Health Care Reform
How Will It Affect Christian Schools?

With the passage of the Patient Protection and Affordable Care Act (also known as PPACA, Patient Protection Act, or health care reform), the question becomes, How will it affect our Christian schools? In the short term, I believe we will see increases in premiums due to the number of new benefits that must be offered. Those include expansion of dependent-child benefits, fewer lifetime and annual limits, and the elimination of preexisting-condition exclusions for children. There may be some relief to the cost of health insurance in 2014 when the health care reform goes into full swing.

In this article, I have put together a list of items in the new law that will affect Christian schools. Although there may be legal challenges to this legislation, including those by a number of states that may be enacting laws prohibiting a requirement for individuals to purchase health insurance, it is now law. The purpose of this document is to give you highlights and effective dates, based on preliminary information, for major provisions of the new legislation. When the phrase plan years beginning September 23, 2010, describes a provision below, it means that if your health plan year begins in October, November, or December, the new rules apply to your plan year beginning in 2010. But if you maintain a calendar year plan, the changes become effective January 1, 2011.

Breast-Feeding Breaks Required
The Patient Protection Act amends the Fair Labor Standards Act (FLSA) to require that employers provide reasonable unpaid break time for up to one year after the birth of an employee’s child and a private place (other than a bathroom) to nursing mothers so they can express their breast milk. “Employers with fewer than 50 employees don’t have to comply if doing so would create an undue hardship by causing the employer significant difficulty or expense.” Although the act provides that such time can be unpaid, this provision is contrary to the general FLSA mandate that employers pay employees for breaks of less than 20 minutes. (So employees may be able to use their regularly scheduled breaks for nursing breaks.) Also, state laws may limit an employer’s ability to treat the time as unpaid. If your state already has such a law, you must abide by the law that provides employees with the most protection. This provision became effective March 23, 2010.

Tax Credit for Small Employers
Beginning in tax year 2010, small businesses may be eligible for a federal income-tax credit. The employer must have fewer than 25 full-time-equivalent employees (FTE) for the tax year, the average annual wages of the employees for the year must be less than $50,000 per FTE, and the employer must be paying at least 50 percent of the health care premium. Employers

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whose FTEs number less than 10 and whose employees’ average annual wages are less than $25,000 will receive a larger credit. Tax-exempt businesses (Christian schools) also will be eligible for the credit even if they do not have a federal income-tax liability. **For tax years beginning in 2010 through 2013,** the maximum credit for a tax-exempt qualified employer is 25 percent of the employer’s premium expenses that count toward the credit. However, the credit cannot exceed the total amount of the income and Medicare (i.e., hospital insurance) tax the employer is required to withhold from employees’ wages for the year plus the employer’s share of Medicare tax on employees’ wages.

Here’s an example: For the 2010 tax year, a qualified tax-exempt employer has 10 FTEs and pays average annual wages of $21,000 per FTE. The employer pays $80,000 in health care premiums for those employees (which does not exceed the average premium for the small group market in the employer’s state) and otherwise meets the requirements for the credit. The total of the employer’s income-tax and Medicare-tax withholdings plus the employer’s share of the Medicare equals $30,000 in 2010. The credit is calculated as follows:

1. Initial amount of credit determined before any reduction: (25 percent x $80,000) = $20,000
2. Employer’s withholdings for income taxes and Medicare taxes: $30,000
3. Total 2010 tax credit is $20,000 (the lesser of $20,000 and $30,000).

For a tax-exempt employer, such as a Christian school, the credit is a refundable credit; so even if the employer has no taxable income, the employer may receive a refund (as long as it does not exceed the income-tax withholding and Medicare-tax liability).

The IRS recently sent out postcards to small businesses to let them know they may qualify for the tax credit. For more information, visit [www.irs.gov/newsroom/article/0,,id=220848,00.html](http://www.irs.gov/newsroom/article/0,,id=220848,00.html).

Be aware that the IRS has not yet given instructions on how tax-exempt organizations will receive the refund or credit. But you can be informed of updates by subscribing to the IRS news releases on the website listed above.

### Dependent Children

If plans offer dependent coverage, they must extend such coverage to children up to age 26 as long as those children are not eligible for other employer-provided health coverage. This provision is generally effective for **plan years beginning September 23, 2010.**

### Lifetime and Annual Limits

Group health plans and health insurers can no longer impose aggregate lifetime limits. They may impose only a restricted annual limit, which will be established by the Department of Health and Human Services (HHS), on the dollar value of essential health benefits. Essential benefits include the following: ambulatory care, emergency services, hospitalization, maternity and newborn care, mental-health- and substance-use-disorder services (including behavioral health treatment), prescription drugs, rehabilitative services and devices, laboratory services, preventive and wellness services, chronic-disease management, and pediatric services.\(^2\) To the extent authorized by law, annual or lifetime limits may be imposed on specific benefits that are not considered to be the minimum essential benefits. This provision is effective for **plan years beginning September 23, 2010.** Restricted annual limits will be set on essential benefits by HHS for health plan years beginning before January 1, 2014. **Beginning on January 1, 2014,** annual limits will be banned for new individual plans and for all employer plans.

### Preexisting Conditions

Group health plans and health insurers cannot impose preexisting-condition
exclusions on enrollees younger than 19. This provision is effective for **plan years beginning September 23, 2010**. All preexisting-condition exclusions will disappear **beginning in 2014**.

**Rescission of Coverage**

Group health plans and health insurers cannot rescind coverage except in some extreme cases (i.e., fraud). This provision is effective for **plan years beginning September 23, 2010**.

**Wellness Grants**

“**Beginning July 1, 2010**, employers with fewer than 100 employees who work at least 25 hours a week will be eligible for grants to offset some of the costs paid or incurred for qualified wellness programs.... Grants will be available for up to five years.”

**Definition of Medical Expenses**

Medical expenses that are eligible to be reimbursed by health FSAs (flexible spending account), HSAs (health savings account), and HRAs (health reimbursement arrangement) no longer include over-the-counter medicines, unless they are prescribed by a doctor. This provision is effective for expenses incurred for **tax years beginning January 1, 2011**.

**Health Insurance Benefits and W-2s**

Beginning in the **2011 tax year**, employers will be required to report the “aggregate cost” of “applicable employer-sponsored coverage” on employees’ W-2 forms. That includes the value of any medical, dental, or vision coverage the employer may provide.

**Expanded 1099 Obligations**

There is a little-noticed section in the Patient Protection Act (Section 2006) that dramatically expands the reporting requirements for 1099 forms. Currently, businesses have to file a 1099 only when paying an independent contractor more than $600. As of **2012**, a business must file the form every time it makes cumulative purchases of $600 or more from any store or vendor during the year. This procedure aims to raise tax revenue by encouraging more employers to report income. Most likely this will increase paperwork for employers.

**Written Materials**

“Group health plans, including self-insured plans, will have to simplify the presentation of any written material and provide an accurate summary of benefits and an explanation of coverage. Formats must be uniform and language must be easily understood by the average enrollee.... Entities that willfully fail to comply with this provision may be fined $1,000 per enrollee.” HHS has been mandated to provide a set of uniform standards. “This provision is effective **March 23, 2011**. Effective **March 23, 2012**, plans will have to provide summaries to new enrollees.”

**Health FSA Contributions**

Beginning **January 1, 2013**, employee contributions to FSAs are limited to $2,500 (will be adjusted for inflation).

**Employer Responsibilities**

Beginning in **2014**, the legislation will require an employer that has more than 50 full-time employees to pay $2,000 per employee if the employer fails to offer minimum essential health coverage and has at least one full-time employee receiving a premium assistance tax credit for purchase of insurance through the exchanges that will be created by the legislation. If an employer does not offer coverage and the employer has one or more employees receiving the tax credit, 30 workers would be allowed to be subtracted from the calculation. Therefore, a school with 70 employees that fails to offer insurance would pay a penalty of $80,000. Schools with fewer than 50 employees will be exempt from penalties.

**Individual Responsibility**

For each month **beginning in 2014**, all U.S. citizens and legal residents must purchase health insurance coverage. The penalty will be phased in as $95 in 2014 and $325 in 2015. “**Beginning in 2016**, the penalty is the greater of 2.5% of income that exceeds that year’s threshold amount necessary for filing a tax return … or $695 a year per adult in the household; the penalty for dependents under 18 is half. The maximum penalty per household is $2,085.”

**Insurance Exchanges**

Under the law, states will create insurance exchanges that must be operational by **2014**. The exchanges will be open to both eligible individuals and some employers. They will be called Small Business Health Options Programs or SHOP exchanges. They are designed to be an open marketplace for comparative information about coverage options and to allow small businesses to create buying pools for purchasing health plans. **Before 2017**, they will be open to only employers that have 100 or fewer employees. **Beginning in 2017**, each state will be allowed to open up the exchanges to larger employers.

