opinion in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* exempting religious organizations from compliance with EEOC discrimination laws under a new application of the "ministerial exception." The case involved a claim of discrimination and retaliation brought by a teacher at an Evangelical Church and School under the Americans with Disabilities Act ("ADA"). The teacher attempted to return to work after disability leave related to narcolepsy, but was told her position had been filled. Although she provided a doctor's note clearing her to return to work, the church would not restore her to her position, and offered to pay a portion of her health insurance premiums in exchange for her resignation. The teacher refused to resign and threatened to take legal action. She was then terminated on grounds of "insubordination and disruptive behavior" and for the damage she caused to her "working relationship" because she had threatened a lawsuit.

The teacher filed a charge with the EEOC claiming termination in violation of the ADA. The EEOC brought a suit against the employer on her behalf claiming she had been fired in retaliation for threatening to file a lawsuit.

### Courts Decision

The Supreme Court held that under the 1st Amendment's Free Exercise and Establishment Clause, the "ministerial exception" barred employment discrimination suits brought by a "minister". The Court declined to adopt a firm definition of "minister" and was reluctant to "adopt a rigid formula for deciding when an employee qualifies as a minister," however it did make clear that the ministerial exception is not limited to ordained religious leaders or the head of a religious organization.

In this case, the teacher's primary responsibilities were non-religious. She taught non-religious classes the majority of the week, but taught religious classes four days a week for 30 minutes, attended chapel with her class once a week, lead class prayer three times a day, and twice a year lead chapel services. She was also labeled a "called" teacher by the church, as opposed to a "lay" teacher. The church considered "called" teachers to be religious ministers and required them to complete a course of theological study, pass an oral exam by a faculty committee, and be approved by their local church district before they are considered "called". "Lay" teachers, unlike "called" teachers, were contract workers and are not commissioned by the church. "Lay" teachers were not required to complete any theological coursework or to even be Lutheran. When she took leave due to her illness, her position was filled with a "lay" teacher, who performed the same tasks.

In deciding that the teacher was a "minister" in this case, the Court considered all the circumstances of her employment weighed many factors, including: (1) the church held the teacher out as a minister, (2) the teacher's title reflected religious training followed by a formal process of commissioning, (3) the teacher held herself out as a minister of the church, and (4) the teacher's job duties reflected a role in carrying out the message and mission of the church.

### **Impact of Decision on Independent Schools**

This decision has the potential to have wide impact on religious independent schools. The Court indicated it would defer to the parochial school to define internally who would be considered a "minister," and the Court would be highly reluctant to challenge that claim. The Court has indicated it will defer to parochial schools to define which employees are considered ministers, regardless of the extent of their religious responsibilities or involvement or the amount of time spent on religious responsibilities. The Court's reluctance to get involved in decisions made by the church regarding ministers could potentially be extended beyond EEOC discrimination to include other lawsuits brought by employees against religious organizations.

### **"Ministerial Exception" Not a Guaranteed Bar of EEOC Claims**

It is important to note that while this decision is a significant barrier for employees bringing a claim of workplace discrimination, it does not necessarily bar all lawsuits. Instead it provides a defense to EEOC claims brought by employees or former employees who qualify as "ministers," which will be determined on a case-by-case basis.

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## Will You Be My "Friend"? Legal Challenges in the Changing Social Media Landscape

By Heather Broadwater, Caryn Pass and Grace Lee

As the number and popularity of social media tools continue to increase, the task of harnessing the power of social media tools while minimizing potential risks remains a significant challenge for independent schools. Teachers, staff, students, alumni, parents, prospective students and their families, donors, professional peers, and other constituents expect schools to create pathways for connection via social media. Independent schools are working to incorporate social media tools in a way that is consistent with their missions, philosophies, and cultures, and that maintains the standards of safety, privacy, professionalism, and decorum expected by various constituencies. As part of this effort, schools are developing, implementing, revising and reissuing social media and acceptable use policies to guide community members on the use of these tools. Much like social media itself, the social media legal landscape continues to evolve, with state legislatures and a federal agency entering the fray.

