

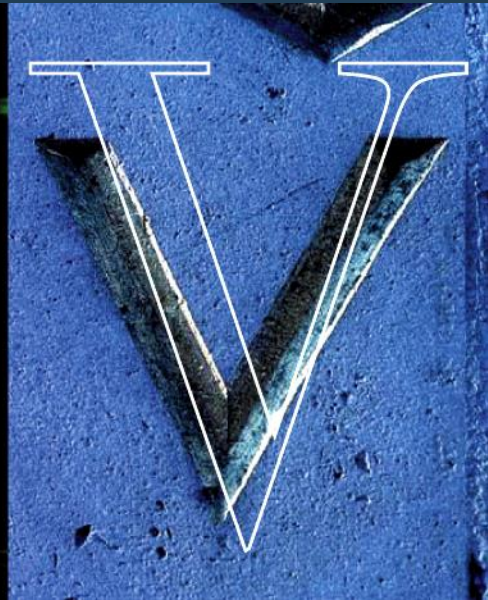
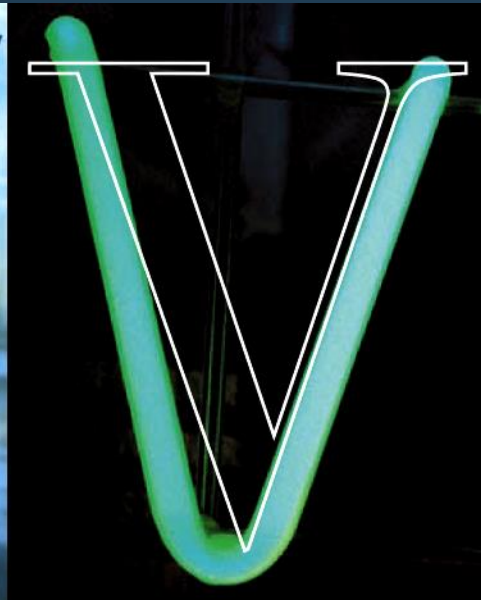
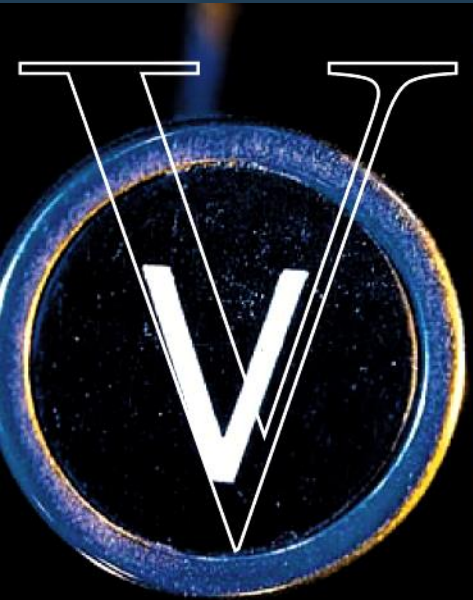
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Hot Legal Issues Facing Independent
Schools:
Developing Proactive Strategies

Tri-State Business Affairs Conference 2016

NJAIS, CAIS & NYSAIS

Caryn Pass, presenter



Topics:

- *Changes to the FLSA (Wage and Hour)*
- *Alumni Allegations of Sexual Abuse*
- *Student Vetting*
- *Mandatory campus housing*
- *ERISA and deferred compensation plans: (what is Harry Atlas doing these days)*
- *Transgender and Gender Fluid Students*
- *Business Manager's Review of Board's Compliance with Fiduciary Duty*
- *Policies and Governance documents*



Changes to the FLSA (Wage and Hour)

- Nothing finalized
 - Still awaiting final decisions
 - Unclear as to amount of time before law becomes effective
- Modification to law used as an explanation of why schools are making other changes
 - Employees currently misclassified can be corrected
- Only impacts minimum salary requirement to qualify for exempt status
- Time to prepare for pending modifications
- Changes can be made consistent with culture of school
- Strategies for making change without creating total chaos



