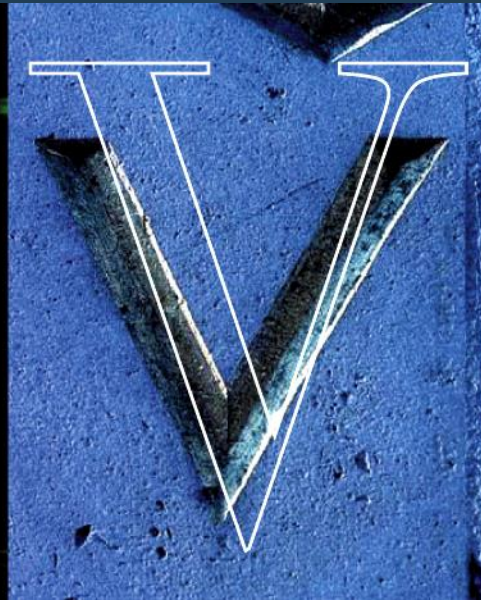
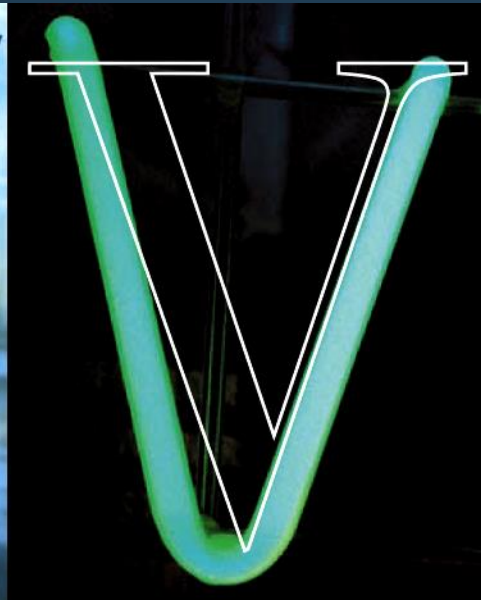
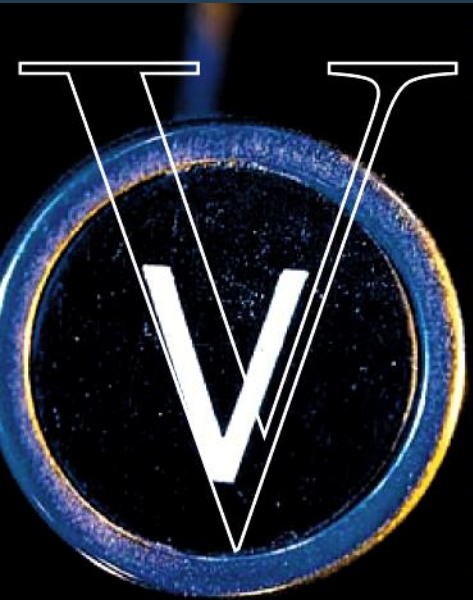


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So Long, Farewell: The Legal Challenges of Employee and Student Departures

*Caryn Pass and Megan Mann, presenters
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Employee Departures

- Involuntary & Voluntary Departures
 - If involuntary, why are we doing this?
 - If voluntary, why are they?
 - Were we paying attention?
 - Did we document issues?
 - What are the terms of the departure?
 - Have we protected the school?
 - How are we communicating about this?

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School World*



Signs, Signs, Everywhere a Sign

- Hindsight may be 20/20, but were we paying attention?
 - The Creepy Teacher
 - The Bully Employee
- Employees often leave or are asked to leave due to long-standing or ongoing circumstances. How closely were we paying attention?

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Documentation

- While we are paying attention, let's write down what we see.
 - Examples:
 - Our employee, “Sticky Fingers,” accidentally uses the school credit card for a person charge. Oops! Oh well, Sticky has an excuse for that. The Amazon accounts are linked, the cards look the same, the dog ate her credit card. We forgive Sticky. She's very well-liked, and often, but not always, does a good job. We tell her to make sure it doesn't happen again. At our next event, Sticky's accounting comes up a little short.



Sticky's Story, Continued ...

- Sticky tells us that her husband is having a hard time, and she has loads of personal and medical problems, heaped onto her workload. Wait, did she just give us information that could later support a discrimination claim? Uh oh. We don't want to "go there," and we like ole Sticky. We wag our finger, shake our head, and ask Sticky not to let it happen again. Next thing we know, Sticky has ordered a dozen scented candles for her home, using the school's card, and has decided our store room is her personal supply room, and we've had enough. We can no longer ignore Sticky's situation. She is clearly stealing from us, or, at a minimum, cannot be trusted with our "books."



Sorry, Sticky

- When we decide to terminate Sticky's employment, she claims we never spoke to her about using the school's card, or using the school's accounts in general. We only raised this issue *after* she told us about all of her family's personal and medical problems. And, of course, she has an excuse for every instance. We have no documentation of the issue. This presents a dual problem:
 - *It makes room for a claim that the termination was somehow related to a protected characteristic*
 - *It makes it easier for Sticky to claim she didn't have warning.*



“You don't write because you want to say something, you write because you have something to say.”

- Make documentation meaningful; make it count; be thoughtful about what you are writing
- Don't “paper the file” or “set someone up”
- Similarly, don't implement “sham” performance improvement plans
- When thinking about what to write, and when to coach and counsel an employee, think about what is productive and helpful, meaningful and realistic. The “papered file” is a bonus (and we, your lawyers, may thank you, depending on what you write!).



We've had ENOUGH!

- Don't wait until you can no longer tolerate the employee. There are no prizes for seeing how far your limits can be tested.
- The Chronic Problems:
 - Poor performers (or even just mediocre ones)
 - She who doesn't play well with others
 - Whiners
 - Bullies
 - Boundary testers



Did someone cry “wolf”?