**Employee Notifications**

By **March 1, 2013**, employers must notify employees about these state health-insurance exchanges. Employers must tell whether their plan meets minimum
coverage requirements and how to access information regarding premium subsidies that might be available for exchange-based coverage. Schools must make sure their plans meet the minimum requirements.

Self-Insured Plans
Businesses must go through more detailed procedures if they have self-insured plans.

Requirements for New Health Plans
The following information is taken from an article titled “Reform Law Will Require New Plans to Cover Preventive Care and Limit Out-of-Pocket Expenses” on the Society for Human Resource Management’s website:

Starting in 2011, the new health care reform law will require health care plans to cover most preventive medical care visits and procedures fully. Under the new requirements, plan participants will not be responsible for co-pays or shared costs for proven preventive services that are rated A or B by the U.S. Preventive Services Task Force (USPSTF). These preventive services include annual checkups, healthy child visits, breast cancer screenings for women, and immunizations.

The requirements for covering preventive services take effect for new health insurance plans that begin providing coverage on or after Jan. 1, 2011 (for calendar year plans). A health plan would be permitted to cover or deny any additional services that are not recommended by the USPSTF. The reform law requires the secretary of HHS to develop regulations to define and enforce the provisions governing preventive health care services.

The law requires that health plans offer coverage to individuals who participate and receive treatment from clinical trials. Health care plans starting in 2011 cannot require preauthorization for emergency room visits or for visits to ob-gyn specialists. (emphasis added)

Grandfathered Health Plans
Certain provisions of the new health care reform law don’t apply to so-called grandfathered group health plans. This term describes those plans in which employees and dependents were already enrolled on March 23, 2010. However, there are certain rules that these plans must abide by to continue to be exempt from some of the law. The IRS recently released interim final regulations stating that too many changes to grandfathered policies may create forfeiture of the exemption. So if you seek to keep the grandfathered status of your current health insurance, you need to study these new rules. These IRS regulations will make it very difficult to remain grandfathered.

The following are helpful sites regarding the grandfathered status and the IRS regulations:
- www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html
- http://healthreform.gov/about/grandfathering.html
- www.laborlawyers.com/shownews.aspx?Show=13029&Type=1122

What’s to Come?
Federal agencies will be publishing more regulations, and there may be court challenges to the law in the next several months or years. We will keep you informed of important developments and will try to answer any questions or concerns you may have. You may also want to review information on the new
Press Release

Extension of FTC’s Enforcement Deadline for Identity-Theft Red Flags Rule

The following information on the enforcement of the Red Flags Rule is taken from the Federal Trade Commission (FTC) website at www.ftc.gov/opa/2010/05/redflags.shtml:

At the request of several Members of Congress, the Federal Trade Commission is further delaying enforcement of the “Red Flags” Rule through December 31, 2010, while Congress considers legislation that would affect the scope of entities covered by the Rule.

The Rule was developed under the Fair and Accurate Credit Transactions Act, in which Congress directed the FTC and other agencies to develop regulations requiring “creditors” and “financial institutions” to address the risk of identity theft. The resulting Red Flags Rule requires all such entities that have “covered accounts” to develop and implement written identity theft prevention programs to help identify, detect, and respond to patterns, practices, or specific activities—known as “red flags”—that could indicate identity theft.

You can find previous articles written on this topic at www.acsi.org/kwllrefarticles and then Financial and IRS Issues.

Significant Changes to Form 990

“Form 990, Return of Organization Exempt From Income Tax, is the IRS’ primary tool for gathering information about tax-exempt organizations, for educating organizations about tax law requirements, and for promoting compliance with tax law.” The 2009 Form 990 has been revised. It now modifies and clarifies certain reporting requirements. Non-church-sponsored Christian schools are required to submit this form annually. On its website, the IRS has provided a table that summarizes the significant changes. The site also has links to video, audio, and written materials on the form and its schedules. See www.irs.gov/charities/charitable/article/0,,id=149938,00.html.

Disaster-Relief Resources for Charities and Contributors

“In the aftermath of a disaster or in other emergency hardship situations, individuals, employers and corporations often are interested in providing assistance to victims through a charitable organization.” Before disaster strikes, review the tax rules that apply. Publication 3833, authored by the IRS, is titled Disaster Relief, Providing Assistance Through Charitable Organizations, and it describes how members of the public can use charitable organizations to help victims of disasters or other emergencies. Find specialized disaster-relief resources for charities and contributors at www.irs.gov/charities/charitable/article/0,,id=149938,00.html.
Louisiana Enacts Special Needs Scholarship Program

Washington, D.C. (June 25, 2010)—Louisiana Governor Bobby Jindal this week signed into law the nation’s 20th private school choice program, which will allow children with special needs to use state-funded scholarships to attend the private schools of their parents’ choice.

Hailed by school choice activists as a significant, bipartisan victory for children with special needs in Louisiana, the legislation enacts a two-year pilot program benefiting children in the state’s parishes with populations of 190,000 people or more. Accordingly, children in Caddo, East Baton Rouge, Jefferson, Lafayette, Orleans, and St. Tammany parishes will be eligible to participate.

The scholarships are worth up to half the cost of what the state pays to send participating children to public schools. The new law will assist children in kindergarten through eighth grade who have autism, developmental delay or other specific learning disorders.

“His new program is a significant victory for Louisiana’s children,” said Betsy DeVos, chairman of the American Federation for Children, a leading school choice advocacy organization. “This program will improve educational access and quality for thousands of students with special needs across the state, and we applaud legislators from both parties for doing what is right for families and not bowing to pressure from special interests.”

The bipartisan piece of legislation was authored by Representative Franklin Foil (R-Baton Rouge) and cosponsored by Representative Major Thibaut Jr. (D-New Roads), Representative Patrick Williams (D-Shreveport), Senator Conrad Apple...
(R-Metairie), Senator Ann Duplessis (D-New Orleans), Senator Eric LaFleur (D-Ville Platte), and Senator Gerald Long (R-Winnfield).

The School Choice Pilot Program for Certain Students with Exceptionalities Act will place Louisiana in the ranks of six other states (Arizona, Georgia, Florida, Ohio, Utah, and Oklahoma) that have enacted school choice programs designed for children with special needs. Across the country there are approximately 24,555 students enrolled in these programs and nearly 200,000 students participating in private school choice programs in general.

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**Tax Credit Scholarship Bill Signed into Law in Bipartisan Ceremony at the Capitol**

Tallahassee—A bill that expands a scholarship program for low-income schoolchildren was signed into law today in a ceremony that brought together Republicans, Democrats and a civil rights icon.

The bill, SB 2126, passed the House April 8 by a 95-23 margin that included 20 of the 43 Democrats present. It passed the Senate March 24 on a 27-11 vote that included four Democrats. A majority of the Black Caucus and nearly the entire Hispanic Caucus voted in support.

“The Florida Tax Credit Scholarship Program offers families an invaluable opportunity to choose a learning environment that gives their children the best chance for success,” Gov. Charlie Crist said. “I am confident Florida will continue to provide more educational opportunities and options with the partnership of the business community through great programs like this.”

Gov. Crist has repeatedly praised the bipartisan support of the Florida Tax Credit Scholarship, which currently serves 27,700 low-income students at 1,017 private schools. During a March 24 rally in front of the Capitol, where 5,500 parents, students and educators urged passage of SB 2126, Crist told the crowd, “There’s no partisan politics about kids. As long as we put the children first, we cannot get it wrong.”

The bipartisan support was evident at today’s signing ceremony. Among the guests were Democrats Al Lawson and Gary Siplin of the Senate and Mack Bernard of the House, who were joined by Republican bill sponsors Rep. Will Weatherford and Sen. Joe Negron.

“I have witnessed the leadership in these schools and they are helping these kids become the next generation,” said Lawson, the Senate Democratic leader, during the ceremony.

The event also featured the presence of a civil rights icon in Florida. H.K. Matthews, who has fought to strengthen the Florida Tax Credit Scholarship for the choices it provides to poor families, said that Crist has contributed to what Matthews believes is a natural extension of the civil rights movement.

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“I have devoted my life to the cause of social justice, and this scholarship promises equal educational opportunities to our most at-risk students, regardless of the financial circumstances they come from,” Matthews said. “It is heartening to see my Democratic friends and my friends in the Black Caucus embrace that as well. We all have risen above the partisan divide, and our children will benefit.”

The bill takes two new steps with accountability: requiring individual schools to disclose standardized test score gains if they have at least 30 tested scholarship students, and requiring individual schools to file a financial report by a certified public accountant if they receive at least $250,000 in scholarship revenue. It indexes the maximum scholarship to 80 percent of the base legislative formula for each public school student—or roughly half the total cost per public school student. (The increase would be phased in over at least six years.) And it increases the cap on tax credits from $118 million to $140 million next year, allowing it to increase by 25 percent in any future year in which 90 percent of the cap is reached.

