



# To Be Or Not To Be (Under Contract)

Insights

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The vast majority of U.S. businesses employ workers on an "at-will" basis. The most significant exception to this general rule? Independent schools.

At-will employment means that the employee is not employed for a fixed term. Most states permit this arrangement, under the theory that society benefits when employers and employees retain the flexibility of ending the relationship for any reason. Mutuality exists: the employee can leave for any reason, with or without notice, and the employer can terminate the worker any time for any reason (as long as the reason is not itself prohibited by law, as in the case of illegal discrimination or retaliation). Except in limited cases (usually involving highly paid executives or professional athletes), few employers today offer individual employment contracts to their employees.

## Theory Versus Reality

To contract or not to contract? That may be the question, but it's one that many private and public elementary and secondary schools answer affirmatively without giving much thought. Most schools who rely on teacher contracts have done so as far back as school administrators can remember. For these schools, past practice and the unique circumstances presented by the academic school year combine to support the use of teacher contracts.

The thinking is that teacher contracts provide mutual reassurance regarding staffing in a given school year – teachers are comforted knowing that they will not be faced with the difficult task of securing employment mid-term should the school decide to let them go, while the school avoids the risk of faculty turnover during the school year. All in all, these are reasonable bases for utilizing teacher contracts.

But does a one-year employment agreement for faculty really provide teachers and schools the protection they think it does? Perhaps "yes" from a purely legal perspective, but less so as a practical matter.

After all, let's say a teacher provides notice in October that he is leaving the school in December because his wife is being transferred out-of-state. Will the school really seek to require him to serve out the term of his contract? In these situations, many schools use the contracts to work out an exit strategy with the departing teacher, but few go so far as to file a lawsuit for breach of contract.

On the other hand, poorly drafted faculty employment agreements can severely limit the rights of schools to make faculty changes during the school year, even when it's in the best interest of a school to do so. Deficient termination clauses are the primary culprits; they often include vague language regarding the circumstances in which a faculty member's contract may be terminated mid-term. Sometimes they so severely restrict a school's options that a problem teacher is kept on just to avoid a potential breach of contract claim – a result that often is not in the best interests of students, parents, and even other faculty members.

Some schools have eliminated teacher contracts entirely, replacing them with a straight at-will arrangement. Others have changed their teacher contracts to include termination language that enhances the flexibility of a school to take mid-term action when warranted. Some termination clauses even incorporate "at-will" language, providing the benefits of the at-will relationship with the sense of security and predictability of an employment contract.

### **Doing It Right**

For schools desiring to continue utilizing faculty contracts, make sure that the agreements contain the following:

- clear compensation terms: will the teacher be paid over twelve months? Will there be reductions for unpaid leaves or approved loans?
- unambiguous grounds for termination: consider incorporating "at-will" language, permitting termination in cases beyond "just-cause" circumstances. If "for cause" terminations will be included, clearly spell out what conduct will support a termination for "cause." Avoid obscure phrases like "moral turpitude" and unnecessary legalisms;
- work duties and expectations: do'n't be afraid to be specific here (for example, "creation of regular lesson plans"), but be sure to include "catch-all" language that will allow reasonable reassignment of duties as needed by the school;
- acknowledgement of school ownership of inventions and intellectual property;
- a confidentiality provision;
- consent to reference check or background checks;
- an arbitration clause or jury trial waiver: these provisions require that employment disputes be heard by an arbitrator experienced in teacher contracts and the school environment generally rather than a jury;
- amendments to be only in writing: this will prevent employees from arguing that something an administrator told them "amended" their contracts; and
- assignment by employer: if ownership of the school is transferred during an academic year, this would allow the new owners to "step into the shoes" of the former employer.

If a school decides not to utilize teacher contracts, it should take steps to ensure that other forms of written communication are not construed to be "employment contracts." Offer letters to teachers

written communication are not construed to be employment contracts. Offer letters to teachers should be detailed regarding terms and conditions of employment, but they should specifically state that the letter does not constitute a contract. If the letter will be followed up by a teacher contract, the letter should state this. Include "at will" language if no written contract is contemplated. And even where a school decides to have faculty members sign contracts, avoid the temptation to use them for non-teaching staff.

### **Just How Much Protection?**

Some schools like contracts because they believe that they somehow insulate schools from claims of discrimination, thinking that the decision not to renew a teacher's contract is not actionable under anti-discrimination law. The truth is that decisions not to retain a teacher may, in fact, be subject to scrutiny under such employment laws.

Whether the non-renewal of a teacher's contract is an "adverse employment action" that could give rise to liability for wrongful termination, discrimination or retaliation under federal and state anti-discrimination laws is somewhat open to debate. But recently, more courts have been willing to allow teachers who are not renewed to pursue such claims.

In order to prevail in a discrimination case, a non-renewed teacher has to show, among other things, that he or she suffered an "adverse employment action." But what exactly is an "adverse employment action"? And does the decision not to bring back an under-performing teacher qualify?

Not everything that makes an employee unhappy is an actionable adverse action. That said, the definition of adverse action has been expanding. Recently the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit held that non-renewal of a contract alone *could* constitute an adverse action where renewal is sought by the teacher. *Leibowitz v. Cornell University*.

Margaret Leibowitz was a non-tenured instructor at Cornell University and the New York State School of Industrial and Labor Relations. She was employed under a five-year contract that was renewed several times. In 2002, Cornell decided not to renew Leibowitz's contract, citing the fact that her job responsibilities were shifting to Cornell's campus in Ithaca, NY. Leibowitz sued for gender and age discrimination, among other things. Cornell asked the court to dismiss the case on the grounds that its decision not to renew Leibowitz's contract was not an adverse action, given that it had satisfied all the requirements of the contract for each period it had been renewed.

The district court agreed with Cornell, but the appeals court did not. It determined that a non-renewed teacher could establish that the school's decision not to renew her contract is an adverse action as long as the renewal was sought by the teacher. Not all courts agree, but most do believe that non-renewal is the same as termination and is subject to scrutiny under state and federal discrimination, retaliation and whistleblower laws.

To be safe, schools should take the same steps to evaluate the potential risks of a decision not to renew an employment contract as to evaluate a decision to terminate an employment contract.

Carefully screen your decisions not to renew a contract in order to ensure that such decisions are based on lawful, legitimate, non-discriminatory and non-retaliatory criteria.

Ultimately, whether a school decides to go the contract or no-contract route, effective communication with faculty is critical to avoid feelings of mistrust and skepticism. And like any legal document, teacher contracts should be reviewed by school counsel regularly to ensure that they are up-to-date.

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For more information contact the author at [sroppolo@fisherphillips.com](mailto:sroppolo@fisherphillips.com) or 713-292-0150.

### ***Related People***



**Stephen J. Roppolo**

Partner

713.292.5601

Email