



Torah Educators Network Current Legal Issues

February 5
2018

What Will We Cover?

- Best Practices for Faculty/Employee Contracts
- Constitutional Challenges to Parsonage
- Changes to 529 Plans
- Large Rise in FMLA/ADA Lawsuits

Case Study

The first grade teacher is absent repeatedly, particularly on Mondays. Her absences are creating concerns among the parents who complain about the large number of days that substitutes cover the class. Can you terminate the teacher for excessive absenteeism?



Would it make any difference if the employee in question was the secretary in the Lower School Office?

School Practices in General

Schools are one of the few industries in the U.S. that provide employees with contracts of employment

- Except for CEOs or other top managers, other industries employ “at will”

Employment at Will

What is employment “at will”?

- The employee or employer can end the relationship at any time for any reason
- No notice is required; no special procedures are required; no additional pay is required.
- Employment at will is the standard for employment relationships in all states except Montana

Exceptions to Employment at Will

A contract of employment for a definite term

- A promise to employ a teacher for the 18-19 school year

A contract or other document that places limits or specific procedures on grounds for discharge

- Employee will not be terminated unless there is “just cause”; or
- Before termination, an employee will have X number of written warnings

Exceptions to Employment at Will

Discrimination, retaliation, or whistleblower laws

- Even though your relationship is “employment at will,” you still cannot terminate someone because of their race, sex, national origin, etc.

Retaliation/Whistleblower

- You cannot terminate because someone complained about protected activity

School Practices in General

- Some schools give only teachers contracts
- Some schools give teachers and administrators contracts
- Some schools give everyone contracts
- Many accrediting entities require a contractual relationship between the school and at least its teachers

School Practices in General

- Many schools do not have their contracts reviewed by their school lawyer
- Many schools “borrow” clauses from other school contracts
- Many schools change the contract without consulting their lawyer

Pros/Cons of Having Employee Contracts

Industry standard: applicants and returning employees expect to get a contract

Pros:

- Tends to cause employees to live out the contract term (continuity)
- Can build in remedies (liquidated damages) for early termination

Cons:

- Limitation on employer's right to terminate
- Limitation on employer's right to change conditions of contract
- Payment for violation of termination terms
- Can't force employee to stay working anyway
- Ambiguous term will be construed against employer

What Makes a Document an Employment Contract?

- Agreement to employ the employee
- For a definite duration
- Specific duties
- Promise to pay certain compensation/benefits
- Signed by the person to be bound



What Makes a Document an Employment Contract?

Regardless of what you call it (or don't call it), it may be an enforceable contract

- “Letters of Agreement”
- “Commitment Letters”
- Offer of Employment
- Confirmation of Employment

What Terms Should be Included

Clear terms of compensation

- Requirement to spread pay over 12 months
- Reductions for unpaid leaves
- Reductions for loans, etc.
- Suspension of pay for force majeure events



Case Study

Your math teacher is also the JV tennis coach. You pay a \$2,500 stipend for the coaching duties and spread that pay over the full 12 months of the contract. The JV tennis season starts in April. He doesn't show up for the first practice and is late for the second practice. Parents are upset. When he doesn't show up for the third practice, you decide to terminate the coaching part of his duties.

What problems do you see?

Pay for Additional Duties

When the contract contains additional pay for additional duties, should you spread over 12 months or pay when the job is done?

- If spread over 12 months, you may have paid much of it before the job is even started.

Case Study

You are really interested in pursuing a particular candidate for the AP US History course. This teacher has 4 kids and needs tuition remission for all 4. Your policy provides for only 1 student at full tuition remission and the remainder must apply for financial aid. Your Head advises you to add to the contract that all 4 kids will receive full tuition remission.

Is this okay?

Benefits Terms

You must be careful when modifying contracts to provide for special benefits for employees.