The eight-year-old scholarship program provides educational options for students from households whose income meets federal guidelines for free and reduced-price lunch. Currently, companies receive a dollar-for-dollar tax credit on their corporate income or insurance premium tax liability for money they contribute to state-approved...
nonprofit scholarship funding organizations. Those organizations, in turn, must spend at least 97 percent of that money directly on scholarships. The legislation signed into law today adds three new tax sources: alcoholic beverage excise tax, direct pay self-accrual sales tax and the oil and gas severance tax.

Oklahoma OKs Voucher for Children with Special Needs

In June, Oklahoma passed the Lindsey Nicole Henry Scholarships for Students with Disabilities Act. This was a great victory for Oklahoma families who have children with special needs. This new program will provide much-needed opportunities for many families struggling every day to see that their children receive a high-quality education.

The program is named after Governor Henry’s late daughter, who died of Werdnig-Hoffman disease when she was an infant. There is no annual cap on the number of scholarships that the state can issue through the program.

The scholarship allows students with special needs to receive funding equal to the state and local dollars that would have been spent to educate them in the public school or equal to the private school tuition, whichever is less. Once in the program, students will continue to receive the scholarship through high school graduation if they remain in a private school.

Oklahoma now joins six other states (Arizona, Florida, Georgia, Louisiana, Ohio, and Utah) that offer school choice opportunities for students with special needs.

Arizona’s Tax Credit Program Goes to the United States Supreme Court

The U. S. Supreme Court has agreed to hear arguments in the appeal to reverse the decision of the U. S. Circuit Court of Appeals for the Ninth Circuit in Winn v. Garriott, which declared Arizona’s 13-year-old scholarship tax-credit program unconstitutional. Arizona’s scholarship program allows individual taxpayers to claim a tax credit for donations to nonprofit organizations called student (or school) tuition organizations (STO) that, in 2008, issued more than 28,000 scholarships to enable low- and middle-income parents to send their children to private schools.

The ninth-circuit court’s decision directly conflicts with at least four U.S. Supreme Court cases. This lawsuit, which was filed 10 years ago by school choice opponents, claims that Arizona, by giving taxpayers the choice to donate to both religious and nonreligious STOs, is unconstitutionally advancing religion, because most taxpayers have to date donated to religiously affiliated charities. Nearly 70 percent of ACSI member Christian schools in Arizona receive the benefit of these scholarships.

The most notable issue is that this case does not involve state action in advancing religion. Private choice and private actors control every decision in the scholarship program without any government influence or control. The Supreme Court has already set precedent in this area. In its 2002 Zelman v. Simmons-Harris decision, the Court said that when state aid reaches religious schools as a result of independent decisions of private individuals it does not carry any endorsement of government involvement.

The state of Arizona has structured its tax credit program to be completely neutral with regard to religion. It is the taxpayers, and not the government, who decide which privately run scholarship program will receive their donation. It is the parents who decide which private school to enroll their children in and which scholarship organization to apply to for scholarships.

ACSI and others are submitting amicus briefs to support the position of the scholarship program in Arizona. Oral arguments will most likely take place in late fall 2010.
Organizations create gift-acceptance policies for several reasons:
• To give guidance and direction to those responsible for the fund-development efforts
• To keep the organization out of trouble
• To use as an out when someone wants to give you something that you really don’t want to accept or that you shouldn’t accept (“I’ll have to get back with you on this donation. I need to check our Gift-Acceptance Policy and possibly run this by the Gift-Acceptance Committee.”)

In our current economic climate, most of us aren’t giving the idea of which gifts not to accept a whole lot of thought—in fact the whole idea of saying no to someone who wants to make a gift to your school may seem somewhat ludicrous. Yet I can tell you that many organizations have found themselves in the midst of real “Why did I ever say yes?” scenarios:
• The 30-foot sailing boat that has a hole in the bottom and no mast
• The piece of property that used to be an old gas station and now is considered a toxic waste dump
• The ’63 Ford Mustang “classic” given to the auction at the annual fund-raising event—whose engine seized on its way there

**Fund-Raising or Fund Development?**
Many of you probably have your own horror stories of items you’ve accepted but wish you hadn’t. ACSI has a great example of a basic Gift-Acceptance Policy and Procedures document, which for most schools would serve as a great starting place. In many instances, this policy is complete except for inserting the name of the school. Yet for many small Christian schools, a document of this type has little relevance when it speaks about such things as a development office, a development director, a fund-raising committee, a capital campaign, or the task of establishing endowments or maybe even annual-fund campaigns. Fund-raising in many schools is centered around the sale of merchandise (candy, cookie and pizza dough, gift wrap, greeting cards, and so many other items). This is where I would like to start our discussion and where we need to distinguish between fund-raising and fund development.

Each year as the administrative team begins to assess what enrollment projections will look like for the upcoming school year, the operating budget begins to take shape. Invariably there is a gap between what will be required to operate the school and what tuition will provide for operating revenue. It is at this point that the head of school or the board chair will identify “fund-raising” as the remedy to bridge this gap (and rightly so—that is what we do). When the marching orders are handed down to whoever is responsible for fund-raising in the school, the first question that is often thought of is. Which vendor will we contact for our fund-raising solution for the upcoming school year? Please don’t misunderstand and think that I’m against all fund-raising projects that require students to have direct involvement in raising money for something important. However never confuse a transaction with philanthropy.

Philanthropy occurs when your cause becomes important enough to me that I am willing to give you my money, just for the satisfaction of knowing that I’m doing something good and worthwhile for those affected by your organization. I don’t need anything back other than a great report from the organization on how my contribution had an impact on the education of a student—maybe even my own. This is fund development in its most pristine form: the real magic occurs when you help me make the decision to support the school a second, third, and fourth time.

**The Great Advantage That Schools Have**
Schools have a distinct advantage over other nonprofit organizations that are also trying to raise money for their
causes. First, there is nothing more important to our primary constituents (our students’ parents) than their children—we don’t need to convince this group that what we are doing is important. After all, they have already enrolled their children at our schools. Second, we have the benefit of being able to carry this message to not only the parents but the grandparents as well. Third, at the start of every school year, we have a new group of potential donors through the families of our new students. It is at this point that I would like to state an underlying principle of fund development for private schools.

This is one of the most important jobs in the world!

It should be both sobering and exhilarating to realize that as fund-development professionals we have a stake in educating every one of our students. Schools are communities of people who are all there for the same purpose—the education of the students. On more than one occasion, I have had groups of volunteers and staff engage in extremely lively debates about how money should be raised and spent on education. As a staff person, you can either view this as a bothersome part of the job or realize that people who are passionate are people who care. I’d much rather have staff and volunteers who are passionate, who have strong opinions, than try to move and motivate individuals who are just going through the motions. As fund-development professionals we will find ourselves at times wearing a variety of hats: everything from referee to cheerleader. Notice that on several occasions in the sentences above I have used the term fund-development professionals. Whether you have a dedicated development director, or one person who’s doing everything from admissions to marketing to fund development, that person has a responsibility first and foremost to the donor and secondly to the organization. At that point, he or she is the fund development professional. Let me explain further.

Developing a Donor-Centered Philosophy

My encouragement to any school is to move from fund-raising to fund development. First, you don’t have to worry about chocolate bars melting, pizza dough rising on its own out of control or your having to figure out how to use last year’s Christmas cards for the new school year. But more important, it’s much more beneficial to the institution to develop individual relationships for giving, and it’s a whole lot more fun. Penelope Burk (2003), in the fourth chapter of her book Donor-Centered Fundraising, cites the three things that donors most want in exchange for their contribution to your organization: (1) prompt notification that their gift was received (for tax purposes and just to know you received the check), (2) acknowledgment that their gift will be used for its intended purpose, and most important, (3) a report back from the organization stating how their gift changed someone’s life (less than 10 percent of nonprofit organizations do this last step).

When I state that our first responsibility is to the donors, I hope it’s evident that if we don’t do what the donors want us to do with their money, then they will likely not make a repeat gift. I am also assuming that we created appropriate avenues for donors to give to our schools in ways that allow them to have a sense of choosing where their contributions will go. However, this also means that these giving options have been carefully considered and communicated to your constituents, so that the gifts received can be used by the school where they are most needed. Despite placing the donors’ wishes first, the school must always have the ability to redirect gifts (with the donors’ consent) to where they are most needed when the project the donors chose to give to has already been fully funded.

When Parents Do the Right Thing in a Wrong Way

There are times when well-meaning parents give in ways that complicate our lives tremendously. Unfortunately, we are often on the receiving end of the news (after the fact) that Mr. and Mrs. Smith just bought two 62-inch plasma-screen TVs for the kindergarten classroom that holds 10 students! So what do you do when this happens? When giving happens in this manner, it indicates a lack of understanding on both the donors’ part and the teacher’s on what would have been more appropriate for the classroom. While we shouldn’t expect every teacher to know exactly what the school needs, the teachers really do need to know that when parents make a generous gesture the parents should be referred to the individual(s) responsible for fund development (development director or head of school). In this way the donors’ intentions can be directed in the most appropriate manner, and yet the teachers can be kept out of the direct giving decision of the donors (parents). We always want to keep our teachers at arm’s length from the donations of parents who want to give items specific to the teachers’ classrooms. Not only does this practice keep the teachers out of the “favoritism” perception, but it also works for the greatest benefit for the donors. In the case in
which a donor makes a gift of a specific item to the school, the best that the school can do at that point is to give him or her a gift-in-kind receipt. But if the parent would have given cash to purchase that item, he or she could have received a full tax deduction for the amount of the gift.

