Summer Projects To Prepare For The 2016/2017 School Year

Insights
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Each year we outline those issues or trends you should consider implementing as your summer projects to ensure that your school is in compliance with the law and best practices. We list below four areas that we recommend you address as you plan for next year.

Wage Hour Changes
By now you should have heard from multiple sources that the U.S. Department of Labor (USDOL) is going to increase the salary requirement that will be necessary for employees to meet one of the white collar exemptions under the federal wage and hour law. The USDOL is expected to issue its final regulations around the end of the second quarter of 2016, but what should you be doing now to prepare?

The white collar exemptions used most commonly by schools are the executive exemption, administrative exemption (including the academic administrative exemption), and the non-teaching professional exemption. The anticipated change is to increase the current salary requirement for these exemptions from $23,660 to $50,440. Moreover, the new salary basis will be subject to an annual update. In addition, the USDOL has signaled that although it has no current changes to the duties tests supporting the exemptions, it may have some later.

In our experience, schools as an industry are still far behind corporate America in properly evaluating their workforces to ensure compliance with federal wage and hour law. However, there are several proactive steps you can take to move in the right direction.

Review Duties And Salary

You should work with your school's counsel to review the salary and duties of those non-teaching employees that you have classified as "exempt" under federal wage and hour law. You'll want to ensure that you have accurately classified these individuals (by looking at the employee's duties and responsibilities for all jobs worked) and that you are properly paying them.

We frequently find that even those employees making more than the anticipated $50,440 are often misclassified as exempt because their duties and responsibilities do not qualify them for any exemption. So, you should engage in a three-part analysis:

1. Does the employee meet the requirements of the exemption from a duties standpoint?

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1. Does the employee meet the requirements of the exemption from a duties standpoint?
2. Is the employee presently being paid at least $23,660?
3. Will the employee be paid at least $50,440 beginning next school year?

If the answer to any of those questions is no, the individual may need to be reclassified as non-exempt next school year.

The analysis does not stop there, however. You should also take a look at your teachers to ensure that they are meeting the duties test for the teaching professional exemption. Many teachers have combination jobs (teaching, proctoring, coaching, etc.). Many also spend a fair amount of time handling non-teaching responsibilities (meet and greet at drop-off/pick-up, lunchroom duty, etc.). You need to work with your counsel to classify the different hours that your teachers work to ensure that they are engaging in teaching or teaching-related duties at least 50% of their total working hours (counting hours at work, before school, and after school).

You would be surprised how frequently we recommend changes to a teacher's schedule or duties to push them into the exempt category. Of course, under federal law, if they are exempt under the teaching professional exemption, there is no salary basis now or projected for the future. In other words, you can pay teachers any way that you want (hourly, salaried, or commission). Some states, such as California, however, do require a minimum salary even for teachers. You should check with your school's counsel on any additional state requirements.

The positions that are often at risk of being misclassified in an independent school include employees holding combination positions (i.e. performing two or more jobs); second teachers or assistants in the classroom; employees who work in admissions and advancement that are not the directors of those departments; administrative/executive assistants (even to the Head of School); supervisors or lead employees in facilities; supervisors or lead employees in the custodial and food service areas; dorm parents; and assistant administrative personnel.

Moreover, with the new salary requirements, individuals in the emotional or college guidance counseling areas, nurses, and part-time exempt administrators may also fail to meet the salary test.

Review Free Housing Arrangements

Another common question is whether the school can take the value of free housing into consideration when determining whether an employee classified as exempt meets the new salary test. In other words, if the employee makes $45,000 and receives $10,000 in free housing, would the value of housing plus salary, combined, satisfy the salary basis test?

The answer is no. The regulations make clear that housing may not be taken into consideration to meet the salary requirements. The bigger question for many schools, however, is whether you are properly providing a free housing benefit. The test for free housing is very strict. You would be wise

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to consult your school counsel on this issue.

Another common question is whether the value of free housing must be included as income in a non-exempt employee's compensation for overtime purposes. In other words, if the employee is transitioned to a non-exempt category and receives housing, must the value of the housing be included in the employee's regular rate, thereby increasing overtime pay? The answer depends on many factors that need to be analyzed with your school counsel, including the employee's job and the taxable (or non-taxable) nature of the housing.

The new anticipated regulations give you an opportunity to look closely at your employee classifications and to both shift those misclassified employees to non-exempt status and to assess whether properly exempt employees will need to be reclassified (or paid more) under the anticipated regulations. You should work closely with counsel to determine your school's risk areas and the proper way to communicate any change in status without causing your employees to feel devalued.