Health, dental, life, disability insurances

Tuition remission

Housing terms

Each of these provisions should be carefully drafted by your attorney to ensure that they comply with law and do not result in a violation of ERISA, your insurance plan, or the tax code.

Case Study

You drafted the teacher employment contract. The contract is for the full school year. The only method of terminating the contract is for “reasonable cause.” Reasonable cause is defined as “moral turpitude, violation of the student/adult boundaries guidelines, sexual harassment, drug or alcohol abuse, or gross misconduct in connection with teaching duties.” The science teacher is new to the school and was a late hire. Within the first two months, it is clear that the science teacher is not working out and that parents are now complaining.

Can you terminate?

What is the impact of termination?

Termination Provisions

It is extremely important that your contract have clear termination provisions that give the school maximum flexibility to make changes where necessary.

- Consider a 90-day introductory period for new employees. During this period, you can define the new employee as an “at will” employee, which will make it easier to terminate if you have made an error in hiring.

Termination Provisions

Ensure that your termination for “reasonable cause” provision is well drafted and flexible. You want to both include a number of clear examples of what constitutes cause (in 21st century language) and some discretionary language for serious behaviors or events that might not be spelled out.

Termination Provisions

Other provisions that you should consider including:

- Termination without cause provision (X days notice or X days pay)
- Disability/Death
- Reduction in Force provisions



Termination Provisions

- Force majeure (what if a hurricane hits?)
- Resignation – what notice will you require?
Any penalty for failing to provide notice?
- Each of these provisions should be drafted by counsel – if you want them to be enforceable.

Duties/Responsibilities Provisions

- Definition of duties/expectations
 - Specific requirements that are important
 - Creation of specific lesson plans
 - Teaching of specific class for X hours/periods



Duties/Responsibilities Provisions

Definition of duties/expectations:

- Broad general statement regarding other terms:
 - All duties expected of a member of the teaching staff
 - Participation in extra curricular activities
 - Supervision of lunch room, drop off, pick up
 - Recordkeeping
 - Attendance at meetings and school events

Other Important Terms

- Acknowledgment that inventions/intellectual property belong to School
- Confidentiality of information gained through employment
- Compliance with employee handbook

Other Important Terms

- At will employment (if so choose)
- Consent to full background check (and updating)
- Consent to reference check

Other Important Terms

- Promise of truthfulness in all statements and documents submitted
- Amendments in writing only
- Assignment by employer
- Payment of attorneys' fees

Dispute Resolution Provisions

Where and how will the dispute be resolved?

- Mediation option – must mediate before suing
- Arbitration – parties agree to a private process
 - Not necessarily faster
 - Not necessarily cheaper
 - Typically private (not filed in public records)
 - Must be carefully drafted to comply with state/federal requirements
 - Be careful on designation of arbitration company
 - Beit Din

Dispute Resolution Provisions

Agreement to waive jury trial

- Case is filed in trial court but the parties agree up front to waive the jury
- Not all courts enforce
- Not private (complaint is filed in the public record)
- But, school would prefer judge deciding and not sympathetic jury

Dispute Resolution Provisions

If no alternative, binding agreement is made, the case is filed in state court

- Public proceeding
- Hits the media faster
- Record in the public records for years to come

Choice of Law/Venue

You don't want to litigate the claim in another state.

- Add a provision that your state law applies
- Add a venue provision indicating that the claim will be brought in your county
- Add a consent to jurisdiction provision

Managing the Contracting Process

- Have counsel draft your master contract
- Do not change the provisions of the contract without counsel's input
- Have the contract reviewed/updated periodically
 - Laws change
 - Interpretations of laws change
 - You may encounter problems to be addressed in the next contract

Managing the Contracting Process

- Ensure that someone is reviewing the contract after it has been signed by the employee to ensure that there are no “cross offs” or changes that must be addressed
- Limit the number of people in the administration that deal with the contracts
- Keep all copies in one place (contract file; personnel file)



Parsonage