

Tough Economic Times Mean Tough Decisions For Schools

By Suzanne K. Bogdan (Fort Lauderdale)

As the economic crisis in our country continues, schools are trying to make predictions and hard decisions regarding staffing. Many schools are trying to determine whether and where they should cut staffing and programs based on projections for enrollment next year. Although most private schools issue contracts for returning teachers between February and April, they may not know the full extent of their re-enrollment commitments until later in the spring. Worse yet, parents who do commit in the spring may change their mind if the parents financial situation changes after signing the re-enrollment contract.

School administrators must understand their fiduciary obligations to protect the school's assets and the legal implications of both their contracting decisions and their reduction in staffing decisions. Outlined below are some thoughts school administrators should consider before issuing contracts or reducing the workforce.

Contract Decisions

Many schools treat employment contracts simply as letters confirming employment. They do not recognize the serious legal implications of offering an employee a contract of employment for a set term with a promised salary. Unless the contract is drafted properly to protect the school and provide it with the flexibility to make changes as may be required by the school's financial situation, the school could find itself in a serious financial commitment that impairs its ability to operate.

As a general principle, vague and ambiguous terms in a contract will be construed against the drafter. Since the school typically drafts the contracts, this means that if a provision in the contract is unclear, the interpretation that favors the employee will be the meaning a court will give to the term.

In addition, if the school's contract only allows the school to terminate the contract for "reasonable cause," the school is bound to the terms of the contract unless the school can establish that one of the definitions of reasonable cause set out in the contract exists (assuming that the contract even defines reasonable cause). It will be the school's burden to prove that the employee engaged in behavior that constituted reasonable cause under the contract. It is also the school's burden to show that the school met all steps required for termination of the contract (i.e., all written notifications, all pay required, all appeals required, etc.).

In this economic climate, schools should ensure that all contracts are developed with advice of counsel. In addition, consider adding one or more clauses to your contracts that will protect the school by providing it with the flexibility to make changes in staffing, programs, hours, etc., as



necessary based on the school's financial situation, as it may change. One way to accomplish this is by adding a provision that allows the school to reduce programs or staffing.

A sample provision states,

In the event of a reduction in enrollment (in a particular grade or the overall school) or a financial hardship impacting the School, as determined in the Employer's sole discretion, the Employer may determine that it needs to reduce or eliminate programs, classes, or staffing. In such event, the Employer will attempt, if possible, to maintain the same level of staffing by reducing pay, hours, or eliminating increases.

The Employer will communicate with Employees who are impacted by the changes and will determine whether reduction in hours, pay, or increases in class size will be sufficient to resolve the financial hardship. The Employer may determine that in addition to or in lieu of such other methods, it may also need to reduce staffing by separating some employees. Employees who will be separated due to such staffing reductions

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Pre-Injury Releases Now In Question In Florida

By Alva Cross (Tampa)

A recent Florida Supreme Court decision leaves more questions than answers when it comes to the enforceability of pre-injury releases executed by parents on behalf of a minor child who participates in school-sponsored activities. In the decision released on December 11, 2008, the Supreme Court held that a parent does not have the authority to execute a pre-injury release on behalf of a minor child when the release involves participation in a *commercial* activity. But the Supreme Court left open the possibility that, despite differing policy considerations, its reasoning may apply to pre-injury releases involving school or community activities. *Kirton v. Fields*.

Facts Of The Case

In May 2003, a father took his fourteen-year-old son to the Thunder Cross Motor Sports Park. To enter the facility and ride an ATV, the father had to sign a release and waiver of liability, assumption of risk, and indemnity agreement on behalf of the minor child. While attempting a particular jump, the child lost control of the ATV and was ejected. The child died as a result of his injuries.

Following the child's death, the personal representative of his estate filed suit against the owners and operators of Thunder Cross Motor Sports. Thunder Cross asked the court to throw the suit out, based solely on the release and waiver executed by the child's father. In support, Thunder Cross submitted an affidavit from the father, which acknowledged that he willfully and with full understanding executed the release and that he, among other things, intended to waive the right to sue for the death of his child. The trial court agreed and dismissed the lawsuit because the release executed by the father on behalf of his minor child barred any claims.

The estate appealed and the appellate court reversed the trial court's order. In so doing, it opined that the issue was not about a parent's determination concerning what activities were appropriate for his or her child, but, rather, the issue was whether a parent could "absolve the provider of an activity from liability for any form of negligence."

The appellate court noted that such a determination went beyond the scope of deciding what type of activity is appropriate for their child because the "effect of the parent's decision in signing a pre-injury release impacts the minor's estate and the property rights personal to the minor." Thus, the appellate court found that the rights of the child or his or her estate "could not be waived by the parents absent a basis in common law or statute," and ultimately held that a parent cannot bind the minor child's estate by signing a pre-injury release.

The appellate court asked the Supreme Court to take a position on whether a parent can legally bind a minor's estate by executing a pre-injury release. The Supreme Court determined that a parent has no such authority.