Handbook Changes

Summer is usually the time that schools take a look at their student and employee handbooks to determine whether they need an update. Throughout the year, we work with clients through difficulties and often identify missing or confusing policies that bear consideration. We outline below our thoughts on both employee handbooks and student handbooks.

Employee Handbooks

First, the Affordable Care Act changed many aspects of the healthcare law for all employers. One of the policies you should have is a coverage eligibility policy to both alert your employees to your school's insurance guidelines, but also to guide human resources in those difficult situations involving leave and reduced hours.

You can no longer simply issue a COBRA notice when an employee exhausts FMLA leave or when the individual drops below the required number of hours for active employee coverage. When you create the eligibility policy, it is extremely important that you also communicate with your health insurance provider to ensure that they are on the same page as your school. We have found many situations in which the carrier has not updated its coverage guidelines to comply with the law, resulting in a conflict between the school's properly drafted eligibility policy and its contractual guidelines with the insurance company.

You should also look closely at the various benefits you provide to ensure that all benefits work together properly, are legal, and that the guidelines, restrictions, and limitations are clear. For example, if you have a paid maternity leave policy, is the policy written in a way that excludes males from paternity leave? Is that the intent? Is the policy legal?

Moreover, if you also have a short-term disability policy, when does that benefit begin and end? Does it overlap with vacation or other forms of paid leave? Is it clear what the waiting period is and how it is calculated? If the employee is taking intermittent leave, does your short-term disability policy

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is calculated? If the employee is taking intermittent leave, does your short-term disability policy cover that? Does the employee have to satisfy a new waiting period after returning to work for some time?

These issues should be worked through carefully with your school counsel to ensure that all of your leave and benefit policies are considered globally before rolling out a new set of benefits.

When we review employee handbooks, we also look closely to ensure that the handbook covers key issues, such as an up-to-date child abuse reporting policy; a requirement that employees cooperate in investigations; a policy outlining the school's ethics guidelines, code of conduct, and conflict rules; a whistleblower policy; a student-adult boundaries policy that includes issues such as texting, social media, and other concerns; and other important policies covering criminal background checks, updates, and conduct issues that come up frequently enough to be addressed specifically.

Student Handbooks

If you haven't taken the time to have your student policies reviewed by counsel lately, you should do so this summer (or sooner). Common areas that have presented schools with difficulties or are altogether missing from student handbooks include attendance guidelines (to ensure that the policies consider disability issues); student-adult boundaries, including social media and texting; policies for students who turn 18 during the school year (to ensure they understand their rights and obligations); parent expectation guidelines; drug testing policies (and canine searches); and comprehensive search policies, including electronics. We often find that where the above policies are either missing or not well written, schools are limited in the actions they can take to protect the school and to discipline students.

In addition, many schools are unaware that because their relationship with a student is contractual in nature, courts require "fundamental fairness" in the relationship when it comes to the imposition of serious discipline or expulsion. This means that your school must have clear policies outlining your expectations, that you must have investigated any alleged infraction thoroughly, you must have obtained the student's version of the events, and the discipline imposed must have been consistent with your policies, investigation, and past practices. For these reasons, it is important to have a good code of conduct that leaves your school with appropriate flexibility while putting the student/parent on notice of those activities that may result in serious discipline.

Training

This time of year, we remind all schools that you should conduct comprehensive back-to-school training in the fall. This training should cover legally important topics, such as child abuse reporting, student-adult boundaries, disabilities issues, leave issues, and sexual/other harassment. You should consider having your school counsel conduct the training, both to ensure that it is legally accurate and comprehensive, but more importantly to show the seriousness with which the school takes the issues.

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Schools that conduct regular training have the double benefit of fewer legal concerns and a strong defense to any claim later asserted. If your counsel can make the training fun and interactive with real-life scenarios, the audience will be more welcoming to receiving this important yearly training.

Florida's Convenience Fee Law

Finally, many schools in Florida have been frustrated for years due to a state law that made it illegal to charge parents a "convenience fee" or "surcharge" to use a credit card when paying bills. The schools either had to absorb the credit card fees, which could be substantial, or require parents to pay either by check or ACH.

On November 4, 2015, the 11th Circuit Court of Appeals found the surcharge law to be unconstitutional. Although the Florida Attorney General sought rehearing, the Court denied the rehearing on January 16, 2016, effectively ending the case. Thus, at this point, Florida schools are free to charge convenience fees to parents for the use of credit cards.

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