Exemption Overview

- Employees covered by FLSA unless qualify under “exemption” category
 - **Non-Exempt** = *Not* exempt from overtime & other requirements
 - **Exempt** = Exempt from overtime & other requirements
- Non-Exempt (covered by the FLSA rules)
 - Compensated at minimum wage for all hours **worked**
 - Overtime for all hours **worked** over 40 in a workweek
 - Overtime calculated at regular rate of pay (not necessarily hourly rate)
- Exempt (not covered by the FLSA rules on overtime)
 - Qualifies under exemption category
 - Executive, Administrative, Administrative in Educational Establishments or Professional
 - Paid on salary basis
 - Minimum salary per week



Three Part Test For Exemption

- 1. **Salary Level**
 - Currently paid at the minimum rate of \$455/week
 - New proposed rate is as high as \$900/week

- 2. **Salary Basis**
 - Paid the same amount each week regardless of the # of hours worked

- 3. **Duties**
 - Meet the qualifications of an exempt category
 - Executive, Administrative, Administrative in Educational Establishments or Professional (teacher)
 - Actual duties performed by the employee
 - Not just as described in the job description

- Factors that are not relevant
 - Has access to confidential information
 - Acts like a professional
 - Is the secretary for the board



Executive Exemption

- **Paid on Salary Basis**
- **Primary duty**
 - managing the school, or a customarily recognized department or subdivision
 - Head of School
- **Direct**
 - two or more other full-time employees or the equivalent
 - four half times
- **Authority to**
 - hire, fire, advance, promote & change status given *particular weight*
 - “*Particular weight*”
 - part of the employee’s job duties to make such recommendations?
 - recommendations are made, requested, and relied upon?



Administrative Exemption

- Paid on Salary Basis
- Primary duty
 - performance of office or non-manual work directly related to the management or general business operations of the School
 - work directly related to running or servicing of the School
- Must
 - exercise discretion and independent judgment on matters of significance
 - authority to compare, evaluate and make decision on matters of significance
 - more than applying well-established techniques, procedures or specific standards described in manuals or other sources



Professional Exemption: Teachers

- **Salary Basis Not Required**
 - can dock in hour increments
 - can dock for leaving day before spring break begins
 - can dock if fails to appear on first day of orientation

- **Primary duty**
 - teaching, tutoring, instructing or lecturing in the activity of imparting knowledge in an educational establishment
 - caution if considering teacher's aids
 - does not generally perform above responsibilities
 - may be eligible for overtime



Preparation Steps and determinations

- Review positions currently classified as exempt
 - Do they meet the new salary basis minimum?

AND:

 - Do they meet the requirements of one of the classifications?
 - Can we modify their job to meet the requirements
 - If don't meet both = Overtime Eligible
- Determine how to pay the newly classified employees
 - Pay OT for all hours worked over 40 each week
 - Fluctuating work week
 - Weekly salary covers all hours worked in that work week
 - Over 40 hours worked paid additional ½ of hourly rate
 - Divide weekly salary by 40 to get hourly rate



Changing From Exempt to Non-Exempt

- Employees often “offended”
 - perceived as “unprofessional”
 - tracking time is often the issue
- Cost Benefit Analysis
 - law requires overtime payment to non-exempt employees
 - employees upset if status changed
 - financial liability for failing to compensate overtime
 - liability for cost of non-payment vs. employee morale
- Challenges
 - Retroactive or only going forward
 - Employees question why not retroactive
- Strategies for Change
 - Identify other changes planned (benefits, handbooks)
 - Roll out as one package
 - Sell as a positive
 - Consider using “overtime eligible” and “overtime not-eligible”
 - Use change in salary basis minimum



Alumni Allegations of Sexual Abuse

- Numerous reports by alumni around the country
- Boarding and non boarding schools
- Often dating back to the 70's
- Reporting by email, letter, calls, social media
 - Facebook, Survivors websites, blogs
 - Don't ignore signs, statements or whispers
- Boston Globe Article
 - Supposedly coming out on Sunday
 - Spotlight investigation now only one article
 - Survey to schools threats for failure to respond
- Read and keep up to date to be prepared
 - Learn about proactive strategies
 - Read “Great is the truth”
- There but for the grace of god go any of us
 - No one is immune; many of these still to come
 - We're a community, throwing stones hurts us all



Legal Claims and Considerations

- Statute of limitations
 - How long does the victim have to file a claim against the school
- Against School by Victim
 - Respondeat superior
 - School has responsibility actions of employees
 - Negligent hiring
 - School failed to properly vet employee pre-hire resulted in employment of dangerous individual
 - Negligent supervision
 - School failed to properly supervise employee
- By School against School for Recommendation
 - School relied upon positive recommendation
 - Failure to disclose inappropriate behavior
 - What should we do?
 - Employee you suspect but can't prove