Back to Mr. and Mrs. Smith ... so what do we now do with two 62-inch plasma-screen TVs for the kindergarten classroom? Talk to the donors about reappropriating one of the plasma screens to where it is needed most.

Special-Interest Giving
If someone offered to write your school a check for $1 million, but only on the condition that you had a well-thought-out plan for how it was to be used for the best benefit of your students, how long would it take you to deliver an answer and walk away with your check in hand? Whether your school has an operating budget of $500,000 or $50 million, you need to have a plan for the following:

• Where you are headed as an educational organization
• How you are going to get there
• With the above in mind, what are the most immediate needs that cannot be funded out of the operating budget are

Some might refer to this plan as a strategic plan, but strategic planning is receiving a bad rap of recent as it is being deemed outdated. Perhaps it is outdated. Today our schools need to be nimble, able to respond to economic and community needs and trends (but never swaying from their Christ-centered missions). So instead call it a significant discussion for sustainability. It really doesn’t matter as long as you know as an administrative team, as a school board, and as a community what your priorities are. Why is this important?

If you know what your priorities are, then when someone comes to you with a generous offer to fund the construction of an equestrian polo center, you can engage him or her in a conversation to direct the giving according to the school’s priorities. First thank the person for such an offer, and then educate him or her about the school’s next several priorities. It may be more appropriate to include a covered play area for early education students and a new roof or a replacement floor for the gymnasium. If you don’t have a plan for priorities, then donor-directed giving could put you into a tailspin of trying to meet the donors’ desires (out of fear of losing donor support) and result in facilities you either don’t want or can’t afford to maintain. It all comes back to educating the donors and bringing them into your world to understand the master plan for the school.

Since the example above may seem a bit extreme, let’s bring it home to situations you are more likely to encounter—maybe every day. Do you have every sports team wanting to do its own fund-raising? Do you find that every club wants to do its own special event? How many “parent groups” are emerging, all with great fund-raising ideas? If everyone in your school is running around with ideas and efforts for fund-raising to support individual interests, you will exhaust both your constituents and the area businesses. Everyone will feel as though every time they turn around your school is asking for money, for an item to give away, for free advertising, for a sponsorship. They will start running the other way when they see you coming.

On the other hand, fund-development efforts are carefully considered in light of the school’s priorities. It’s much easier to say, “No, we can’t take on an effort to raise money for a 50-meter pool,” if the priorities for the future are well defined. Remember, communities move together in one direction and at the same time. One of the greatest motivators for donors to give to your school repeatedly is to know that their investment in your school is secure. As fund-development professionals (whoever that may be in your school) our greatest task is to educate every one of our constituents on the needs of the school and its plans for the future, and to create opportunities for donors to get involved where God is already at work.

Henry Blackaby, in his Experiencing God Bible study workbook, reminds us that our job is to look around to see where God is at work and then join Him there (Blackaby and King 1990). Let God be at work in your school and trust Him to bring others to join in what He is creating with and for your students.

“Some trust in chariots and some in horses, but we trust in the name of the Lord our God” (Psalm 20:7, NIV).

Editor’s note: You can find sample gift-acceptance policies and other articles on fund-raising at www.acsi.org/kwllrefarticles. Once on that Web page, choose School Fundraising.

For the last 25 years, Robb Resler has been involved in fund development and marketing in some form, and he has had experience in both private schools and Christian schools. He is currently serving as the alumni and development director for Admiral Farragut Academy, a pre-K through 12th-grade private boarding and day school in Saint Petersburg, Florida. Robb can be reached at rresler@farragut.org.

References
At Issue

ACSI’s Quarter Century on Capitol Hill

Reflections of Dr. John Holmes, ACSI Director for Government Affairs

For a quarter of a century, ACSI has had a Government Affairs office in Washington DC. Back in July of 1985, I began to serve as an executive assistant to ACSI’s then executive director Paul Kienel, in a part-time capacity. It was a job that kept expanding and eventually became full-time. I’ve had the privilege of working with five presidential administrations, protecting the rights of Christian schools and religious freedom. I learned early on that you cannot be like John the Baptist—the “voice of one crying in the wilderness”—in DC. Every successful effort to stop—or especially to pass—legislation demands networking with other groups.

It’s true what they say about the “golden Rolodex.” You have to know key people who care about your concerns, and you also need to understand why your position is being opposed by some key players. ACSI has networked with many different kinds of groups, including the Airlines Association and the American Civil Liberties Union (ACLU). Most of the time, ACSI and our friends like the Christian Legal Society have opposed the legislative agenda of the ACLU, but there have been exceptions, such as the coalition that successfully sought passage of the Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000. Eventually RFRA was partially struck down by the U.S. Supreme Court regarding its application against state and local governments, but it still is in effect regarding actions of federal government. This partial success has helped Christian schools even in the former Soviet Union.

Rev. Tim LaHaye, now famous for his Left Behind book series, talked with me early on about small groups on Capitol Hill that might be helpful to ACSI. I remember when Dr. LaHaye told me to find out where Library Court was meeting. At first, I thought it was a place rather than a coalition meeting. When I found the meeting, I met some of the people who have been helpful colleagues for nearly all my time here in Washington. Their jobs may have changed and they may have different titles now, but they are still loyal to issues that matter regarding traditional values and religious freedom.

Back in 1985, the office was dependent on a Commodore 64 computer (that we purchased at Toys “R” Us) and the telephone. The Internet was in its infancy, and our first Internet access and e-mail exchanges were over very slow telephone lines. To find a copy of a proposed bill on Capitol Hill, you had to find the bill room for each house of Congress. Senate legislation was not available at the House bill room and vice versa. That is still true today, but gradually access to proposed bills all changed. We now do most of that research on the Internet through the Library of Congress Thomas website (http://thomas.loc.gov).

Our first fax machine was amazing—for those days. It could both send and receive faxes. The incoming faxes were printed on a roll of thermal paper, and if exposed to light, they would fade away or look like burned brown paper. The machine substituted for a phone, storing a list of frequently used phone numbers and taking audio messages from callers. And our first car phone? It was the size of a toaster! It really was too big to carry around on the Hill. Eventually we had trailing-edge computers, then cutting-edge computers that required an ongoing learning curve, which continues to this day.

A favorite memory of our efforts on Capitol Hill was a Sunday-afternoon telephone call asking that ACSI become involved in working for appropriate religious-freedom exemptions from the proposed Americans with Disabilities Act (ADA). That was three days before a Senate ADA hearing. We were able to have constitutional attorney William Bentley Ball testify on our behalf along with Dr. Sharon Hughey, a blind psychologist and a graduate of one of our member colleges. Both talked about the virtues of the ADA but also about its discrimination against religious entities. Eventually, ACSI gathered more than 60 religious- and civil-rights groups that spoke in favor of religious exemptions, exemptions that were then included in the bill’s final draft, which became
We later asked the Senate staff member why he had called us for help. He said that he had seen how ACSI handled itself when we lost a Senate vote to stop the override of President Reagan’s veto of the so-called Grove City bill, an override that forced onerous government regulations upon the entire college when it had received federal funding only for its students—not the college—in the form of grants and loans. Grove City College has not accepted any federal help since. For ACSI, good came as a result of a loss.

During the last week of ACSI’s first 25 years, we learned that a Catholic church and school in Richmond, New Hampshire, won a discrimination settlement against the local government for $1,500,000 on the basis of the Religious Land Use and Institutionalized Persons Act of 2000, which was enacted in part because of ACSI’s efforts. Maybe our efforts on Capitol Hill will prove to be helpful to your Christian school as well.

Comments from Paul Kienel, President Emeritus
When ACSI was formed in 1978, it soon became evident that we needed to have an office in Washington DC to monitor and at times influence legislation in behalf of our member schools. Dr. John Holmes, a very successful Christian school administrator from Southern California, had moved to the Washington DC area to establish a new church for his denomination. As a pioneer pastor, he needed additional income. Since ACSI could not afford a full-time person at that time, it was a perfect arrangement for John and for ACSI for him to be our Washington DC representative. He was and still is uniquely suited for the position we offered him. He has since become our full-time representative and has served the association extremely well. He is highly regarded by legislators and all those who attempt to influence public policy in Washington.

