Human Resources and Employment Law Practices in Christian Schools

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Disclaimer

• State laws governing employment vary widely, particularly in the areas of overtime, non-discrimination, leave of absence, and employment at-will. The material presented in the seminar provides applicable federal material, but it has not been customized to any particular state.

• The seminar notes are not intended nor should they be used as a substitute for specific legal advice or opinions since legal advice and counsel may be given only in response to inquiries regarding factual situations.

• Before implementing this material in a policy manual or employee handbook, you should consult an attorney who is familiar with your organization and is well versed in the laws that govern the employment relationship in your state.

• Always check your state law at the state labor department website: http://www.dol.gov/whd/state/state.htm.
The Hiring Process

• Title VII of the Civil Rights Act of 1964
  – The Nation’s employment non-discrimination law.
  – Employers cannot discriminate based on race, sex, religion, or national origin.
  – Amended to add age discrimination, pregnancy, or pregnancy-related medical conditions, and disabilities.
  – Section 702
    • Has specific wording that allows religious nonprofit employers to discriminate based on religion.

• The cultural battle!
  – We must clearly articulate our religious mission and religious requirements for employment at the school.
    • Have a Biblical statement of faith that employees must adhere to without mental reservations.
    • Have a mission statement that identifies the school's religious purpose.
    • Have job descriptions that clearly identify the religious qualifications such as being born again and other expectations.
    • Have a lifestyle statement that articulates what type of life the person must lead to qualify for an employment position in a religious school ministry. (24/7/365)

• Bishop v. Amos 483 U.S. 327 (1987)
  – Amos, a support worker in a Mormon church-owned gymnasium who was discharged because he failed to qualify for a certificate that he was a member and eligible to attend its temples.
  – The lower court ruled in favor of Amos and it was appealed.
  – It was heard by the US Supreme Court in 1987.
  – The Supreme Court ruled that applying the exception to a religious organization’s secular activities does not violate the Establishment Clause.
  – Religious exemption applies to all employees of a religious ministry!
The Hiring Process

• Emphasize that individuals on your staff must serve as “Christian role models” for your students.
  – This should enable you to require higher standards from applicants and employees than is typical for secular employers.
  – This phrase and concept of “Christian role models” should be a part of your job descriptions and contracts.
  – Use scripture.

The Hiring Process

• Emphasize that teaching is a ministry.
• Schools can lose their religious exemption in the law if a school is not consistent in applying its religious criteria to its hiring and employment practices.
  – Hiring of a non-Christian
  – Knowingly hiring a person not living the Christian lifestyle
  – Inconsistency can cost your greatly!

The Hiring Process

• Employee Life Style Requirements
  – Luke 6:40 is a key verse for those that would seek to train or teach children:
    A student is not above his teacher, but everyone who is fully trained will be like his teacher.
  – Use the phrase “Christian role model” often in your employment materials.
  – Have employees sign a “Lifestyle Statement” as a part of their contract.
  – Declaration of Moral Integrity
    • Deals with moral standards expected of employees.
    • Attach it to your job applications
Exempt and Non-Exempt Employees

• The federal Fair Labor and Standards Act (FLSA), (29 USC § 201 et seq.) establishes the federal minimum wage and a 40-hour workweek with time-and-a-half pay for overtime work for employees.
  – An “exempt” employee is one that is exempt from the overtime requirements.
  – Executive, professional, and administrative employees can qualify as “exempt”.
  – The Dept. of Labor looks at duties, not titles of individuals when determining whether they are properly classified as “exempt” from overtime or not.

Exempt and Non-Exempt Employees

• To qualify as an "EXECUTIVE" exempt person, the individual must:
  1) manage an enterprise, department, or subdivision as a primary duty;
  2) direct the work of at least two full-time employees;
  3) have authority to hire and fire or to make recommendations on hiring and firing; and
  4) be paid a minimum of $913 per week (as of December 1, 2016).