### Social Media as an Employer-Employee Issue

It may be news to many independent schools that they are within the jurisdiction of the National Labor Relations Board (NLRB), and that the NLRB has issued policy guidance applicable to school social media and acceptable use policies. Despite widespread belief that the NLRB and the law that it enforces, the National Labor Relations Act (NLRA) are relevant only to employers with unions, the NLRA applies to most employees in private-sector workplaces. It does not cover public school employees. The NLRB's authority over religious organizations, including religious schools, has been a matter of dispute. The NLRB currently says that it "will not assert jurisdiction over employees of a religious organization who are involved in effectuating the religious purpose of the organization, such as teachers in church-operated schools." Whether it can assert jurisdiction over religious organization employees who are not "involved in effectuating the religious purposes of the organization" and how that involvement is defined are at issue in current court cases.

The NLRB is interested in social media policies and employee disciplinary matters related to social media because employees may use social media as a platform for engaging in collective action regarding the terms and conditions of their employment. This type of "concerted activity" is protected by the NLRA, even in non-unionized workplaces. In 2011, the NLRB pursued a high-profile charge against a non-profit that dismissed several employees after they criticized another employee via Facebook in a manner that the employer considered harassment. An administrative law judge agreed with the NLRB that the employees' communications with each other via Facebook, in reaction to a co-worker's criticisms of the manner in which employees performed their jobs, were protected activity, and that the employer violated their rights under the NLRA in firing them.

As it has reviewed and pursued social media cases against employers the NLRB has issued two reports describing these social media cases. The most recent report highlights two main



points: (1) “employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees;” and (2) “an employee’s comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.” The NLRB notes that it is interpreting the NLRA as it applies to communication tools that did not exist when the NLRA was written, and that this remains a developing area of the law.

### **Social Media as a Matter of State Law**

Like the NLRB, state governments are formulating policy with potential implications for the use of social media tools by independent schools and their employees.

The State of Missouri directly addressed the question of whether teachers should be interacting with students via social media. Missouri’s legislature attracted widespread media attention – and criticism – when it passed a law that appeared to prohibit public school employees from entering “friendships” via Facebook or connections via other social media with their students. After the Missouri State Teachers Association challenged the law, the State replaced the controversial measure with a requirement that all public school districts enact social networking policies by March 2012. While these provisions currently apply only to public schools, they reflect a growing concern about online interactions between students and school employees, and an expectation that school administrators take a more proactive role in considering the possible uses and misuses of social media tools within the school community.

Other states have enacted provisions that may have indirect implications for independent school social media policies. In the wake of tragedies resulting from online and in-person bullying, the vast majority of U.S. states have enacted anti-bullying legislation and/or regulations. In some states, the provisions are mandatory only for public schools. However, they reflect a growing belief that schools have an obligation to protect students from bullying, whether in the physical or digital realm. Even where independent schools are not covered by anti-bullying laws, parents may claim that a failure to protect students from online bullying is a breach of the enrollment agreement or negligence by the school. Anti-bullying measures are relevant to social media policies because of the duties they create for school employees to intervene when they know – or should know – about bullying conduct. School employees who have online friendships with students or who interact with students in online spaces may have access to posts that constitute or reveal bullying. Anti-bullying provisions make it clear that social media policies need to consider not only what social media may reveal about school employees, but also the obligations that may arise based on the information available to school employees via social media.

### **The Takeaway**

Social media is here to stay. It is an attractive tool for employees and other members of the independent school community, and will only grow in its attractiveness and importance to these constituencies. Social media also creates potential legal exposure, which schools must carefully weigh against the pressure to use social media and the possible related benefits. Independent schools that do not have social media policies should be considering the risks and rewards of social media, and how to appropriately balance those factors in light of applicable laws. Independent schools with social media policies should review their policies in the context of evolving law, community expectations, school culture, and school risk tolerance to ensure that these policies continue to appropriately balance the risks and rewards of social media tools with school culture.

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CREATE A SAFE ENVIRONMENT  
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## ONE PAYMENT, TWO PAYMENTS, RED PAYMENTS, BLUE PAYMENTS:

### Compliance with the Truth in Lending Act Obligations in the Drafting of Enrollment Agreements.

By Suzanne Garwood and Heather Broadwater

*With families facing increasing financial pressure, many independent schools have worked to offer more flexibility in the payment of tuition and fees. Schools should be aware that the payment plans they offer may be considered loans under the federal Truth in Lending Act, and may trigger obligations to provide parents with consumer disclosures.*

When asked to describe their schools, few independent school leaders would say "creditor." Yet, "creditor" is the definition that the Federal "Truth in Lending Act" (TILA) applies to many independent schools, based on payment plans that allow parents to defer the payment of tuition. When schools meet the definition of "creditor," they may be required by federal law to provide consumers with standardized disclosures summarizing the cost of credit extended. Therefore, it is critical that independent schools understand how TILA defines "creditor," the disclosure obligations that attach when tuition payment plans qualify as "credit" under the TILA<sup>i</sup>, and the penalties for failing to provide the required disclosures.

