



Tough Economic Times Mean Tough Decisions for Schools

Insights

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As the economic crisis in our country continues, schools are trying to make predictions and hard decisions regarding staffing. Many schools are trying to determine whether and where they should cut staffing and programs based on projections for enrollment next year. Although most private schools issue contracts for returning teachers between February and April, they may not know the full extent of their re-enrollment commitments until later in the spring. Worse yet, parents who do commit in the spring may change their mind if the parent's financial situation changes after signing the re-enrollment contract.

School administrators must understand their fiduciary obligations to protect the school's assets and the legal implications of both their contracting decisions and their reduction in staffing decisions. Outlined below are some thoughts school administrators should consider before issuing contracts or reducing the workforce.

Contract Decisions

Many schools treat employment contracts simply as letters confirming employment. They do not recognize the serious legal implications of offering an employee a contract of employment for a set term with a promised salary. Unless the contract is drafted properly to protect the school and provide it with the flexibility to make changes as may be required by the school's financial situation, the school could find itself in a serious financial commitment that impairs its ability to operate.

As a general principle, vague and ambiguous terms in a contract will be construed against the drafter. Since the school typically drafts the contracts, this means that if a provision in the contract is unclear, the interpretation that favors the employee will be the meaning a court will give to the term.

In addition, if the school's contract only allows the school to terminate the contract for "reasonable cause," the school is bound to the terms of the contract unless the school can establish that one of the definitions of reasonable cause set out in the contract exists (assuming that the contract even defines reasonable cause). It will be the school's burden to prove that the employee engaged in behavior that constituted reasonable cause under the contract. It is also the school's burden to show that the school met all steps required for termination of the contract (i.e., all written notifications, all pay required, all appeals required, etc.).

In this economic climate, schools should ensure that all contracts are developed with advice of counsel. In addition, consider adding one or more clauses to your contracts that will protect the

school by providing it with the flexibility to make changes in staffing, programs, hours, etc. as necessary based on the school's financial situation, as it may change. One way to accomplish this is by adding a provision that allows the school to reduce programs or staffing.

A sample provision states,

In the event of a reduction in enrollment (in a particular grade or the overall school) or a financial hardship impacting the School, as determined in the Employer's sole discretion, the Employer may determine that it needs to reduce or eliminate programs, classes, or staffing. In such event, the Employer will attempt, if possible, to maintain the same level of staffing by reducing pay, hours, or eliminating increases.

The Employer will communicate with Employees who are impacted by the changes and will determine whether reduction in hours, pay, or increases will be sufficient to resolve the financial hardship. The Employer may determine that in addition to or in lieu of such other methods, it may also need to reduce staffing by separating some employees. Employees who will be separated due to such staffing reductions will be provided with 30-days notice or 30-days pay in lieu of notice. No other compensation or benefits will be due.

Of course, the amount of notice and pay are within the School's discretion when drafting the contract. Some schools provide 30-days pay; others provide as much as 90-days pay.

Another way to accomplish flexibility to make changes mid-year is to have a "termination without cause" provision that essentially requires that the school give a certain number of days notice of termination or pay in lieu of notice. A typical clause reads, "The School reserves the right to terminate this contract and employee's employment without cause by providing 30-days written notice of termination to the employee or 30-days pay and benefits in lieu of notice. No other compensation or benefits will be due." Again, the amount of notice or pay is to be determined by the School as it drafts the contracts.

Schools are often fearful that if they include these provisions in their employment contracts, teachers will leave. But our experience has shown, however, that the outcome depends on the method of the school's communications and the effort by the administration to be honest and forthright regarding these issues. We recommend that you hold a full school meeting to discuss the situation. Be up front regarding the economic situation facing the school and the administration's thought processes.

Discuss that the school is looking at all budget items to determine where it can make cuts without impacting the quality of education and ask employees for their assistance in finding ways to keep the school viable financially. Consider asking whether any employees are interested in taking an unpaid sabbatical, reducing their hours to part-time, or taking a voluntary severance package. (Any such package should be developed with counsel).

Look first at benefit plans and determine whether a reduction in hours will impair the employee's ability to maintain critical benefits, such as health insurance or tuition remission. Consider

ability to maintain critical benefits, such as health insurance or tuition remission. Consider eliminating some costly benefits or asking employees to share more in the cost in exchange for the school being able to maintain more employees at full employment. Consider reducing the tuition remission benefit or putting caps on the number of children an employee can enroll for free. Consider reducing the contribution to 403(b) plans. Renegotiate phone contracts or other service contracts. And, consider all ideas from employees with an open mind. With the right kind of heartfelt communications about these issues, most employees will work with the school to find ways to reduce costs and to increase enrollment.

If You Must Reduce Your Workforce

If you find that, even with your best efforts, you must reduce the number of employees, these decisions should be made with the advice of counsel. There are many issues that must be taken into consideration when making decisions on reducing your workforce. If you are considering reducing mid-year, ensure that your employment contracts for the positions in question permit you to terminate the relationship (or reduce compensation) mid-year. Many schools are surprised when they learn that their contracts do not provide any flexibility.

Some of the decisions you must consider up front are will you reduce based on qualifications? Performance? Seniority? Cross-training? Some combination of all these? Who will make the decisions? What documentation is there of the process or the need?

If you are using performance as a criterion, what do your existing documents reveal regarding the employee's performance? Are there evaluations, observations, emails, memoranda or other documents that contradict the decision that an individual is a low performer compared to others? Did the individual consistently receive raises, bonuses, etc., that are indicia of good performance?

Are the individuals under consideration for reduction in protected categories? Have they recently exercised rights under the Family and Medical Leave Act (i.e., taken job protected leave or currently on leave), had a workers' compensation injury, or complained about some inequity, discrimination, or other protected activity? If the school's selection process results in the decision-making having a disparate impact on individuals over the age of 40, minorities, women, or others who have recently exercised rights, the school could find its savings in employee salaries quickly eaten up by the cost of litigating or settling claims.

Once the selection process is complete, there are many other decisions that must be made. Will the school want to have employees sign severance agreements? If so, there are specific state and federal requirements that must be included in a severance agreement for it to validly release claims. For example, the Older Workers' Benefit Protection Act (OWBPA) requires that any release that seeks to release age claims for persons over 40 years old be written in clear, understandable language; it must specifically reference the OWBPA and the Age Discrimination in Employment Act.

Also, the release must: tell employees what they will receive at termination even if they do not sign the release; tell employees that they have the right to review the document for up to 21 days (45 days if the release pertains to a reduction or job elimination); advise employees to consult with counsel

if the release pertains to a reduction or job elimination); advise employees to consult with counsel; provide certain age-related information about the positions/titles of other employees being considered for separation and the ages of those selected/not selected; specifically state why the school is reducing the workforce or eliminating positions; and provide employees with a 7-day period in which they can revoke their signatures after execution. All of these requirements, and others that may be specified by the state in which the employee works, must be included for a release to be valid.

These are a few of the issues that school administrators must consider before simply making decisions to reduce the workforce. It is far better to invest the time and energy up front to think through as many of these issues as possible, rather than having to scramble after the fact to justify decisions that, at best were rushed and, in the worst case, may have been improper.

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