Comments from Ken Smitherman, ACSI President, Retired 2009
As director for Government Affairs in Washington DC, Dr. John Holmes has played a crucial role in the Christian school movement in the United States through the delicate nuances of a relationship with the federal government that has significantly helped ACSI discover and implement appropriate opportunities of “being at the table.” John has articulately developed and nurtured relationships with key congressional, White House, Department of Education, and numerous other entities of the U.S. government. These relationships have provided ACSI member schools with critical information.
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while at the same time creating an alert system regarding legislation and regulation that would be harmful to the movement.

John has played a key role in the development and implementation of an annual program to mentor ACSI board members in key government matters. These efforts have strengthened the association in achieving a level of credibility with government officials and agencies, helping ACSI to gain recognition as a viable and authoritative education voice representing education from a Christian perspective.

In addition to his diligence and success at representing ACSI in the national-government arena, he has played a vital networking and leadership role with other private school organizations as well as other faith-based agencies with whom collaborative action has greatly helped in representing and protecting the rights of faith-based services and programs serving in the United States and globally.

Thank you, John, for your quarter century of faithful service on the front lines.

Comments from Dr. Tom Cathey, Director for Legal/Legislative Issues

During our executive staff meeting this summer, Dr. Brian Simmons, current president of ACSI, recognized John Holmes for his 25 years of service. He shared the blessing that John has been to ACSI and the great impact John has made in DC! For me, it has been a great pleasure to know John over the years while I served on the Legal/Legislative Committee of the ACSI Executive Board and now as the director for Legal/Legislative Issues. I would be remiss if I did not also mention his wife, Char, who has faithfully served as John’s assistant during these many years.

To both John and Char, thank you for your faithful service first to the Lord Jesus Christ and second to ACSI and our member schools.

Early Education Program—Licensed or Exempt?

By Leanne Leak, ACSI EE Field Director for Western States

Many Christian schools offer programs for young children. How do the unique needs of this age group affect Christian schools’ policies and practices? Preschool children are the least mature and therefore the most vulnerable students on campus. Because of this susceptibility to harm, many of the organizations that offer programs for young children must comply with their states’ childcare licensing regulations. However, about 30 states include some form of licensing exemption that may apply to Christian schools. These exemptions raise the question, How do Christian schools approach this freedom from regulation in ways that benefit the children the schools serve?

The Role of Childcare Licensing

Although specific criteria vary from state to state, the agencies that monitor regulatory compliance share a common purpose. Licensing regulation exists to protect children through the prevention of harm. “State licensing of child care usually applies to all private programs and provides the baseline of protection—from injury, disease, or developmental impairment.” Looking at program excellence as a continuum, licensing has been described as the floor of quality, below which it would not be safe to operate. In this analogy, accreditation represents the ceiling of quality, embodying standards that schools strive to attain. Recognizing the significance of children’s early experiences, many states have implemented quality-rating scales that move schools to higher levels of quality, thereby facilitating the transition from meeting licensing standards (the floor) to reaching accreditation standards (the ceiling).

Notes

1. See John 1:23, KJV.
3. For example, one of ACSI’s member international schools could not get help from the U.S. embassy because of its ambassador’s misperception of the “separation of church and state.” Thankfully, when we sent the ambassador a letter explaining the federal government’s legal responsibility to help American citizens under RFRA, the embassy reversed course and helped the American school, and the problems were resolved.
Exemption from Licensing Requirements

Depending on the state, Christian schools may qualify for an exemption from childcare licensure for a variety of reasons. Seventeen states exempt programs that offer religious instruction. Twelve states exempt programs operated by religious organizations. Eleven states exempt preschool programs operated by private schools. Factors that may influence eligibility for exemption include the age of the children being served, the hours of participation, and the accreditation status of the program. In some cases, schools that are exempt from licensing regulation are required to register with a government entity and may be held accountable for some components of the licensing requirements. It is imperative that each school understand the nuances of the regulatory law that applies to its unique situation.

There is some controversy related to license-exempt care, a term that refers to informal childcare arrangements as well as to childcare centers. Childcare associations believe that license-exempt care puts children at risk and creates a system of unfair competition. And secular advocacy organizations perceive exemption from licensing as a form of special rights granted to religious groups.

Monitoring Your Compliance: Self-Regulation

Although schools may qualify for an exemption from licensing requirements, they are not morally exempt from vigilant protection of the children they serve. As a starting point, each school administrator should educate himself or herself about state licensing regulations.

Being informed about standards of excellence is empowering, and it may even uncover blind spots. From there, comparing the school’s current policies and practices with the licensing standards will provide a fact-based profile of the school’s adherence. After identifying areas in which the school exceeds compliance, complies in an alternative fashion, or needs to implement new practices, an administrator (or an appointee) can create an action plan.

In speaking with ACSI early education directors who have been engaged in the process of self-regulation, I realized that they felt assured that accessing external standards helps them conduct a thorough assessment of their program. Directors saw self-regulation as an outflow of their commitment to ministry and a way of demonstrating such commitment to parents. Although free from the requirement to follow licensing standards, the directors were motivated to validate their program with external measures. The directors mentioned dividing the task into manageable components as a key to success. Because licensing requirements can be lengthy, the directors recommended allowing sufficient time to read and digest the information before beginning the self-assessment.

Accreditation and Exemption

Early education programs accredited by ACSI monitor their adherence to their state licensing standards. This issue was addressed in an ACSI Early Education Director’s Report article:

Many states offer some form of exemption to early education centers involved with ACSI accreditation. For programs that exist to minister to young children in the name of Christ, meeting and exceeding these standards should not be problematic. In fact, because licensing requirements are minimum requirements for the health and safety of children, why wouldn’t Christian programs want to exceed the requirements?

States that offer exemptions to programs do so because compliance will be measured in an alternative fashion. State agencies see accreditation as voluntary participation by centers that endeavor to provide early care and education that go beyond meeting minimum requirements. In fact, when a state receives the ACSI accreditation tool for approval, the state wants to see that the ACSI accreditation standards significantly exceed minimum standards.

If an early education program operates with an exemption but does not acknowledge minimum state guidelines and does not self-monitor to comply with them, the program will have difficulty achieving ACSI accreditation. (Maher 2004, 3; italics in the original)

Accredited schools that have exempt programs affirm their commitment to voluntary self-regulation in their accreditation annual report. The schools commit to an annual review of state regulations by the director and the board chair, the ongoing monitoring of voluntary compliance with state licensing requirements, and the communication of this information to enrolled parents. Additionally, they maintain documentation of fire and health inspections, and they complete background checks on all staff members. Schools that are not pursuing ACSI accreditation would benefit from following similar self-regulatory practices.

Beyond Licensing

An unintended consequence of the regulatory process is a narrowing
of the administrators’ focus to only compliance with a list of requirements. It is no surprise that Christian schools would want to aim higher than this and extend their focus beyond merely protecting children’s basic health and safety to actively promoting children’s growth in every area of development. However, this commitment to children’s learning and character development does not make adherence to licensing requirements unnecessary. In fact, many of the areas addressed by licensing requirements actually create the conditions children need to reach their full potential. Specifically, three interrelated areas—(1) child-staff ratios, (2) maximum group sizes, and (3) staff qualifications and ongoing training—have been identified as structural aspects of care that are typically regulated and that affect outcomes of children who are enrolled in a childcare program.6

One of the strengths of Christian schooling is the innovation made possible by autonomy and impassioned leadership. When schools exercise this freedom and invest in developing high-quality early education programs, threats of excessive government intrusion lessen. Administrators who continually refine their early education programs not only create better classrooms for children but also ensure that parents will continue to have rich choices for their children’s schooling.

Resources
• You can find childcare licensing requirements for each state at http://nrckids.org/STATES/states.htm.
• The ACSI Mid-America Regional Office has developed a chart to assist the exempt early education programs in self-regulating their compliance to licensing standards as part of the accreditation annual reporting process. The chart includes columns for the state code, a description of the program’s current practices in each area, and an action plan for compliance. The chart has been modified to be applicable to all schools, not merely those involved in accreditation. It is available for download on the ACSI website at www.acsi.org/kwllrefarticles under School Issues.
• If you have questions regarding this article, you can e-mail Leanne Leak at leanne_leak@acsi.org.

Notes
3. See note 1.

Reference

Jury Box

Are Schools Liable for the Actions of Volunteers?

In November of 2005, Principal Bates needed a coach for the girls’ basketball team. She appointed Gary Unthank, a 23-year-old coach, to be the girls’ basketball coach at a Christian school in Kentucky. Unthank was a volunteer. In compliance with the school’s policies, a criminal background check was completed before his appointment. However, Mr. Unthank had previously resided in Ohio, and the background check extended only to the state of Kentucky. The check did not reveal anything, even though Mr. Unthank had drug-related criminal charges as well as traffic-related charges in the state of Ohio. The school was a church-sponsored school, and it was revealed that Mr. Unthank had shared his past drug issues with church members of the associated church before his appointment as coach. As a part of his coaching responsibilities, Mr. Unthank was permitted to drive the school van to take the girls’ basketball team to away games.