- Little Red Riding Hood has been getting consistently poor performance reviews. We’ve told her that she won’t get another contract if she doesn’t improve performance. Red comes in the next day complaining that she feels harassed. This feels a lot like Red is avoiding the inevitable.
 - Do we ignore the complaint?
 - Terminate her employment anyways?
 - It’s difficult to know when to treat these as related matters, and when to treat them separately.



Making the Decision

- For involuntary terminations, it's important to have a clear, articulable reason for employment termination.
 - If you can't come up with more than “not a good fit,” then you likely have “not a good reason” for the termination
 - Avoid descriptions that are readily associated with protected characteristic claims
 - *We just need more energy!*
 - *She's too emotional!*
 - *We needed him to man-up and take responsibility!*

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We've Made the Decision. Now What?

- Timing: immediately/decline to renew a contract
- Separation documentation:
 - Severance? (Amount, Terms)
 - Termination Letter?
- The meeting:
 - Prepare talking points and stick to them
 - Have a plan to propose for communication and departure
- Communication:
 - What are we saying to community members, including students and colleagues?
 - Are we discussing this message in advance with the employee?



Protecting Our Community

- TAKE THE COMPUTER
 - (Seriously, we need more people to take the computer)
- Gather keys, key cards, passwords, etc. Gather all hardware and other property given to the employee. Cut off access.
 - This may require escorting the employee out, and arranging for an alternate way for him to get his things (sending them to him; arranging an after-hours meeting).
- Remind them of confidentiality terms. Decide on how we will handle this in the community.



Other considerations

- Are there any facts that exist to support a discrimination claim?
- Has there been any interference with FMLA or other rights?
- Has the employee raised any complaints recently?
- Do we anticipate upset parents/students, and what is our plan for handling that?
- Emotions (fear, frustration) are reasonable, but don't let them dictate the process.



Student Issue: Slide 1

The school has a current twelfth grade student that has had behavior issues off and on since seventh grade. His behavior has never been aggressive or violent but his name seems to come up whenever allegations and investigations of drugs and alcohol. He flies just below the radar. On a regular basis teachers voice their concerns about the negative influence he has on other kids in the grade. There have been a number of “run ins” with the parents when they disagreed with the school’s disciplinary decisions which included two in school suspensions and one three day out of school suspension for drinking while on a class trip.



Student Issue: Slide 2

Three girls visited the dean of students to report that the student had pot brownies and was attempting to sell them to other students. The girls saw him sell brownies out of his locker and have heard from others that he carries brownies in his backpack and stores his inventory in his car which is parked in the parking lot. They reported that other students were also aware of the young man's entrepreneurial efforts. The dean interviews the students identified by the girls. No one else is aware of the pot brownies.



Student Issue: Slide 3

The dean then called the businessman down who denied vehemently the allegations levied against him. The dean searched the student's backpack, looked through his locker and went out to the parking lot to inspect the car. (which was a considerable amount nicer than the dean's car.) No pot brownies found in the backpack, locker or car. Not even a crumb. There was however a re-usable shopping bag filled with boxes of brownie mix and a box of zip lock baggies. The dean of students, head of school, head of the upper school meet and decide that enough is enough. It is time to separate this student from the school.



Student Issue: Slide 4

Even though no baked goods were found, the student reports, and stash of brownie mix along with the students behavior history warranted an expulsion. The school has a discipline policy which allows for a hearing before the disciplinary committee followed by an appeal to the head of school if the decision is not to the student's (parents') liking. The school decided to forgo a hearing before the disciplinary committee since the discipline was of a "serious nature". The discipline policy does not address under what situations the committee can be bypassed. The decision was made to immediately expel the student.



Student Issue: Slide 5

The parents are livid when informed of their son's immediate expulsion. They demanded to see the notes taken by the dean during the interviews and insisted on being told the names of the reporting students. College decisions are pending. The school informed the parents they would be reporting the expulsion to colleges. They threatened the head of school with a law suit alleging a breach of the disciplinary policy; demanded a return of all tuition alleging the school violated their student's privacy by looking in the backpack, locker and car; and demanded the return of their \$5 million dollar gift to the capital campaign.



Query:

1. Good idea to expel the student?
2. Does the student's past behavior influence the decision?
3. Should the dean of students have taken notes during the meeting with the girls? Should the dean of students have interviewed the students by himself?
 - Do we hand over the names of the students to the parents?
 - Do we hand over the notes from the meeting to the parents (if notes were taken)?



Query:

4. Good idea to: search the locker? search the backpack? how about the car?
 - Is there an “expectation of privacy”? Has the school breached the student’s right to privacy?
 - Do we need to address a search in the student handbook?
5. Does the lack of “concrete evidence” impact the decision”?
6. Do disciplinary policies need to include specific exceptions or does the school have the ability to bypass without specific language?
7. Should we put the termination decision in writing to the parent?



Query:

8. Can/should the school report the discipline to the colleges? Would the decision be different if the student had already accepted an offer to college? What if the school has no written policy related to reporting to colleges? Should there be a written policy?
9. Should the school return the parent's tuition? Should the school allow the student to withdrawal? How should the school allow the student to complete the school year from home?
10. How does the school respond to inquiries from other private schools related to the reason for the student's departure?



Venable Independent School Law Practice
wise in the school world

www.Venable.com/education

@schoollawyer

Caryn Pass

cpass@venable.com

(o) 202.344.8039

(o) 212.307.5500

(c) 202.222.8026

Megan Mann

mmann@venable.com

(o) 202.344.4520

(o) 212.370.6260

(c) 917.597.1705

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