Exempt and Non-Exempt Employees

• To qualify as an "ADMINISTRATIVE" exempt person, the individual must:
  1) either be responsible for office work directly related to management or general operations or be responsible for work directly related to academic instruction or training at a school;
  2) regularly exercise discretion and individual judgment in matters of significance, as opposed to merely following procedures, and have authority to make important decisions;
  3) regularly assist an owner or executive, or perform work that requires special training or experience under only general supervision; and
  4) be paid a minimum of $913 per week, or if employed on a yearly basis, a minimum salary of $47,476 (as of December 1).
To qualify as a "PROFESSIONAL" exempt person, the individual must:
1) have knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, or have talent in a recognized field of artistic endeavor;
2) the work must require the consistent exercise of discretion and judgment in its performance; and
3) the work must be predominantly intellectual and varied in character, not routine physical, mental, manual, or mechanical work.
4) be paid a minimum of $913 per week, or if employed on a yearly basis, a minimum salary of $47,476 (as of December 1).

Teachers
- Usually fit under the “Professional Category”.
- There is a subcategory under this exemption for teachers
- It does not require a college degree to qualify.
- Simply teaching in a classroom setting qualifies.
- Teachers serving in nursery schools and up through the college level automatically qualify for the professional exemption category whether or not they earn $913 per each week employed.
- A teacher qualifies for the overtime exemption by virtue of the position alone.

Academic Administrators
- Under the “Administrative Category”.
- There is a subcategory under this exemption for academic administrators
  - Paid on a salary basis which is at least equal to the entrance salary for teachers in the same educational establishment
  - Primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment
Exempt and Non-Exempt Employees

• The New DOL Final Rule: The Change in Minimum Salary for Exempt Employees
  – So what has changed?
    • Beginning December 1, 2016
      – The minimum wage for an exempt employee is raised from the $455 per week to $913 per week or $47,476 annually.
      – This amount will be updated and raised every three years beginning January 1, 2020.
  – What did not change?
    • The “duties test” did not change!
    • The exemption for academic administrators or teachers did not change!

Exempt and Non-Exempt Employees

• The New DOL Final Rule: The Change in Minimum Salary for Exempt Employees
  – What does this mean for private schools?
    • Salaries for academic administrators and teachers who meet the exempt requirements for exemption will not change.
    • Salaries for other exempt employees will need to be increased to at least $913 per week or $47,476 annually.
      – This would include Business Administrator, HR Director, Development Director, etc.

Exempt and Non-Exempt Employees

• Special Cautions
  – People mistakenly believe that if a person is placed on a salary, they become an "exempt" employee.
  – Wrong! Exempt employees are defined as “exempt” by what they do, not by how they are paid.
  – Secretaries or Administrative Assistants usually are not “exempt”.
  – Teacher aides in preschool or K-12 schools do not qualify for "exempt" status.
  – Part-time exempt employees cannot be pro-rated.
  – Substitutes
Special Overtime Issues

1. Employers must pay for all “required” work.
2. Employers must pay overtime whether it is authorized or not.
3. Stop employees from working unauthorized overtime.
4. Employees cannot “volunteer” time beyond the normal workday in their normal areas of responsibility.
5. An exempt employee who works two distinct jobs regularly—one exempt, one nonexempt—must be compensated based on the primary duty.

The Hiring Process

• The Age Discrimination in Employment Act of 1967 (ADEA)
  – Amendment to Title VII
  – Applies to employers with 20 or more employees.
  – Under ADEA employers must guard against making any employment decisions that unfairly impact employees age 40 and over.
  – Age discrimination doesn't just apply to someone older than 40 losing a job to someone younger than 40. An employee simply has to show that he was replaced by someone “substantially younger.”

• The Pregnancy Discrimination Act of 1978
  – Another amendment to Title VII
  – Makes clear that discrimination against a woman because of pregnancy, childbirth, or a pregnancy related medical condition is unlawful sex discrimination.
  – It is easy to stumble into a problem regarding employee pregnancy problems or out-of-wedlock situations.
    • Because you cannot discriminate against a person because of her pregnancy, you must proceed carefully and with the help of an attorney.
What Can Schools Do to Promote/Require Christian Lifestyles?

• Adopt a strong Lifestyle Statement that employees must follow.
  – Put your employees “on notice” regarding what is an acceptable Christian lifestyle to be a part of your school ministry.