Issues in Litigation

- Attorney Client Privilege
 - When materials, conversations, other actions are conducted in “anticipation of litigation”
 - Protects from disclosure to opposing counsel and other entities
- Document Hold
 - Once “potential for legal claim” suspected
 - Requires school to “retain” documents related to matter
 - Suspends “Document Retention and Destruction” Policy
- “Document Retention and Destruction” Policy
 - Establishes what should be retained and destroyed
 - Timeline for retention and destruction
- Old Documents
 - Where are they and what do you have
 - Yearbooks, personal files



Communications

- Consider Level of Transparency
 - May influence victims decision to file legal action
- Confirm all details prior to disclosure
 - Avoid breach of privacy
- Draft:
 - Letters to current and former parents, alumni, former non-graduating students, donors, other members of community
 - Letters to current and possibly former employees
 - Include instructions for speaking to press
 - Talking Points for Board
 - Press statement
- Notify Accrediting Association(s)
- Establish spokesperson
 - Consider message selection sends
 - Inside of school vs “professional spokesperson”



Steps to Consider

- Insurance
 - Notify current insurance provider
 - Determine insurance coverage at “time of abuse”
 - May need to hire “insurance investigator”
 - What coverage existed
 - Obtain copies of plans
 - Plan may also cover: Investigator, Crises Management Services, Additional Security to deal with press
- Report to Police and “child protective service”
 - Difficult if victim wants to stay anonymous
 - May or may not be “obligated” to report
 - Risk of non-reporting
- Create list of individuals that may have knowledge
 - Current and former employees at time of abuse
 - Board members at time of abuse
 - Other parties with knowledge of alleged abuser



Engaging Professionals

- Attorney
 - Represents the School
 - Employees may need to engage private attorney
 - Question of Knowledge of Abuse
 - Consider appointment by insurance
 - Who selects counsel
- Investigator
 - Conduct independent and complete investigation
 - School's knowledge of abuse
 - Abuse by other employees
 - Engaged by legal counsel (privilege)
 - No relationship to school, board members, other school employees, attorney for school
- Crises Management Firm
 - Can assist with strategy, press, communications
 - Engaged by Counsel



Review Policies and Procedures

- Policy On Reporting Abuse
 - To child protective services and or police
 - By parents, students, employees
 - Consider role and responsibility of school counselor
 - Internal reporting of issues
 - Central location that monitors concerns
- Policy on Internal Investigations
 - Procedure for conducting investigation
 - Maintaining interview notes and other documents
 - Drafting of investigation results
- Boundaries, behavior and standards of performance
 - Social Media, meeting students one on one, inviting students to home
- Conduct training of Employees, Students, Parents
- Procedures for supervising and evaluating employees



Hiring Procedures

- Carefully Review Entire Process
- Use Application
- Consider Central Oversight to Ensure Consistency
- Criminal Background Checks
 - State Obligations are floor
 - Include Social Security Check
- Sexual Offender Registries
- Loss of teaching license (Often method for addressing questions of abuse)
- References:
 - date and time of call, telephone number, name of reference, notes of conversation, if message was left
 - former employers and other non identified references
 - Any concerns or allegations of inappropriate contact with students
- Social Media Check



Notifying Without Allegation

- Victims ask:
 - “Why Now”? “Where Were You All Of These Years”
- Allegations of “Open Secret”
 - Assumption that adults were aware and did nothing
 - Lack of sensitivity and concern
- **Distribute letter indicating that:**
 - Not aware of allegation
 - In light of many claims reported in schools
 - In support and protection of community
 - Encourage the reporting of incidents of abuse
 - Engage Investigator to receive complaints
 - Notify of current policies and procedures for protection students
- Care given to other issues faced by school



Student Vetting

- Student injured by fellow student
- Education history (on application and in interview)
 - all history not just last 2/3 years
 - reasons for departure
 - was student subject to accused of sexual misconduct
 - violence, drug use, harassment of others
 - carefully review dates of attendance (month and year)
 - specifically inquire into any disciplinary issues
 - inquire into gap in attendance
- Google and or Facebook search?
- Recommendations
 - teachers rarely know full story
 - recent teachers
 - form completed by school administration
 - reason for departure, allowed to return, disciplinary history, discipline on transcript
- **Especially International Students**
 - **Increasing # of Students With History of Discipline**
- **Criminal Background Checks of Parents**



