

# THE SCHOOL RULE:

## Contracts 101: Employment Practices

by David R. Hostetler, Esq.

*This article is the fourth in our “School Rule” series on effective contract practices. The following provides an introduction to some of the basic principles of school employment contracts.*

*“Horse sense is the thing a horse has which keeps it from betting on people.” —W.C. Fields*

W.C. Fields’ insight into human behavior may have made him a good lawyer . . . assuming he stayed sober. Lawyers typically read many court cases, deal with a wide range of human problems, and counsel many people. Thus the wise practice of law is, in many ways, also a practice in the study of human beings. If we’re not careful, we lawyers can become excessively pessimistic or cynical about human tendencies. Pessimism, or some would say realism, often dictates formal legal arrangements. When drafting and interpreting contracts, such real-world dynamics and human realities are one major factor shaping a lawyer’s thinking. If you think that independent, classical or Christian schools are insulated from these human realities, think again (especially if you believe in original sin). Perhaps the prevalence or degree of day-to-day problems is muted or they are more readily resolved in such schools. But experience tells us that no matter what the context, one should reasonably prepare for a multitude of future possibilities and problems. In the context of school employment practices, such realism and foresight should manifest themselves.

Employment contract law is one area where predictable and unpredictable contingencies must be accounted for. Below, in no particular order of presentation, are some important school employment contracting considerations and principles worth highlighting from my experiences over the past 22+ years of practice and teaching school law, 18 of which have focused on education practices.

1. **Determine the appropriate length of guaranteed contract terms (e.g., no length of time, one semester, one year, multi-year).** Most jurisdictions allow for employment at-will relationships. That is, the relationship may be terminated by either party for any reason if not prohibited by any other law (e.g., anti-discrimination laws, public policy rules). Some jurisdictions prohibit bad faith terminations of at-will employees, others do not. The main point is that independent schools

normally have the right to employ individuals at-will, thus maximizing their flexibility regard employee status and job protection. If someone is not the “right fit,” school officials may sever the employment relationship when and how they wish. (Of course, regardless of what the law allows, moral, ethical, and school values should also guide whether and how such matters are handled.)

Thus, schools officials must decide which staff members will be employed at will, and which will be employed under “specific-term” contracts that guarantee employment for a specific duration or under conditions requiring “just cause” to dismiss the employee.<sup>1</sup>

### 2. **Balance values in determining job protection.**

Strategically, school officials must consider and balance multiple values in determining whether to guarantee a specific duration of employment (beyond at-will status), like a one-year or school-year contract. A few of these values include: (1) employer flexibility to hire and nonrenew employees; (2) attracting qualified employees with desirable job protecting and benefits; (3) developing a professional school climate and fostering high employee morale; (4) conserving financial resources; (5) considering prevailing practices in the surrounding area or among similar schools.

3. **Determine the form of contracts.** Will all staff receive a written contract (versus an oral contract)? Will they receive a short informal letter agreement or a more formal, lengthy, and specific employment contract?

4. **Determine the contents of the contracts.** How specific should the contract be? The answer is usually dictated by such things as complexity, length, and professional level of the position. Short letters of agreement typically contain such things as the job title or designation, basic duties and expectations, confirmation of at-will or specific-term job status, and salary and benefits. In addition, more formal contracts address other specifics: hours and length of work, special and specific duties (perhaps with job description attached), and availability for other duties as assigned. Additional terms might include special compensation or benefits, bonuses, salary increases, performance expectations, grounds and

*The “School Rule” column is designed to offer legal updates and practical legal recommendations. Mr. Hostetler, legal consultant for ACCS, specializes in education law, is founder and director of Lex-is School Law Services (Chapel Hill, NC), and is an associate professor of education law, policy, and ethics at Appalachian State University (Boone, NC). He may be contacted at [hos@Lex-is.com](mailto:hos@Lex-is.com) or (919) 308-4652. More information is available at [www.Lex-is.com](http://www.Lex-is.com).*

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procedures for nonrenewal or dismissal, affirmation of school mission or statement of faith, *etc.* Furthermore, many general “boilerplate” sections are also included in formal employment contracts. (See the April 2012 “School Rule” for details.)

5. **Establish a regular, orderly, and manageable contract process.** Create and adhere to a formal schedule of contract practices, coordinated with the timing of staff evaluations and recommendations (e.g., contract review and revision, dates for letters of intent, renewal/nonrenewal notices, submission of signed contract).

6. **Avoid common employment contracting pitfalls.** There are many ways that contracting process can “go south.” Below are a few examples of what to avoid.<sup>2</sup>

- a. Failure to review and update contract templates by an attorney or other qualified employment specialist.
- b. Issuing vague or inconsistent contracts. One very common example is when a school issues a contract that specifies the relationship as being “at will,” but later in the agreement indicates a specific term of employment e.g., one year or “the school year”) or guarantees the job as long as there is not “just cause” to dismiss or nonrenew.
- c. Informing or promising applicants or job offerees certain terms or promises but not including them in the contract.
- d. Extending a job offer before the school board has formally approved it. (Although a “conditional” offer may be made: e.g., conditioned on board approval, successful employment, or criminal background check.)
- e. Inadvertently incorporating employee handbook policies into the contract. (Normally, in many jurisdictions, what’s in an employee handbook is NOT considered part of the employment contract unless the contract clearly incorporates the handbook or portions thereof into the contract.)
- f. Copying, cobbling, or otherwise drafting contracts without sufficient knowledge of contracting law. For example, adapting other school or organizational documents, without awareness of the legal consequences and nuances unique to your school.
- g. Failure to involve a qualified attorney in the review, drafting, updating and interpreting of contracts.

Resolve to review and, as necessary, strengthen your contracts and contract practices. You never know when you’ll be dealing with a devotee of W.C. Fields, who also once noted that “the best thing to break is a contract.”

### NOTES:

1. I use the term “just cause” termination in contrast to “at will” termination. The former requires a reasonable educational or operational justification (i.e., justifiable reason), the latter requires no or little justification (depending on the jurisdiction).

2. For additional problems and principles, see the “School Rule” columns of March, April, and November, 2011.