• Consider adopting the Declaration of Moral Integrity and using it on an annual basis with all church and school employees.
  – It further defines the moral requirements of the school.
  – Helps level the playing field by affirmatively making the same sexual purity demands/commitments of both men and women employed in your school.

• Be sure to address the sexual orientation issue in all your employment materials.

What Can Schools Do to Promote/Require Christian Lifestyles?

• Reference the Lifestyle Statement and Declaration of Moral Integrity in job descriptions, employee handbooks, and employment contracts.
  – Be sure to include Scripture verses as references regarding your moral stance in as many places as possible.

• Be sure to go over the Lifestyle Statement at the beginning of every school year during the employee in-service time.
  – Help employees understand that they don’t just have a job at your school, but a ministry to children whether they are teachers, custodians, librarians, etc.

• Be sure to be consistent in the application of your personnel policies over the years.

The Hiring Process

• The Americans with Disabilities Act (ADA)
  – Job application procedures, interviewing, hiring, advancement, discharge, compensation, training, and other terms and conditions and privileges of employment are covered under this law.
  – Employers who have employed 15 or more full- and part-time employees for at least 20 weeks in the current or preceding year are subject to the ADA. (Check your state laws)
  – Requires employers to provide reasonable accommodations so that disabled job applicants may qualify for employment, or current employees that may become disabled may continue employment, if they can perform the essential functions of the jobs.
The Hiring Process

• The Americans with Disabilities Act (ADA)
  – It is discriminatory to fail to make reasonable accommodations unless you “can demonstrate that the accommodations being considered impose an undue hardship on the operation.”
  – It is critical to clearly define the essential functions in each job description.
  – The purpose of a “reasonable accommodation” under the ADA is to make it possible for an employee to perform the “essential functions” of the job, not eliminate the essential functions.

• The ADA Amendments Act (2008)
  – I’m disabled, you’re disabled, we are all disabled.
  – What changed?
    • “Disability” definition to be read more broadly.
      – This reverses more than a decade of conservative federal court opinions.
    • Mitigating measures are to be ignored.
      – Includes medications, prosthetics, hearing aids, mobility devices, and learned adaptations. Can consider glasses or contact lenses.
    • An impairment that substantially limits a “major life activity”.
    • Just about anything is a “major life activity”.

• Americans with Disabilities Act
  • What to do...
    – Good job description are your protection!
    – A school must define the essential functions for each position for employment.
    – These should be clearly listed in the job description under the title Essential Functions.
    – Be sure to include the physical and mental/emotional requirements and what functions are essential to perform that job.
The Hiring Process

• Threat of New “SEXUAL ORIENTATION” Nondiscrimination Category
  – The Employment Non-Discrimination Act (ENDA) seeks to add “sexual orientation” as a new non-discrimination category to Title VII.
  – It passed the House of Representatives in the past but not the Senate.
  – Last year, it passed the Senate but did not pass in the House.
  – President Obama’s Executive Order.

The Hiring Process

• Threat of New “SEXUAL ORIENTATION” Nondiscrimination Category
  • Three steps to protect your school ministry:
    1) Amend your school’s Statement of Faith by adding a sentence or two that acknowledges God’s intention for the sexuality of men and women and traditional marriage. If your school is owned by a church, both the church’s and schools’ statements should be amended with the same wording.
    2) Adopt a clear Lifestyle Statement for your ministry that, among other things, speaks to the homosexual issue.
    3) Adopt and use the Declaration of Moral Integrity will all staff positions on an annual basis.

The Hiring Process

• Preparing Effective Job Descriptions
  – Everyone on staff needs an effective job description.
  – Sets the standards and goals that each employee must endeavor to meet.
  – Should be used as the primary focus of evaluations.
  – Job descriptions should be uniform
    • Spiritual and Educational Job Requirements
    • Essential Job Functions
    • Additional Job Responsibilities
    • Physical Job Requirements
The Hiring Process

• Preparing Effective Job Descriptions
  – Should include:
    • Hired by
    • Responsible to
    • Supervises
    • Evaluated by
  – There should be a statement as to exempt or non-exempt status
  – Job descriptions should be signed as a part of the contract.
  – Should be discussed as a part of the interview process.