Mandatory campus housing

- Value of housing is taxable income unless:
 - *provided for benefit/convenience of the school*
 - connection between housing and business
 - business of boarding school is education and housing of students and support activity
 - *condition of employment*
 - must live on campus to properly perform job
 - more than just stated in contract
 - considerations:
 - similarly situated employees reside on campus?
 - still be employed if moves off campus?
 - » dean of students lives on campus but moves off after acquires housing second year of contract
 - *located on school's campus*
 - on property that is an integral part of campus
 - far end of campus harder to justify “convenience” of school (i.e. farm house if not overseeing farm)
 - mere ownership is not sufficient (i.e. purchased by school but adjacent to campus)



Non-“mandatory” housing

- If employee receives qualified campus housing that doesn't meet exemption criteria (mandatory/school benefit/on campus)
 - value of housing not considered taxable income provided:
 - employee pays rent that is (at least) equal to the lesser of:
 - a) 5% of the **appraised value** of the qualified campus lodging, or
 - b) the average rent paid by individuals (other than other employees or students of the school) to the school for comparable lodging.
- If employee receives the residence rent-free, lesser of (a) or (b) included in gross income
- Include value of housing in gross income
 - Require employee to pay taxes on value of housing
 - Gross up value of housing to cover tax
- Rental agreement and or include in employment agreement
- Failure to appropriately characterize housing benefit
 - payment of back taxes on value of housing, penalties, interest



Head of School Housing

- **Must meet “mandatory criteria”**
 - Housing on campus, condition of employment, benefit/convenience of the school
- **Benefit of school: regular use for entertaining or other school activities**
 - Meetings with faculty, staff or students
 - Entertaining parents, donors, “friends of the school”
 - Fundraising events
- **Track use by head of school**
- **Include details in HOS employment agreement**
 - Describe “mandatory criteria”
 - Timeline for removal of head in various conditions
 - Termination with cause, without cause, death, disability
 - Not “lease” or “rental” relationship;
 - Consider if head and spouse divorce (spouse may have rights to housing pursuant to court order)



Language for Employment Agreement

- **General Criteria:**
 - As a condition of employment, Educator will be required to live on campus in the housing (“Campus Housing”) provided by the school in order for Educator to properly perform the responsibilities of his/her position.
- **Removal of Employee After Termination:**
 - If Educator’s employment ends for any reason or, in the sole discretion of the School on campus housing is no longer appropriate, he/she will/may be required to vacate Campus Housing within X days of the last day of employment.
- **Who May Live In Campus Housing:**
 - Only the Educator may live in Campus Housing under this Agreement unless permission is given in writing by a School authorized agent to allow an individual other than the Educator to live with the Educator. Such permission may be revoked by the School at any time for any reason as determined by the School in its sole discretion and the individual will be required to vacate Campus Housing.
- **NON MANDATORY HOUSING: (CONFIRM WITH STATE LAW)**
 - Educator agrees and acknowledges that this Agreement does not serve as a lease or give Educator a leasehold estate. Neither Educator nor any individuals living with Educator in Campus Housing is/are tenants of the School. Employee waives in his/her behalf and those that may reside with him/her in Campus Housing any and all notices to vacate the Campus Housing as may be required by the law.
 - (CONSIDER ENTERING INTO A LEASE AGREEMENT)



ERISA and deferred compensation plans: what is Harry Atlas doing these days

- Complying with 403(b) plan documents
 - Time to do a review to determine plan requirements
 - Check to confirm compliance with plan documents
 - If permission to participate starts upon employment can't defer to three months of tenure
 - Establish correction strategy if violation of plan
 - Must provide same benefit to all employees uniformly

- Use of 457(b)
 - Unlike in 403(b) there is **NO CATCH UP** for over 50
 - Only highly compensated can participate
 - Employer or employee can contribute
 - **TOTAL** amount can not exceed \$18,500 (2016)

- Use of 457(f)
 - Once Employee vests full amount of funds must be considered taxable income
 - Can defer payout but not treatment as taxable income