“A.T.” and “M.C.” were two of the girls on the basketball team. Shortly after the beginning of the basketball season, Mr. Unthank started calling A.T. at home in the evenings and giving her rides home after practice. A.T.’s mother, Lori Eubanks, found out about the calls and subsequently visited with Principal Bates to share her parental concerns. Principal Bates expressed to her a concern that the girls’ basketball team would probably be disbanded if Unthank
was dismissed. However, Principal Bates assured Ms. Eubanks that Unthank would be spoken to and supervised regarding this issue. Principal Bates did meet with both Coach Unthank and the boys’ basketball coach. She told Mr. Unthank to stop calling A.T. and to not give A.T. any more rides home. But despite the orders given by Principal Bates, Mr. Unthank engaged in sexual intercourse with fourteen-year-old A.T. more than once. In the criminal trial, Mr. Unthank pleaded guilty to third-degree rape.

During one of the girls’ games, M.C. was struck by a basketball; the strike caused her to leave the game. Following the girls’ game and after the boys’ game had begun, Mr. Unthank approached M.C. and asked her to walk to the school van with him. M.C. followed Unthank into the van, where he “grabbed her legs and began rubbing her arm.” His actions stopped only because other team members began to approach the van. Unthank denied assaulting M.C.

The two girls’ mothers sued the Christian school for negligent hiring and retention and for the tort of outrage. (The tort of outrage is also known as intentional infliction of emotional distress.) The circuit court granted summary judgment in favor of the Christian school. The court ruled that Mr. Unthank’s actions were not foreseeable or known to the school and thus the school could not be liable. Eubanks and the Coopers (M.C.’s parents) appealed. What did the court of appeals rule in this case? Was the Christian school liable for the actions of a volunteer? You be the judge!

Cooper v. Unthank (2009) not Reported in S.W.3d., 2009 WL 3320924

See The Verdict on page 22.

In today’s litigious society, Christian schools often find it necessary to defend themselves against expensive lawsuits, even when the accusations may be groundless or frivolous. For an annual fee of $219, ACSI will reimburse member schools up to $30,000 per year for legal-defense costs arising out of employment- and student-related lawsuits.

ACSI has expanded the LDRP to include reimbursement of attorney fees of up to $500 to participating member schools so that they can obtain legal advice through prelitigation attorney consultations for threatened employment-related litigation.

For further information, contact legal-legislative@acsi.org.

Can you explain why your employees are exempt or which of your employees are entitled to overtime pay? You may now have to prove your explanations in writing!

The U.S. Department of Labor (DOL) recently released its Spring 2010 Regulatory Agenda outlining its anticipated regulatory and enforcement focus for the upcoming year. As a part of this agenda, the DOL issued a proposal that would require employers to prepare detailed records on every employee’s status under the Fair Labor Standards Act (FLSA). Like the I-9, employers would have to keep the information on file in order to be prepared to show it to the DOL upon request.

Every employer would have to perform an FLSA “classification analysis” for each exempt employee, explaining why he or she is considered exempt from FLSA (and thus exempt from overtime eligibility). Employers would have to document why they consider certain workers to be independent contractors. Employers would have to provide a copy of the analyses for employees, along with “basic information about their employment, including how their pay is calculated.” The employer would then have to retain these analyses to provide them to the DOL inspectors if the inspectors request them.

The DOL states that these new measures are intended to protect workers through greater transparency by employers. However, complying with all of this regulation will require employers to invest significant resources.

The DOL will consider this for a year before it makes its final decision. Find more information regarding the DOL’s 2010 regulatory agenda at www.dol.gov/regulations/2010RegNarrative.htm.
Family and Medical Leave Act and the Courts

The Family and Medical Leave Act (FMLA), which became law in 1993, provides qualified employees with up to 12 weeks of unpaid leave per year for the birth or adoption of a child, for giving care to a spouse or an immediate family member who has a serious health condition, for convalescence after an employee’s own serious health condition, for a “qualifying exigency” caused by an immediate family member’s being called to active military duty, or for providing care to a seriously ill or injured covered service member who is an immediate family member. There is no statutory exemption of religious institutions under this act. All schools must be in compliance with the wall-posting requirement (posting a notice that explains the rights and responsibilities associated with FMLA). Schools must keep and preserve records pertaining to their compliance with this act.

Schools with 50 or more employees must be in compliance with all other provisions of the act that may require up to 12 weeks of unpaid leave during any 12-month period for “eligible employees.” Provisions of this act include special rules regarding leave for instructional employees (29 U.S.C. § 2618). An eligible employee who complies with notice requirements under the act must be restored to the same or equivalent position upon his or her return and should not lose any benefits accrued before his or her leave.

To be eligible for FMLA benefits, an employee must (1) work for a covered employer; (2) have worked for the employer for a total of at least 12 months; (3) have worked at least 1,250 hours over the previous 12 months; and (4) work at a location where at least 50 employees are employed by the employer either at the same location or within 75 miles of it. (Employees located on several campuses of the same school would be added together.)

Now after 15 years, we have a number of court cases that have defined and clarified this complicated act. This article will examine some of the cases that have taken place as well as their implications.

Handbook Policies Can Make a Difference

Communication of FMLA is probably one of the most important things a school can do to protect itself. As a school leader you should put all the details of FMLA in the school handbook and set specific policies as it relates to the school. Be clear in your policy about how you plan to calculate the 12-month year, since the law lets you choose from four different methods.

Also, make sure that every employee signs an acknowledgment form stating that he or she has received the employee handbook and has understood the policies contained therein. In a recent case the employer determined to calculate the employee FMLA leave by the “rolling method.” The rolling method measures a 12-month period backward from the date an employee first uses FMLA leave. This company gave each employee a notice of the change and posted it on the employee bulletin board. One of the employees took additional leave after she had used up her 12 weeks of FMLA that had been calculated using the rolling method. She was then fired for absenteeism. She sued under FMLA, and the courts agreed with her. The court said the employer neither properly used the rolling method nor properly communicated it. Although the company handed out the new policy and placed it on the bulletin board, it did not put the new policy in the employee handbook. (Dodaro v. Glendale Heights, No.01C6396, N.D. Ill., 2003)

In another case a bank teller took 16 weeks of maternity leave upon the employer’s approval. When she returned to work, she was demoted to a lesser position. The bank claimed that FMLA offered her no protection since she took more than 12 weeks off. She sued and said the bank failed to inform her of the interpretation of FMLA, either in its employee handbook or at the time she initially informed the bank and asked for the leave. The court ruled in her favor, stating that an employer can be liable if failure to inform an employee interferes with that employee’s FMLA rights. (Fry v. First Fidelity Bancorporation, 64 LW 2503 [DC E.Pa 1996])

In a recent case a college fired one of its directors for absenteeism, stating that the director had used up her FMLA leave. The court ruled in favor of the employee, saying that the college in its handbook policies failed to make clear its “leave year.” The court noted that the regulation provides that if an employer “fails to select” one of the options defined in the FMLA statutes, “the option that provides the most beneficial outcome for the employee will be used.” The college did state in its handbook the fiscal year would be used for sick leave and vacation time. However, it did not specify the same in its FMLA policies. (Spencer v. Marygrove Coll., E.D. Mich., No. 07-CV-11135, 8/26/08)
When Does FMLA Leave Start?

For an employee to be eligible for FMLA, he or she must have worked for at least a year and for 1,250 hours over the previous 12 months. So when does this required time period begin? It begins the moment the employee is on the payroll. If you have a teacher substituting or working part-time whom you then hire full-time, you may need to go back and count from the time the teacher began the temporary work. Record keeping is a very important component of FMLA.

In a 1997 case a federal court in Ohio ruled that the clock can start ticking when an employee begins temporary work. The ruling permitted a 6-month employee at Defiance Metal Products company to claim that her FMLA rights were violated when she was fired for absenteeism. The company claimed that she was not covered under FMLA because she had only worked for 6 months. However, she had worked 7 months as a temporary employee before being hired for her permanent position. The court said that this qualified her for FMLA coverage when the temporary-work time was combined with her permanent-work time. (Miller v. Defiance Metal Products, Inc., 1997 WL 809684 [ND OH, 1997])

In another case a court’s ruling showed that the clock does not always tick for every day a person is employed. A hospital employee attempted to file a claim under FMLA for excessive absences. The employee had admitted he had worked only 1,037 hours over the last 12-month period. This was short of the 1,250-hour requirement. But he argued that his vacation time and holidays made up the difference. The court ruled that FMLA time does not include vacation days, personal or regular holidays, days of suspension, and sick days. These are not hours compensated for actual work rendered even if the employee receives pay for them. (Clark v. Allegheny University Hospital, 1998 WL 94803 [ED PA 1998])

Special note: Many part-time employees, like cafeteria workers, bus drivers, and teacher aides, will probably not be eligible for FMLA leave even though other employees of a large school will be eligible. On the basis of a 180-day year, part-time employees would have to work almost 7 hours a day or 35 hours a week to be eligible, since they must work at least 1,250 hours during the previous 12 months to qualify for leave.