#### Is Your School a Creditor?

"Creditors" are persons or entities who regularly extend<sup>ii</sup> "credit" of \$51,800<sup>iii</sup> or less that is either subject to a "finance charge" or that is payable by written agreement in more than four installments. For purposes of this definition, "credit" means "the right to defer payment of debt or to incur debt and defer its payment."<sup>iv</sup> A "finance charge" is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.<sup>v</sup> Below we briefly explore what each of these definitional elements means in the context of tuition payment plans.

**STEP #1: DETERMINE IF YOU DEFER TUITION PAYMENTS.** The school needs to determine the date on which tuition is due and payable (e.g., the beginning of the school year). If a school permits parents to pay tuition after the date that tuition is due and payable, then the school must continue on to "step #2" to determine whether this deferral qualifies as "credit." If a school does not permit parents to pay tuition after the due date, then the analysis stops here. The school is not offering credit and it does not qualify as a creditor for TILA purposes.



**STEP #2: DETERMINE IF YOU CHARGE A FINANCE CHARGE.** Generally speaking, a finance charge includes any amount that parents must pay because the parents have deferred the payment of tuition. Thus, a fee or charge paid by parents who pay tuition on the due date does not qualify as a finance charge. Examples of charges that are not finance charges include charges for books, lunch plans and fees. In contrast, an example of a fee that does meet the definition of a finance charge is a fee charged to those parents to use a third-party service to make the deferred tuition payments. If a school imposes a finance charge then the analysis stops here. The credit is covered by TILA, the school qualifies as a creditor and it must provide required disclosures. This conclusion is true irrespective of the number of payments that the parents make. If the school does not impose a finance charge on the tuition deferment, it must proceed on to “step #3” of the analysis.

**STEP #3: DETERMINE THE NUMBER OF PAYMENTS.** If the school does not impose a finance charge on the deferred payments, then it must determine the number of payments that the parents will make. Many schools offer two- and ten-payment plans. Because TILA applies only to plans that have more than four payments any two-payment plans (without a finance charge) are not covered by TILA. Ten-payment plans, however, irrespective of whether they are subject to a finance charge will be covered by TILA and the school will need to provide disclosures.

Thus, in sum, a deferral of tuition can become credit in one of two ways. First, the school can impose a finance charge; or, second, the school can permit the parents to repay in more than four installments. If the payment plan meets either of these criteria, then it will constitute credit under TILA and the school must provide the required disclosures.

#### **What Does an Independent School Need to Disclose if it is a “Creditor?”**

Assuming that the school qualifies as a creditor and the tuition payment plan it offers its parents qualifies as credit, then the school must provide the parents with clear and conspicuous disclosures of the cost of that credit in a form that the parents may keep (which may be either in paper or electronic) before consummation of the loan. “Consummation” is not defined under TILA; however it is generally understood to mean the time at which the borrower contractually obligates himself to the terms of the loan.<sup>vi</sup> Generally speaking, this time will not include any rescission periods. The reason for this is because the goal of the law is to act as a shopping tool for the borrower. Accordingly, for certain mortgage loans, TILA makes clear that the rescission period follows both consummation and the providing of loan disclosures; and, while this provision does not expressly apply to tuition loans, the analysis should be the same.<sup>vii</sup>

The content of the disclosures that schools must provide to students is as follows:

- **Creditor** – If the school is making the loan in its name, the school must identify itself as the person making the disclosure.
- **Amount Financed** – The school must disclose the amount of credit provided to the student or on the parent’s behalf along with the following descriptive sentence: “The amount of credit provided to you or on your behalf.” Typically, this amount would equal the amount of tuition due, and may also include any fees that the school is charging, but that are not finance charges.
- **Note** that if the school is offering financial aid, the amount of the aid may affect the amount financed. Said differently, if the amount of financial aid is known at or prior to the signing of the tuition contract, then the school should reflect the amount of the financial aid as a “credit” to the total of the amount financed. For example, if the school’s tuition is \$10,000 and the parent receives \$1,000 in aid, then the amount financed (or amount of credit provided) is \$9,000.