Transgender and Gender Fluid Students

- First lawsuit filed by parents and 18 year old student
 - Refusal to allow entry to girls bathroom
- Evolving on a daily basis
 - Recent bathroom cases encouraging challenges in independent schools
- Students self identifying as:
 - transgender, gender non-conforming, gender fluid
other gender based identities
- Identifying at younger ages (Kindergarten common)
- Acceptance implies creation of safe space
 - Fully and safely incorporate into the school community
- Culture and mission critical to strategy
 - Religious schools
 - Single sex schools
- Board and parents highly involved
 - Strong feelings impact actions
 - Pants suit vs Neiman Marcus Selected Dress =
Termination of HOS



Legal Claims

- Title VII doesn't apply (Not accepting federal funds)
- Violation of Human Rights
 - Discrimination based on gender
- Bullying
 - Failure to address student, faculty, staff and parent behavior
 - Not invited to parties, play dates
 - Statements by teachers (“he/she or whatever you are today)
- Failure to take actions ensuring safe space
 - Physical facilities
 - Treat students based on his/her self identified gender
 - Training and educating faculty and staff
 - Educating parents, students, members of community
- Failure to educate
 - hostile environment prevented student from receiving an education
- Misrepresentation and detrimental reliance
 - claims of welcoming, open, accepting environment inaccurate
 - return of tuition; payment of other expenses including counseling



Names, Pronouns, Records etc

- Student selected name of choice
 - what is the name chosen by the student?
- Dress code/style chosen by student
- Sports teams and participation
 - does student play on team of gender of choice or gender of birth?
 - school's position
 - regional, league or other regulating entity
- Student selected pronoun: He, she, it, they, them
- Use of name in written format (birth name or selected name)
 - “Official/Legal” documents – Transcripts, birth certificate, Medical Records, ACT/SAT
 - “Non-official” documents – Class lists, yearbooks, school work & tests
- Use of name orally (birth name or selected name)
 - In classroom, during graduation, other school activities, with colleges



Privacy and Confidentiality issues

- Sharing identity of student with members of the community
 - Students, faculty, staff, other members of community (parents of other students)
 - Other entities: college, testing agencies, department of education, courts (guardian ad litem)
- Speaking with parents of transgender/gender non-conforming student
- Student communications with counselor or nurse
 - Who has access to communication with student
 - What are “privilege” guidelines
- Maintaining and access to records related to transgender/gender non-conforming identity
 - registrar, nurse, testers or other professionals, counselors, division head, teachers
- Medical issues
 - hormone therapy and other related medical strategies
 - medication and or treatment for anxiety or depression



Safe Physical Space

- CONSIDER IF UNDERTAKING REMODELING OR CONSTRUCTION
- Use of bathrooms throughout the school
 - identified gender
 - use of bathroom in gender of choice or gender of birth
 - gender neutral
 - specific locations/convenient to student
- Locker rooms
 - gender of choice or gender of birth
 - other options not in locker room
 - who decides?
- Restrooms in sports fields or other out of the way campus locations
- Other locations where students dress or use facilities
 - theatre, pool, ice rink
- Field trips and other off site overnight sleeping arrangements
 - **sport trips**
 - **international trips**



Applications and Admissions Process

- Lawsuit Shopping
 - Evaluating how schools address transgender student
- Identification on application
 - he, she, other
 - male, female, transgender
- “Additional information that may assist increasing a positive learning environment”
- Memorializing conversations with parents, student
 - discussions in admissions meetings
 - preparations prior to visit of student (especially younger students)
- Responding to disclosure by parent or student
 - discuss with caution; allow parent/student to share as they deem appropriate
 - consider in advance how school will respond
 - policy guidelines



Business Manager's Obligation to Review Board's compliance with fiduciary duty

- Authority to bind school
 - who can sign and amount limits for multiple signatures
 - what goes before board/finance committee
- Endowment investments
 - compliance with investment policy
- Audit and 990 completion
 - how is 990 presented to board
 - how is audit presented to board
- Retirement plans and oversight
- Establishing balanced budget
- Assuming reasonable debt
- Compliance with intermediate sanctions



Policies and Governance documents

- Charter and articles of incorporation
- Bylaws
- Whistle blower policy
- Document destruction and retention policy
- Intermediate Sanctions Policy
- Audit Policy
- Investment Policy
- Conflict of Interest Policy
 - Process for vetting conflict
 - Disclosure of conflict
 - Annual execution by trustees, head and cfo



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