



Legal Considerations For Tough Economic Times

Insights

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Even though there are signs that the economy is recovering, many schools are still finding that they are overstaffed in light of their budget needs. Although most private schools issue contracts for new and 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 parents' financial situation changes after signing the re-enrollment contract. Schools then find that they are faced with a need for a reduction in force.

Problems can arise when schools use the reduction process to weed out underperformers without having good documentation of the performance problems. We have outlined below some of the thorny issues that school administrators need to continue to deal with properly to protect the institution.

Contract Decisions

Make sure you are using a good contract that has been drafted by or reviewed by your legal counsel. 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 or conflicts with another provision (or published document), the interpretation that favors the employee will be the meaning a court will give to the term.

In addition, school administrators must ensure that the contract provides the school with flexibility to terminate employees (and the school's pay obligations) for various reasons that can be anticipated: performance; interaction; policy violation; under-enrollment or financial stressors. Some schools also choose to include a no-cause provision, which gives the school flexibility to terminate the relationship with a set amount of notice or pay in lieu of notice, such as 30, 60, or 90 days pay. Each of these clauses must be carefully drafted to reflect both your school philosophy and to be upheld in the event of a legal challenge.

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. Reduction decisions often result in litigation if the decision-making process is viewed as unfair or illegal. Indeed, age discrimination claims resulting from the reduction process is one of the fastest growing categories of claims.

There are many issues that must be taken into consideration when making these decisions. If you are considering reducing mid-year, you must 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 teachers or staff based on qualifications? performance? seniority? cross-training? some combination of the above? 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 indicative of good performance?

Other important considerations are whether the individuals under consideration for reduction fall into protected categories. These include not only the categories of race, sex, religion, and national origin, but whether the employee has 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 larger impact on individuals over the age of 40, minorities, women, or others who have recently exercised rights, the school could find that its savings in employee salaries is quickly eaten up by the cost of litigating or settling claims.

After The Selection

Once the selection process is complete, the school will need to decide whether it wants to offer employees 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, including specific requirements under the Older Workers' Benefit Protection Act (OWBPA) for a release to validly release age claims.

Finally, if the school finds itself in a position of needing to hire later in the same school year, it should consider re-employing persons that it has recently let go due to economic circumstances. Otherwise, the decision to hire a new employee could result in a challenge by a separated employee.

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.

For more information, contact the author at SBogdan@fisherphillips.com or 954.847.4705.

Related People



Suzanne K. Bogdan

Partner

954.847.4705

[Email](#)