The Hiring Process

• The Application Process
  – Unless you can defend a question on your application on the basis that it is “job related,” it is best not to use it.
  – Again, you can ask religious questions but you must be able to demonstrate that they are job-related.
  – You should have different applications for different types of employees.
  – Administrator, Teacher, Support Staff, Volunteer applications are all in the Personnel Resources CD.
  – Use a two part application.
    • Part I – General questions and testimony
    • Part II – More sensitive questions regarding lifestyle and morality.

The Hiring Process

• The Application Process
  – Screening candidates – Google or not?
    • There is an increased use of search engines and social-networking sites being examined by employers to dig beyond a candidates application or resume.
    • This can uncover “red flags” regarding applicants.
    • There are several legal risks in this approach.
      – Make sure you’ve got the right person. The rarest of names can be duplicated.
      – Be consistent with your searches. Do it for all candidates or maybe for all high-level candidates.
      – Realize that your search may disclose photos or other details, which means you may have to explain whether you considered the individual’s race/age/disability in your decision.
      – Remember everything you read on the internet is not always true.
The Hiring Process

• Conducting Background Checks
  – Fair Credit and Reporting Act (FCRA)
  • Covers the use of a third-party vendor background checks.
  • Employers required to
    – Secure written permission when they want to check on various background issues (not just the credit) of a job applicant or employee.
    – Must be separate from application.
    – If the employer makes an adverse employment decision based on the information gained from a background check, the employer must disclose that fact to the applicant or employee and state what the information was that influenced the employment decision.
    – FCRA requirements do not apply when a school responds to state law and has criminal background checks done through a process that involves the state police or the state department of education.

The Hiring Process

• Interviewing Applicants
  – When asking a person to answer a question on an employment application or in an oral interview—it must be job related.
  – You should have a prepared list of questions that you ask every person.
    • Stay away from “rabbit trails” during the oral interview.
    • Stick with the script!
  – How a question is worded will make a significant difference in how an applicant may view the question and favorably respond.

The Hiring Process

• Interviewing Applicants
  – Think about whether there are any ways that answers to those questions could be used inappropriately to screen out or discriminate against applicants.
  – Reword the questions to give them a better “job-related” context.
  – Remember, in oral interviews you need to be just a professional as in the written application process.
  – Don’t make a mistake here.
  – Have your interview questions written out in advance.
The Hiring Process

• Interviewing Applicants
  – Be creative in your oral interview process. Look for new ways to ask old questions:
    • Old: What’s your attitude toward teacher evaluation?
    • New: Describe ways in which teacher evaluation has been helpful to you.
  – Gain insights into your applicants by asking them about “current issues.” (Make it job-related)

• Interviewing Applicants
  – We live in a pluralistic society with many conflicting beliefs and values. As a teacher you may be asked specific questions about controversial issues by your students. Your answers will come from your personal convictions. We need to know the views of those that would be role models for our children.
    • Please share your personal convictions as a Christian toward:
      – wine, beer, and other alcoholic beverages
      – smoking and chewing tobacco
      – marijuana and other drugs
      – pre-marital sex and cohabitation
      – divorce and remarriage
      – abortion
      – homosexuality
  – Do you have a personal testimony regarding any of the above items that you would like to share?

• Interviewing Applicants
  – “We hire the most qualified applicants for school positions.” This is a common statement.
  – However, there is a better way to state this. “We hire applicants that are the best fit/best match for our school.”
  – Sometimes the most qualified person, at least by degrees earned, is not a good match.
The Hiring Process

• You’re Hired!
  – Every employee should be given a contract.
  – A contract must clearly articulate the rights and responsibilities of both
    the administration and the teacher.
  – It should be realized that in hiring an administrator or a teacher, legally
    enforceable documents are entered into which create rights and
    responsibilities for both parties.
  – Any breach gives grounds for a legal action against the school, and
    therefore, any contract must be entered into with knowledge of the
    consequences.
  – Local legal counsel should always be sought whenever changes are being
    made in contracts, Employee Handbooks, etc.
  – Legal cases in close to forty states have ruled that an Employee
    Handbook is equivalent to or essentially is considered a contract that
    binds the employer unless there is a specific and clear disclaimer in the
    employment contract.

