

PURPOSE, POWER, AND PROTECTION: MAKE SURE YOUR SCHOOL'S EMPLOYMENT AGREEMENTS INCLUDE THE 3 P'S

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Purpose, power, and protection – if those words don't come to mind when you're thinking about your current employment agreements, then it's time to take another look. Before you get to the spring employment renewal and hiring season, now is the perfect time to reflect on the state of your employment agreements and make sure they are meaningful in every respect. In fact, every single provision in your agreement should be designed to be **purposeful**, **powerful**, or **protective** of your school. This article will help you review the most common and important provisions you should include in your agreements and ensure they fulfill the three P's.

Employment Agreements: The Basics

Education is one of the last remaining industries to use annual employment agreements, and your employees will probably expect them. Whether your school characterizes them as offer letters, letters of appointment, employment contracts, or something else, reviewing your employment agreements on a regular cycle gives you an opportunity to reflect on any problem areas and confirm legal compliance.

Regardless of what you call them, you may have a legally enforceable contract on your hands – which means that you should be doubly sure they are compliant. While your agreements can help set expectations and be central to budgeting or strategic plans, they can also limit your school's rights if not carefully drafted. They could, in fact, open the school up to breach of contract claims. And when there is a provision that is unclear and could be interpreted

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in multiple ways, a court will typically construe it in favor of the employee because the school drafted the language and courts want to counteract that power imbalance. All the more reason to make sure you are drafting your contracts with counsel!

The 3 P's in Practice

If you haven't reviewed your agreements in a while, use this time to pull them out and compare them with this guide. You'll want to make sure every single provision – but especially each critical topic described below – is purposeful, powerful, or protective.

1. At-Will Employment: Almost all states default to at-will employment unless changed by a contract provision. When is employment "at-will"? Employment is at will when the employee or the employer can end the relationship at any time for any reason, so long as it's not unlawful. Typically, this doesn't require notice, special procedures, or additional pay. In at-will employment, either party is allowed to separate for a good reason, a bad reason, or no reason at all – so long as it's a lawful reason. Unlawful reasons include discrimination, retaliation, protected activity, and more.

Employment is not at will when it is a contract of employment for a definite term, such as a promise to employ a teacher from July 1, 2023, to June 30, 2024, or if there are limits or specific procedures for grounds to discharge, such as "reasonable cause."

Be purposeful. At-will employment is generally recommended to avoid additional legal claims – like breach of contract – but consider what's best for your employee population. Does your strategic planning office need the certainty of contracts? Do you really want employees to feel "stuck" in a contract if they don't want to work there anymore? Would a change be too radical for your current employees to feel comfortable?

2. Compensation and Benefits: Your employment agreements should distinguish between 10-month and 12-month employees when addressing compensation. Some schools pay 10-month employees only during the school year and don't provide pay in the summer. Some employees prefer the stability of steady income and would rather have smaller paychecks throughout the entire year. Your school has flexibility here, but the compensation provision of the

agreement should be clear. It should also explicitly state that compensation is subject to legally required deductions. Some state laws allow you to deduct costs for failure to return equipment or mistakes in pay. Check with your local attorney about state wage laws that might apply to your school.

For employees who perform extra duties – like coaching the chess team or working as an afterschool program counselor – consider whether those duties should be part of the employment contract or handled separately. If you include the extra duties, do you want to pay the employee at the time the service is rendered? Or spread over a 12-month period? If spread out, you may end up paying much of the total compensation before the extra duties have started. Take a baseball coach for example. If the baseball season starts in the spring semester but the employee is terminated in December, months before the season even starts, you have likely paid them for duties they never performed – and may very well have provided them with compensation to which they weren't entitled.

As for benefits, schools generally should not list benefits in the employment agreement but should instead refer to the employee handbook or insurance plan documents. Flexibility is key because benefit plans change all the time. Using phrases like “at the School’s discretion” can be very useful.

Be powerful. Work with counsel to draft discretionary provisions to give your school the power it needs to adjust to evolving challenges.

3. Force Majeure Clauses: Your employment agreements should have a force majeure clause which excuses performance obligations when circumstances arise that are beyond the parties' control. These clauses typically cover events like floods, fires, war, condemnation, strikes, labor disputes, etc. If you already have a force majeure clause, make sure it covers epidemics, pandemics, and cyberattacks.

Force majeure clauses have been standard for a while, but now with more widespread remote learning capabilities, take time to think through how physical closures could impact your practice. If the school closes and/or modifies its operations, curriculum, schedules, length of the school day or year – or changes the means of learning and teaching – ensure that your clause spells out that employees are fully

expected to perform all duties and responsibilities at the school's discretion and as communicated by the school.

Be protective. Protect your school from as many potential situations as you can think of. We have different capabilities to plan for difficult situations than we did five years ago. Put that knowledge to work.

4. Digital Images and Intellectual Property: Your school likely has some form of promotional materials, social media presence, and a website. Do you use employee photographs, images, or recordings? Make sure your agreement has a provision stating that employees consent to the creation and use of their identity, voice, and image in any of the school's publications, written materials, social media accounts, or website without any additional compensation. Many schools have separate consent forms, but you can eliminate that step by building it right into your employment agreements.

Similarly, make sure your employment agreement contains a provision that protects your school's investment in its employees, programs, and processes. You can protect these resources by making clear that all intellectual property is the exclusive property of the school, including employee creations in the scope of employment.

Be purposeful. There's no need to double up on separate consent forms. You want to strike a balance between thorough and exhaustive, but consent to these provisions should be conditions of employment.

5. Dispute Resolution: Disputes are inevitable – but there are various forums for resolution besides traditional courtroom litigation, including mediation and arbitration. Mediation can help keep issues out of the public eye and ultimately save time and expense if the matter can be resolved early. Arbitration is usually private in that there's no public record but might not be confidential. Arbitrations can be cheaper and faster than litigation, but that trend is turning.

If you want to allow an opportunity for litigation, some states allow a jury trial waiver. Allowing an impartial judge to decide a matter rather than a sympathetic jury can help make outcomes more reliable. Be sure to include a choice of law and venue provision; you don't want to litigate the claim in another state.

Be powerful and protect the school. You can control much of how dispute resolution will play out if you proactively consider your options ahead of time. Use that in a way that ultimately protects the school's interests.

Conclusion

Whatever way your employment agreements look or function, make sure they work for the school. Review the provisions in your employment agreement to make sure there aren't any unnecessary terms, all key terms are included, and your school leadership understands the terms and how it all functions together. Power, purpose, and protection are the hallmarks of any good, legal document. Work with your legal counsel to get the most out of your agreement and set your school up for success.

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