- **Itemization of Amount Financed** – The school may either provide a detailed description of the items that constitute the amount financed or ask that the parent request a copy. If the school opts to provide this disclosure, it must be separate from the other required disclosures.
- **Finance Charge** – The school must disclose the cost of credit as a numerical value using the term “finance charge” and a brief description, such as “the dollar amount the credit will cost you.” This disclosure must be “more conspicuous” than the others. To make the disclosure more conspicuous, the school can highlight this disclosure in bold.
- It is not required to use a larger font size.
- **Annual Percentage Rate** – The school must disclose the cost of credit as a percentage using the term “annual percentage rate” and a brief description, such as “the cost of your credit as a yearly rate.” Essentially, this disclosure is the disclosure of the finance charge as an annualized rate. And, similar to the finance charge disclosure, this disclosure must be “more conspicuous” than the others.
- **Payment Schedule** – The school must disclose the number, amount and timing of payments scheduled to repay the obligation. For example, the school may disclose a payment schedule of nine payments of \$1,000, each payment due on the first of the month.
- **Total of Payments** – The school must disclose the total of payments using that term and a descriptive explanation such as “the amount you will have paid when you (parents) have made all scheduled payments.” The total of payments equals the total of the amount financed plus the finance charge as disclosed according to the requirements set forth above.
- **Demand Feature** – The school must disclose if the loan has a demand feature (meaning that the school can require repayment prior to the term of the loan).
- **Prepayment Fees** – The school must disclose: (i) whether the loan contains a fee for prepayment of the loan prior to maturity; and (ii) a statement indicating whether the borrower is entitled to a rebate of any unearned finance charge if the borrower prepays the loan prior to maturity. A prepayment fee requirement would be rare in a school loan, and a school should consult state laws to ensure it has the authority to impose such a fee.
- **Late Payment** – The school must disclose if the loan imposes a fee upon a borrower’s late repayment of the loan. Again, the school should consult state laws to ensure that any late payment fees it imposes are consistent with state law.
- **Total Sale Price**. The school must disclose the total cost of the tuition including any downpayment. Thus, if a student is required to give a downpayment, the amount of that downpayment should be subtracted from the total “sale price” or amount of tuition due.

Although the disclosure obligations may appear complex, Regulation Z, the implementing regulation to TILA, provides model forms for providing these disclosures. Use of these model forms constitutes a safe harbor in litigation. However, schools must ensure that the numerical values that constitute the actual prices contained in the disclosures are accurate. Software packages are available to assist schools with calculating these values.

#### **What Are the Penalties for Failing to Provide Disclosure?**

TILA provides for a private right of action (enabling parents to bring a suit against the school), as well as criminal penalties. Aggrieved borrowers (parents) can sue schools that fail to provide disclosures, or who provide disclosures that are inaccurate, for statutory and actual

damages in an individual or class action. Successful plaintiffs are entitled to attorney's fees and costs.

The amount of statutory damages available in an individual action is capped at \$2,000. Class-action damages are capped at \$1 million. Parents must bring action within a one-year statute of limitations.<sup>viii</sup>

Given the potential penalties for failing to provide the disclosure required by TILA, independent schools should review their tuition payment plans to determine whether they may meet the definition of "creditor" under TILA, and whether they are meeting TILA's disclosure requirements. Schools with questions about TILA coverage and obligations, or schools wishing to explore how they might revise their tuition payment plans to avoid falling under the definition of "creditor" should contact their Venable independent school attorney for further discussion.

<sup>i</sup> 15 U.S.C. §§ 1601 et seq.

<sup>ii</sup> A person "regularly extends credit" if he extended credit more than 25 times in the preceding (or current) calendar year. 12 C.F.R. § 1026.2(a)(17) n. 3.

<sup>iii</sup> This dollar value is adjusted on an annual basis.

<sup>iv</sup> 12 C.F.R. § 1026.2(a)(14).

<sup>v</sup> 12 C.F.R. § 1026.4(a).

<sup>vi</sup> "Consummation" means the time that a consumer becomes contractually obligated on a credit transaction. 12 C.F.R. § 1026.2(a)(13). The Commentary explains "[w]hen a contractual obligation on the consumer's part is created is a matter to be determined under applicable law; Regulation Z does not make that determination. " 12 C.F.R. Off. Staff Comm. § 1026.2(a)(13) – 2.

<sup>vii</sup> 12 C.F.R. § 1026.23. "The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice . . . or delivery of all material disclosures."

<sup>viii</sup> 15 U.S.C. § 1640.

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