



Employment Contracts – Who Needs Them And What Needs To Be In Them?

Insights

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As indicated in the companion article written by Candice Pinares-Baez, January begins the hiring season for most schools. Job fairs, conferences, and recruiting are in full force. It is also the time to take a look at your employment contracts to ensure that when you find the perfect employee, you are issuing to them an employment contract that works for you and not *against* you.

Who Needs An Employment Contract?

Anyone who has heard me speak at conferences on this subject before knows that schools are the only industry in the United States that issue employment contracts to more than simply their CEO. Some schools issue contracts to everyone. Others issue them to only their teachers. It is certainly an industry-standard to issue contracts to teachers and we agree that a school may not be as competitive if it refuses to issue contracts to teachers. Moreover, from the School's standpoint, it is important to have continuity in the classroom all year round.

We believe that most teachers under contract tend to live up to their contractual obligations to work the entire school year. For this reason, we recommend that you continue to use contracts for your teaching relationships, but decide whether for your community, you really need to issue contracts to your administrators, groundskeeping employees, administrative assistants and other individuals. Doing so may make it more difficult or costly to end the employment relationship.

Legal Concepts Applicable To Contractual Relationships

If you issue contracts, you have an obligation to ensure that you live up to the contractual obligations. Moreover, if you say that an employee can only be terminated for "just cause," you bear the burden (and cost) of proving just cause. Finally, since you are the drafter of the contract, any vague or ambiguous statements will be construed against you and in favor of the employee.

For these reasons, you should have your contract drafted and/or reviewed by your school's employment counsel. It's far better to invest a little bit each year ensuring that you have the most updated provisions that are protective of the school rather than to roll the dice and possibly pay legal fees and damages to extract yourself from your contractual obligations.

What Should Be In Your Contract?

The key is to have a contract that you can issue (to any level of employee) that works for you.

Consider the following:

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Term

If you put a definite term in the contract (e.g. the 2013-2014 school year) you want to ensure that the “term” defined includes (at least for teachers) the planning and training week before students come to school without extra pay. You also want to ensure that the term can be shifted or enlarged without extra pay to account for school closures due to hurricanes, fires, tornadoes, or other disasters. In other words, you want it to be clear that the stated salary covers all work done before the year begins and after it was scheduled to end.

At-Will Employment

The concept of at-will employment is the general law in all states except Montana. At-will employment means that either you or the employee can terminate the employment relationship at any time without cause or reason. You should know, however, that there are a lot of exceptions to the concept of at-will employment. One is that a set term is inconsistent with at-will employment because both the employee and the employer are agreeing that the employee will work for a particular period (rather than being able to leave or end the relationship at any time).

Another exception is that even though the employer can end the relationship at any time, it cannot do so if the termination (or non-renewal of the contract) would violate a statutory right, such as the non-discrimination statutes, the whistleblower statutes, the FMLA regulations, or other laws. Thus, if you choose to define your employees by contract as “at will,” you need to ensure that none of the other contractual provisions is inconsistent with this status and you need to take care when ending the relationship.

Reasons For Termination

Many schools have a “reasonable cause” for termination provision in their contract. If you choose to include this, make sure it is well defined and permits the school to determine, in its discretion, whether cause exists. Because the cause termination is the hardest to prove and is an emotional concern for the employee in question, we also recommend that you have several other termination reasons.

We recommend a 90-day introductory period during which you have specifically defined the employee as “at will.” You need to be clear when the 90 days begins to run. It should begin with the first day worked under the school schedule to eliminate the argument that it began when the employee signed the contract in March.

We also recommend a no-cause termination provision, also sometimes referred to as a termination for convenience. Under this provision, the employer can either give a certain number of days notice (e.g. 30-days notice of termination) or the same amount of pay in lieu of notice. This permits you to remove an employee that is simply not working out well although the employee has not engaged in behavior that would constitute cause to terminate.

Some schools also include several additional provisions in their contracts such as termination for reduction-in-force, a condition that a certain number of students must enroll for the class to be offered, or a “force majeure” clause, which permits the school to suspend or terminate the relationship when the school is forced to close due to a natural disaster of some form.

Each of these provisions should be drafted by your counsel to ensure that they are both internally consistent with other provisions of the contract and externally consistent with other documents, such as your application and employee handbook.

Benefits

For maximum flexibility, we recommend that you refer to your employee handbook for all benefits provisions. The handbook can typically be revised as necessary, which means that you are not contractually obligated not to modify benefits. Also, pointing to your handbook ensures that there is consistency in the application of benefits, which is important from a non-discrimination perspective.

If you have housing benefits that you intend to be non-taxable (which should be discussed and analyzed with your employment counsel) your employment contract should contain appropriate language to make clear that the employee is required to live in school-provided housing.

Dispute Resolution

You should consider how you want employment disputes to be resolved. You can build in a mediation obligation (requiring both parties to try to resolve their issues pre-suit with an outside mediator), an arbitration provision (which keeps you out of court but has the impact of a judicial decree), or a waiver of jury trial (which allows the parties to file suit in court but requires that the case be determined by a judge without a jury). Waivers of jury trial are not legal in all states so it’s important that you know your state’s laws on this issue before building it into your contract.

Other Provisions

There are a number of additional provisions that can be built into the contract, such as a description of duties and responsibilities (supplemented by both an external job description which may be revised from time to time and the employee handbook). Some schools also include a confidentiality provision requiring the employee not to disclose to third parties information learned about the school’s proprietary processes and other important information about the school.

You can also include a consent to photograph or use the employee’s image or voice in the school’s publications, website, or social media postings. Finally, many schools like to include a representation that all information provided in the hiring process, including grade transcripts from colleges and references, are true and correct with a warning that any falsification will be grounds for immediate dismissal.

Legal Provisions

Your attorney will add to your contract several important provisions that make clear that all promises between the parties are included in this writing; that the contract cannot be modified except by a writing signed by the employee and head of school, and similar issues.

Final Thoughts

Many schools use documents that are referred to as letter agreements, offer letters, or letters of intent. You should be aware that, depending on the language used, those documents may well be considered contracts of employment. You should have your employment attorney review those documents to be sure that, if they are not intended to be contracts, they have appropriate language and disclaimers.

For assistance in reviewing or drafting your employment contracts, contact your Fisher Phillips attorney or the author at SBogdan@fisherphillips.com or 954.525.4800.

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