Acting on FMLA Requests

It is important that you as the supervisor think in terms of FMLA when speaking with an employee who mentions a medical issue and the need for time off. The employee does not need to mention the words FMLA for the conversation to count as notification. Once notified, you need to act quickly on the request and not delay. Within 2 business days after you learn of an employee’s FMLA-related absence or planned absence, you must send a written notice to the employee. The letter should outline the organization’s specific requirements for using leave.

In one case a banker at JPMorgan Chase, the parent of a child who suffers from diabetes, often requested time off for her child’s medical care. When she asked for FMLA leave, her supervisor delayed requesting the paperwork from HR for 2 months. However, the supervisor did grant the requested time off. When the HR department approved the leave, it was applied retroactively. Later the employee was fired for an unrelated reason. She sued the bank for interference with her FMLA claim because of the 2-month delay. “The court wrote that ‘even where an employee’s FMLA leave is eventually approved, an employer’s delay ... constitutes a violation’ ” (National Institute of Business Management 2007, citing Mueller v. JPMorgan Chase Co., No. 1:05-CV-560, ND OH, 2007).

Belerim Beqiri asked for 1 month’s leave to go to Kosovo because his mother was sick in the hospital. His employer denied him the leave and suggested that he take it at a later time. He sued, arguing that he had been denied his FMLA rights. The company argued that Beqiri was not entitled to leave under the FMLA and that he failed to provide adequate notice. The company said he had not provided sufficient information to substantiate his mother’s sickness and his need to care for her. The court said, “Once an employer is given notice that an employee is requesting leave for an FMLA-qualifying reason, the employer bears the obligation to collect any additional information necessary to make the leave comply with the requirements of the FMLA.” The court agreed that this was sufficient notice. Here the combination of the words sick and hospital should have alerted the company to a possible FMLA request. (Belerim v. Nelco, Inc., No. 3:05-CV-803-H, 2007 U.S. Dist., LEXIS 40447 [WD.Ky. June 4, 2007])

The employer must be sure to provide the FMLA paperwork once the leave request has been made by the employee. In the Ridings v. Riverside Medical Center case, a full-time exempt manager requested and was granted 3 weeks of medical leave to have her thyroid removed. Upon returning, she had difficulty working a full 8 hours each day, so she would leave early and take work home with her. Her employer told her twice that she must return to a full 8-hour day and took corrective action afterward.
Before the Bench

The FMLA regulations outline eight specific items that must be addressed in the written response to an FMLA request by an employee:

1. That the leave will be counted against the annual FMLA leave entitlement
2. Any requirements for the employee to furnish medical certification and the consequences of failing to do so
3. The employee’s right to elect to use accrued paid leave for unpaid FMLA leave and whether the employer will require the use of paid leave, and the conditions related to using paid leave
4. Any requirement for the employee to make co-premium payments for maintaining group health insurance and the arrangement for making such payments
5. Any requirement to present a fitness-for-duty certification before being restored to his or her job
6. Rights to job restoration upon return from leave
7. Employee’s potential liability for reimbursement of health insurance premiums paid by the employer during the leave if the employee fails to return to work after taking FMLA leave
8. Whether the employee qualifies as a “key” employee and the circumstances under which the employee may not be restored to his or her job following leave

What Constitutes a Serious Health Condition?
FMLA defines serious health condition as “an illness, injury, impairment, or physical or mental condition” that involves any of the following:

- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer’s, stroke, terminal diseases, etc.)
- Any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than 3 consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.)

Schools should be very careful to make quick judgments as to what constitutes a “serious health condition.” The first thing they should do is request medical certification. Here are three cases worth noting:

1. In this case a company fired its truck driver for taking unauthorized leave while he underwent doctor-recommended tests after suffering chest pains. The company argued that he did not qualify for FMLA leave because the EKG showed that he had not suffered a heart attack and that therefore he didn’t have a serious condition. The court ruled in favor of the employee and said that FMLA did apply because the employee’s doctor determined that the absence was necessary until further tests could determine the condition’s severity. Therefore the court was saying that if an employee just thinks he has a serious condition, he can take

Ridings then provided a note from her doctor stating that she could not work an 8-hour day until further notice. Her supervisor at the medical center then gave her the FMLA application and medical certification forms. After several tries to get the employee to return the forms, the employer suspended Ridings without pay for 3 days and finally fired her. She sued the company, stating FMLA interference and retaliation. The court ruled in favor of the employer because it had provided the employee with the proper paperwork and given her sufficient time to complete it. This case shows that, while an employer is required to provide the proper paperwork and give the employee sufficient time to return it, the employer may require the employee to comply with the request for medical certification in a reasonable amount of time. (Ridings v. Riverside Medical Center, 7th Cir., No. 06-4328, August 11, 2008)
FMLA leave to have that condition checked out. (Woodman v. Miesel Sysco Food Serv. Co., No. 226001, Mich Ct. App., 2002)

2. The courts have ruled that a normal pregnancy can constitute a “serious health condition” if the particular job poses an unreasonable risk of harm to the employee. A female worker’s job required her to stand all the time and to move around constantly. When she became pregnant, her doctor was concerned that her job would cause her to be at risk for hypertension and premature delivery. She applied for FMLA leave, but she was denied by her company, which stated she did not have a “serious health condition” because she was experiencing a normal pregnancy and was physically able to perform her job. Here the court said that even though the company’s facts were correct, the employee was prevented from working by the restrictions placed on her by her doctor. Therefore, the courts considered this a “serious medical condition.” (Whitaker v. Bosch Braking Sys Div, 180 F Supp 2d 922 [WD Mich 2001])

3. If the employee fails to give notice, the employer can deny the leave regardless of whether the medical reason for the leave is genuine. Steve Aubuchon, an employee of Knauf Fiberglass, notified his employer that he wanted FMLA leave to stay home with his pregnant wife. However, Aubuchon did not cite his wife’s incapacity, complication, or any other serious health condition. Since pregnancy in itself is not usually grounds for FMLA leave, his company denied the leave. When he did not show up for work, he was terminated according to company policy. He appealed, and he was reinstated to his position. Later when Aubuchon was terminated for other reasons, he filed a lawsuit claiming that his first termination was a violation of his FMLA rights and that his final termination was in retaliation for exercising those rights. The court in this case agreed with the employer. Aubuchon had failed to give his employer the proper notice stating that his wife had complications covered by FMLA. The court also said he could not fix that failure to give proper notice after he was fired, when he produced documentation from his wife’s doctor confirming her complications. (Steve Aubuchon v. Knauf Fiberglass, 7th Cir., No. 03-1382, March 8, 2004)

Conclusion
As Christian school leaders, we cannot be too careful in how we treat our employees and respond when they ask for leave. Schools should have clear policies on the Family and Medical Leave Act; administrators should have a very clear understanding of all the act’s details.

Finally, remember that some states have their own FMLA rules that you may need to consider. You can find more information about FMLA at one of the Legal/Legislative Services Web pages of the ACSI website at www.acsi.org/kwwlrefarticles. See www.dol.gov/whd/fmla/index.htm also.

Most quotations taken from the court cases cited in parentheses and the DOL’s former Employment Standards Administration website

**FMLA Compliance Checklist**

___ Draft a written FMLA policy and place it in your faculty and staff handbook.

___ Clearly cover the FMLA policy during your faculty and staff orientation meetings at the beginning of each school year.

___ Post the Department of Labor’s Notice of FMLA Rights.

___ Respond to an employee’s request for FMLA leave within 2 business days.

___ Include absences for workers’ compensation as FMLA leave.

___ Establish a measuring method to determine the annual tracking for FMLA leave.

___ Verify “serious health conditions” by using medical certification.

___ Deduct intermittent leave from the employee’s allowable 12 weeks.

___ Continue to cover paid benefits during the leave period.

___ Understand the differences between ADA (Americans with Disabilities Act) and FMLA and treat these acts separately.

___ Reinstate the employee to the same or equivalent position when he or she returns.

Reference
National Institute of Business Management. 2007. Act fast on FMLA requests: Delay triggers a violation. HR Specialist: Employment Law 37, no. 6 (June): 1.
Are Schools Liable for the Actions of Volunteers?

The case went to the Commonwealth of Kentucky Court of Appeals. During discovery, there was testimony offered by several members of the girls’ basketball team that Mr. Unthank made sexual advances toward the girls and that he was “weird” and “creepy.” There was also testimony that before Mr. Unthank’s statutory rape of A.T. and alleged assault on M.C., Principal Bates had been told by a student who knew of Mr. Unthank’s calls to A.T. that this student suspected a possible sexual relationship between Unthank and A.T. Additional testimony revealed that Unthank had been removed from the sponsoring church’s youth ministry because of his drug-related activity.

