How Do I Keep Departing Employees from Disparaging My School? A Proactive Approach

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Employees often leave schools unhappy — either because they were not satisfied with the work or were terminated involuntarily. More and more often, these departing employees take their grievances to social media and make disparaging and derogatory comments in the public domain about their former school employers. And schools have found themselves frustrated with traditional "solutions" that have proven ineffective. An increasing number of schools are thus considering a proactive approach to this problem – developing written agreements preventing employees from making such comments well before any problems arise.

Traditional "Solutions" Aren't Effective

Oftentimes, schools impacted by disparaging online comments made by former employees have done nothing in response to these comments. They hope they would either fade away with the passage of time or that other school stakeholders would realize most of these posts are just rants of unhappy former employees.

But even schools not content with this "wait and see" approach that have explored other strategies have not found much success. Making direct requests or applying pressure on the social media websites to take down the disparaging and derogatory comments – even when some or all of the comments are untrue – is not usually a fruitful strategy. The social media websites almost uniformly reject such pleas.

Emails or letters to the departing employees demanding the departed employee "cease and desist" from the disparaging conduct, either from the school or their outside law firm, also have limited success. In fact, in some cases the departed employee is actually *encouraged* that the school had to take the time, trouble, and expense of hiring an outside law firm and continued making the disparaging comments.

Lawsuits for interference with contractual relations, defamation, or other legal theories are costly and few schools want to incur the costs and go through the ordeal of suing former employees for their disparaging comments. Plus, many schools are afraid that that employee may hire a lawyer and file legal counterclaims against the school, thus exacerbating the problem and not resolving it.

Consider an Alternative Strategy

This body of experience makes it obvious that a "reactive" strategy for dealing with these posts by the departed employee is not effective. In this context, you should consider a proactive strategy that could be helpful in the future. **In sum, it involves having all employees sign a short agreement either during their on-boarding process or during their employment restricting them from making such disparaging comments.**

By way of background, most states do not allow employers to require lower-level employees, such as teachers, clericals, or kitchen staff, to sign agreements with post-termination restrictions on competition or solicitation of families. They are considered unlawful restraints on trade or competition. And a new law just passed by Congress will prevent you from restraining employees from discussing allegations of sexual harassment or assault before the fact (read more here).

But schools have begun to require higher-level employees – such as Heads of School, Directors, Admissions Directors, and similar roles – to sign agreements with strict post-termination restrictions on competition. And it is reasonable in this basic agreement to add an additional provision where the employee agrees that they will not, after leaving the employment of the school for any reason, make disparaging or derogatory comments in any form, including on social media, about the school, its employees, students or their families (excepting, of course, allegations of sexual harassment or assault).

The Proactive Strategy, Explained

Many high-level school employees have access to confidential personal, medical, financial, or academic information about students and their families. They may also have access to proprietary information or even trade secrets about the school's curriculum, teaching techniques, forms, and processes. This permits employers to require employees to sign an agreement, as a condition of initial or continued employment, that they will not disclose or use such confidential information and trade secrets for non-business or personal reasons (so long as state or local law permits such an agreement).

And, as described above, it is easy enough to fashion a quick but effective prohibition on non-disparagement as well.

The real leverage in such an agreement would come by adding a robust attorneys' fees provision. It would state that the employee agrees to pay all of the school's costs of enforcing the agreement, including the costs of litigation and collection and any fees of collection or for attorneys and other professionals.

With such a Non-Disclosure and Non-Disparagement Agreement in place ahead of time, the strategy for dealing with negative posts by a departed employee would change dramatically. The school's internal Director or other leader would send a cease-and-desist letter to the departing employee, with a copy of the Agreement enclosed, threatening to pursue legal action if the posts are

not immediately deleted. The letter would include a reminder that the departed employee would be responsible for any costs or fees of collection and litigation that the school may incur.

This letter would put the risk of continuing to violate the Agreement on the employee, not the school, and could be more effective in getting the disparaging posts removed. If the departed employee fails to comply with the agreement, the school would be on better footing to seek court action to enforce the agreement and to award its fees and costs of litigation. Plus, by having an internal leader send the initial letter, it reduces the risk that the departed employee will immediately "lawyer up."

Get Counsel Before Acting

Of course, no single "form" agreement will fit every situation. State laws on these types of post-termination restrictions may vary – along with other considerations, not limited to provisions under the National Labor Relations Act and the new federal law prohibiting NDAs in sexual harassment and assault situations. Please consult your Fisher Phillips attorney, the author of this Insight, or any attorney in our Education Team to obtain practical advice and guidance on how to implement the strategy outlined in this article. We will continue to monitor the latest developments related to workplace law for schools, so you should ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information.

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D. Albert Brannen
Partner
404.240.4235
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