The Hiring Process

• You’re Hired!
  – Be sure that all of the documents referenced in the contract such as Job
    Description, Employee Handbook, Student Handbook, etc. are consistent
    with each other and that your school is willing (just like the
    administrator or teacher) to abide by its statements.
  – It is imperative that your school spend the money on a local attorney to
    check everything for agreement and state and local laws.

The Hiring Process

• You’re Hired!
  – Contracts
    • Attach a Statement of Faith that the employee signs.
    • Attach a Lifestyle Statement that the employee signs.
    • Attach a Declaration of Moral Integrity that the employee
      signs.
    • Attach a Job Description that the employee signs.
    • Attach a Financial Worksheet that the employee signs.
    • Every contract should include wording on Mediation and
      Binding Arbitration.
The Hiring Process

• You’re Hired!
  – Christian Conciliation and Binding Arbitration
    • Recommended that this be used in employment contracts and even parent agreements.
    • Fulfills scriptural mandate
      – 1 Cor. 6 – Christians not going before secular courts
      – Matt. 5:23 and Matt 18:15-17 – Addressing Biblical conflict

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The Hiring Process

• You’re Hired!
  – Christian Conciliation and Binding Arbitration
    • If a school utilizes a Christian mediation/arbitration agreement, the board and administration should be committed to its purpose and make every effort to resolve disputes in a Christ-like manner.
    • This includes working with the disgruntled employee (or parent, if you use such an agreement in your enrollment contract) on a reasonably quick time schedule to resolve differences.
    • A quick response by a school to a request for mediation/arbitration can make all the difference, because it communicates to the disgruntled party the school’s commitment to resolve conflict in a biblically faithful manner.

The Hiring Process

• You’re Hired!
  – Christian Conciliation and Binding Arbitration
    • Make sure your faculty and staff clearly understand the purpose.
    • The suggested language in ACSI’s Christian mediation/arbitration clause specifically refers to the Rules of Procedure from the Institute for Christian Conciliation (ICC), a division of Peacemaker Ministries.
    • Every arbitration process must be conducted according to an established set of rules.
    • The arbitration is not necessarily conducted directly under the auspices of ICC, nor does the Institute necessarily advise schools or employees on the merits of a claim.
    • www.peacemaker.net
The Hiring Process

- **You’re Hired!**
  - **Contracts For Non-Exempt Employees (Support staff)**
    - "Non-exempt employees" simply means that these individuals are “on-the-clock” whether they are paid a salary or by the hour.
    - If they work overtime, they must be reimbursed at 1.5x their wage rates.
    - In most states these employees are also considered “at-will” employees that may quit at any time or be terminated at any time, with or without cause, as long as the termination is not because of an illegal or discriminatory reason.
    - Use an Employee Acknowledgement of At-Will Employment Form with each of these employees.

- **The Hiring Process**
  - **You’re Hired!**
    - **Contracts For Non-Exempt Employees (Support staff)**
      - **List of documents provided to at-will (non-exempt) employees:**
        - Employee Acknowledgement of At-Will Status
        - Employment Agreement Regarding Mediation and Binding Arbitration
        - Statement of Faith
        - School Lifestyle Statement
        - Declaration of Moral Integrity
        - Job Description
        - Financial Worksheet
      - All of these documents should be signed by the employee.

- **The Hiring Process**
  - **You’re Hired!**
    - **Limitations of One-year Contracts**
      - Most schools give teachers one-year contracts.
      - If not happy with performance, then you just do not offer them a new contract.
      - Be careful that failure to offer a new contract is not a pretext for an illegal discriminatory employment decision.
      - One year contract are good for the school, but alone do not protect you if you make unlawful discriminatory decisions.
      - Giving a person repeated one-year contracts over several years may obligate you in the eyes of some legal critics or jurisdictions to assume that the person has tenure and can only be fired or relieved of duty for “just cause” that you may have to prove.
      - Make sure your wording on the contract states that a series of contracts does not constitute tenure.
The Hiring Process

- You’re Hired!
  - Forms to be filled out at hiring.
    - I-9 form (Kept in separate file with all employees)
    - New Hire Form (Sent to State office)
    - W-4 form (For payroll and deductions)
    - Insurance enrollment forms
    - 403(b) enrollment forms

The Evaluation Process

- No federal law requires your school to conduct regular employee evaluations.