It was argued to the court that the presented facts created a jury question on the appellants’ claims for negligent hiring/retention. The court looked at previous cases that held that liability can be imposed on an employer who knew or should have known that the employee was unfit for the job in which he or she was employed and that his or her placement or retention in that job created an unreasonable risk of harm. In their appeal, the parents did not pursue their earlier claims based on respondeat superior (literally, “Let the master answer”), or vicarious liability, “apparently conceding that Unthank’s criminal acts were not in furtherance of the interest of the Academy or the church.” The court said that “negligent hiring/retention claims differ from liability based upon respondeat superior in that the law imposes a duty upon the employer to use reasonable care in the selection or retention of its employees.”

In its decision the court stated, The imposition of a duty upon the employer in a negligent hiring/retention claim arises from the special relationship between the tortfeasor* and the defendant.... We conclude that the requisite special relationship exists between a school and its students to impose liability on a school for negligent retention/hiring.

The court said that Mr. Unthank’s drug history and drug-related charges did not render him a desirable athletic coach but that there was nothing in his criminal history to suggest he had the propensity to sexually abuse children. However, there were additional facts that compelled the appeals court to reverse the lower court’s (circuit court’s) decision. The appeals court concluded that there was a question of material fact as to whether it was foreseeable that Mr. Unthank would sexually abuse a child.

Principal Bates was warned by A.T.’s mother that Mr. Unthank engaged in inappropriate behavior toward girls at the school. Furthermore, the principal was warned by some students who felt his behavior toward female students was inappropriate. The appeals court concluded that although Principal Bates and other school personnel may not have known that Mr. Unthank would commit or was committing criminal acts, the law requires only that it be reasonably foreseeable that there was a risk of harm.

The appeals court also concluded that it was not beyond reason for a jury to conclude that Principal Bates’ knowledge of Mr. Unthank’s late-night phone calls to female students, of Mr. Unthank’s providing transportation to A.T. in a private vehicle, and of information gained from A.T.’s mother and other sources make it foreseeable that the coach would commit the acts alleged by the appellants.

Consequently, the appeals court reversed the lower court’s decision for summary judgment on the claims of negligent hiring/retention (but affirmed the lower court’s decision for summary judgment regarding the tort of outrage).

*Tortfeasor means “a person who commits a ... civil wrong, either intentionally or through negligence.” See http://legal-dictionary.thefreedictionary.com/Tortfeasor.
**Anonymous Tips**

**What Can We Learn from This Case?**

In this case, the court looked at a volunteer as if he or she were an employee. ACSI recommends that schools fingerprint all employees and conduct background checks beyond the local community or the state in which the school is located. The association also recommends that, if a volunteer may have unsupervised contact with children, the volunteer should undergo the same fingerprinting and background-checks procedures as an employee.

Christian schools shy away from fingerprinting just because of the cost. Today, schools cannot afford not to do both fingerprinting and thorough, national background checks. You can find a recent article titled “Background Checks: A Must!” under Employment Issues at www.acsi.org/kwlrefarticles.

Also as school administrators, we must immediately investigate all claims of employee or volunteer misconduct and then take appropriate action if warranted. Today, schools cannot overlook any concerns about sexual inappropriateness by employees or volunteers. In this case, a more thorough investigation with team members and other students would have been appropriate and would likely have served to protect the school. This is an area that courts and states are very concerned about. Several states have recently passed much stronger laws and penalties on school personnel who sexually abuse the children under their care. This is something we as Christian schools cannot take lightly.

**IRS Releases Governance Check Sheet.**

The IRS has released a check sheet that will be used by agents during examinations of exempt organizations to gather information on the “governance practices and the related internal controls of organizations.” According to the IRS, the check sheet will be used to collect data for its continuing efforts to understand the “intersection between governance practices and tax compliance.”

The check sheet reports on organizations’ governance structures, including bylaws provisions, board meetings, and relationships between directors; board practices for compensation decisions; adoption of written conflict-of-interest and document-retention policies; and financial oversight practices. The sheet is available at www.irs.gov/charities/article/0,,id=216068,00.html.

**DOL Announces the Disability Non-discrimination Law Advisor.**

The U.S. Department of Labor (DOL) announced on May 4, 2010, the availability of a “new tool to help America’s employers ensure that their employment policies and practices do not discriminate against qualified individuals with disabilities.”

The interactive, online tool “helps employers quickly ... determine which federal disability nondiscrimination laws apply to their business or organization and their responsibilities under them.” To do this, “it asks users to answer a few relevant questions ... [and] then generates a customized list of federal disability nondiscrimination laws that likely apply, along with easy-to-understand information about employers’ responsibilities under them.”

The Disability Nondiscrimination Advisor is one of a series of “e-laws” (Employment Laws Assistance for Workers and Small Businesses) advisors developed by DOL to help people understand federal employment laws. To access it, visit www.dol.gov/elaws. To learn more about DOL’s efforts to increase employment opportunities for people with disabilities, visit the Office of Disability Employment Policy website at www.dol.gov/odep.

**DOL Announces Child Labor Rules.**

The following is from a DOL news release:

Washington—The U.S. Department of Labor today announced the publication of final regulations updating protections for young employees in non-agricultural work for the 21st century economy.

“Today’s regulations protect young employees from dangerous machines and tools, excessive work hours and other hazards at work,” said Secretary of Labor Hilda L. Solis. “These rules incorporate recommendations from the National Institute for Occupational Safety and Health and take a common sense approach to keeping young workers safe from harm.”

The new regulations give employers clear notice that there are certain jobs children are simply not allowed to perform. They also expand opportunities for young workers to gain safe, positive work experience in fields such as advertising, teaching, banking and information technology, as well as through school-supervised work-study programs.

“With the completion of these rules, I have asked my staff to turn their attention to strengthening the regulatory protections for children working in agriculture,” added Secretary Solis. “We cannot put a price on the health and safety of a child, or on the value of a positive work experience. This Labor Department will not rest in our efforts to ensure health, safety and opportunity for every worker in America.”

Editor’s note: Both federal and state laws restrict the hours and type of work performed by young employees. Find federal information at www.dol.gov/topic/youthlabor and links to your state child labor laws at www.youthrules.dol.gov/states.htm.

Reprinted from WHD (Wage and Hour Division) news release “U.S. Labor Department Announces Publication of Final Child Labor Rules for Non-Agricultural Work,” May 19, 2010
U.S. Supreme Court and Mediation/Arbitration Clauses

Q. Our school has included a Christian mediation/arbitration clause in our contracts and employee handbook for several years. I read recently that the Supreme Court had considered mandatory arbitration agreements and wondered whether the school can continue to require arbitration and, if so, what the school should include in light of the rulings.

A. You are correct in that both state and federal courts, including the Supreme Court, have recently considered employment-related mandatory arbitration agreements. Because of the Federal Arbitration Act, the Supreme Court has upheld employment-related mandatory arbitration clauses as long as they meet standards applicable to any other contract. You should note, however, that in the most recent Supreme Court case, the dissenting four justices would have restricted the enforceability of employment arbitration agreements. Moreover, Congress is currently considering the Arbitration Fairness Act of 2009, which could eliminate all predispute arbitration agreements.

At present, the enforceability continues depending on the language contained in the arbitration agreement. In light of this, ACSI has recommended that member schools periodically review their contracts and employment policies to update them. Some member schools are using mandatory arbitration clauses that are 10–15 years old. ACSI has updated the sample Christian mediation/arbitration clause contained in the Personnel Resources for Christian Schools CD.*

To meet federal and state legal requirements, an employment-related mandatory arbitration clause should include the following areas and the appropriate language:

1. Access to a neutral arbitrator—both parties must agree on the arbitrator, using a fair procedure.
2. Mutual obligation—both employer and employee must be mutually obligated; both are required to arbitrate.
3. More than minimal discovery—rules and procedures must be in place to permit fair investigation and discovery so the parties can prepare adequately for the arbitration.
4. A written award or opinion from the arbitrator—this allows examination of arbitrator’s rationale.
5. Allowance of any type of relief that the employee could otherwise obtain in court—the employer cannot restrict the type or amount of award to less than that which the employee could receive in court.
6. Assurance that the employee does not have to pay unreasonable costs as a condition to access to arbitration—generally the cost cannot be more than what would be incurred in filing an action in court.
7. Equitable appeal procedure, if any—this is not required, but if included, it must be fair.
8. Compliance with state—agreement must comply with specific state statutory language or requirements.

Even in situations involving noncontract employees (usually nonteaching staff), situations in which an arbitration clause may be in an employee handbook, the school should still have employees sign a statement specifically agreeing to the Christian mediation/arbitration clause. Even though mandatory mediation/arbitration clauses usually save the time, money, and testimony of both sides, the primary rationale should be that this is a biblical forum to resolve disputes between believers. 

*Visit the Purposeful Design Publications website (www.purposefuldesign.com), and go to Legal/Legislative under the Resources tab.

Attorney John L. Cooley served as a Christian school administrator for 10 years before attending law school. He charges a flat fee of $110 for up to 30 minutes of legal work by telephone, and more than 500 Christian schools seek his legal advice each year.