- Two important legal reasons why you should:
  - Periodic and competent evaluations reduce the likelihood that a fired employee will claim unfair treatment. Evaluations alert employees to what you expect of them, where they excel, and how they can improve.
  - The evaluations are your documented proof of poor performance that will help you justify your employment decisions. Title VII protections apply to evaluations, so it’s illegal to use race, color, gender, or national origin as the basis for decisions on hiring, firing, promotions, pay raises, benefits, work assignments, leave of absence, or just about any other aspect of employment.

- Evaluations should be at least based upon the job description.

- Two Purposes
  - To improve the employee’s skills and effectiveness.
    - A time of “coaching” — encouraging and helpful.
  - To protect the school if allegations of discrimination, wrongful discharge, etc.
    - The importance of a “paper trail.”
The Evaluation Process

- Annual evaluations are just one piece of the evaluation process.
- Develop a “supervision policy”
  - This process should begin early in the school year with all faculty.
  - The degree of supervision may vary as to the teacher.
  - First year teachers that are new to the school should get early observations and feedback on how they are doing.
  - The whole goal of evaluation is motivating people to be successful.
- *Guiding Faculty to Excellence: Instructional Supervision in the Christian School* by Gordon Brown

The Discipline and Termination Process

- Have a board policy on employee discipline and dismissal.
- Develop a Progressive Discipline Plan.
  - It should serve as a redemptive function.
  - It should help to meet the job expectations.
- If this does not work, then it is time for dismissal.

The Discipline and Termination Process

- Avoid These Firing Mistakes
  - Keep your cool.
    - Avoid heightening an already emotional situation.
    - Don’t spring the news suddenly, shout names or berate the worker in front of other employees.
  - Avoid surprises.
    - Workers should never be completely surprised by a termination.
    - Give your employees regular feedback on their performance, and suggest methods for improvement.
    - At the very least, progressive discipline proves to a court that you had valid reasons for terminating a worker.
The Discipline and Termination Process

• Avoid These Firing Mistakes
  – Play by the rules.
    • Follow your established discipline policy. If your handbook says you'll provide a verbal warning, a written warning, and a probationary period, then do each.
    • Your handbook should give you the right to terminate employees immediately who engage in serious misconduct.
    • Before skipping progressive discipline, be sure of your facts. It's not enough to hear rumors of wrongdoing from others.
    • Conduct a thorough investigation, then ask the employee for his side.

• Avoid These Firing Mistakes
  – Watch what you say.
    • Workers will remember whatever you say on the day you fire them—or in the preceding weeks—in the worst possible light. While you should always avoid making statements that could be construed as discriminatory, you should be especially cautious if you may have to fire a worker.

• Avoid These Firing Mistakes
  – Don’t be too kind.
    • You may feel compassion for a worker you must fire, but don’t express your feelings in the wrong way.
    • If a worker’s performance is substandard, don’t offer compliments on his job performance.
    • Doing so may make you feel better, but it will only infuriate the worker because it will appear that he is being fired for no reason. And that can easily spark a wrongful-termination suit.
    • When hiring workers, don’t make promises you can’t keep. Some courts have taken general statements, such as “We hope you’ll be with us a long time,” as a promise of perpetual employment.
The Discipline and Termination Process

• Avoid These Firing Mistakes
  – Keep quiet.
  • Don’t discuss your reasons for the termination with other employees.
  • It’s enough to say, “Jamie will not be working with us anymore.”
  • Some employers have spoken too freely about the reasons for a departed worker’s termination, only to find themselves in court defending a defamation of character suit.

Excerpt from "Fire at Will," a book from the National Institute of Business Management

Resources

• Legal Legislative Update
• ConNEXUS Legal Legislative Group
• Legal Legislative Website Resources
• Tom Cathey email – tom_cathey@acsi.org