The Court's Reasoning

In finding that a parent does not have the authority to execute a pre-injury release on behalf of a minor child when the release involves participation in a commercial activity, the Court explained that parental rights were not absolute, and that the State has the right to step in, in certain situations, and assume parental authority. The Court acknowledged that the legislature had not expressly precluded the enforcement of pre-injury releases, but nonetheless determined that "public policy concerns" prohibited parents from executing pre-injury releases on behalf of their minor children.

In reviewing other cases concerning the enforceability of parental waivers, the Court looked to its 2005 decision in *Global Travel Marketing*, in which a father filed a wrongful death action against a safari operator for the death of his son. Before the safari, the child's mother signed a travel contract on behalf of herself and her son, which included a release of liability and an arbitration

agreement provision. *Global Travel Marketing* moved to compel arbitration of the father's claim, which the trial court granted. On appeal, the appellate court cited public policy reasons in determining that the arbitration clause was unenforceable as to the child.

But the Supreme Court found the arbitration agreement enforceable against the minor child's estate and noted several important distinctions. For example, the Court considered the nature of the waiver and whether it concerned the waiver of a legal right or just the waiver of a particular forum in which the claim is presented. Based on this consideration, the Court determined that a parent could waive the forum (i.e., arbitration vs. litigation) in which a claim is presented on behalf of his or her child. The Court further emphasized that its decision only concerned the enforceability of binding arbitration agreements, and not the broader issue of parental waiver of a tort claim on behalf of a minor child.

In reaching its decision in the *Kirton* case, the Court noted that a parent's decision to allow a minor child to participate in a certain activity is not the same as the conclusion that the parent is authorized to execute a pre-injury release on behalf of the minor child. The Court further explained that "there is injustice when a parent agrees to waive the tort claims of a minor child and deprive the child of the right to legal relief when the child is injured as a result of another party's negligence," because when the parent executes that type of release, he or she is not acting in their child's best interest, but rather, "protecting the interests of the activity provider."

The Court reasoned that enforcing pre-injury releases would remove the incentive for business owners to take reasonable precautions to provide a safe environment for minor children. The Court further noted that "a commercial business can take precautions to ensure the child's safety and insure itself when a minor child is injured while participating in the activity. On the other hand, a minor child cannot insure himself or herself against



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will be provided with 30-days notice or 30-days pay in lieu of notice. No other compensation or benefits will be due.

Of course, the amount of notice and pay are within the School's discretion when drafting the contract. Some schools provide 30-days pay; others provide as much as 90-days pay.

Another way to accomplish flexibility to make changes mid-year is to have a "termination without cause" provision that essentially requires that the school give a certain number of days notice of termination or pay in lieu of notice. A typical clause reads, "The School reserves the right to terminate this contract and employee's employment without cause by providing 30-days written notice of termination to the employee or 30-days pay and benefits in lieu of notice. No other compensation or benefits will be due." Again, the amount of notice or pay is to be determined by the School as it drafts the contracts.

Schools are often fearful that if they include these provisions in their employment contracts, teachers will leave. Our experience has shown, however, that the outcome depends on the method of the school's communications and the effort by the administration to be honest and forthright regarding these issues. We recommend that you hold a full school meeting to discuss the situation. Be up front regarding the economic situation facing the school and the administration's thought processes.

Discuss that the school is looking at all budget items to determine where it can make cuts without impacting the quality of education and ask employees for their assistance in finding ways to keep the school viable financially. Consider asking whether any employees are interested in taking an unpaid sabbatical, reducing their hours to part-time, or taking a voluntary severance package. (Any such package should be developed with counsel).

Look first at benefit plans and determine whether a reduction in hours will impair the employee's ability to maintain critical benefits, such as health insurance or tuition remission. Consider eliminating some costly benefits or asking employees to share more in the cost in exchange for the school being able to maintain more employees at full employment. Consider reducing the tuition remission benefit or putting caps on the number of children an employee can enroll for free. Consider reducing the contribution to 403(b) plans. Renegotiate phone contracts or other service contracts. And, consider all ideas from employees with an open mind. With the right kind of heartfelt communications about these issues, most employees will work with the school to find ways to reduce costs and to increase enrollment.

If You Must Reduce Your Workforce

If you find that, even with your best efforts, you must reduce the number of employees, these decisions should be made with the advice of counsel. There are many issues that must be taken into consideration when making decisions on reducing your workforce. If you are considering reducing mid-year, ensure that your employment contracts for the positions in question permit you to terminate the relationship (or reduce compensation) mid-year. Many schools are surprised when they learn that their contracts do not provide any flexibility.

Some of the decisions you must consider up front are will you reduce based on qualifications? Performance? Seniority? Cross-training? Some combination of all these? Who will make the decisions? What documentation is there of the process or the need?

If you are using performance as a criterion, what do your existing documents reveal regarding the employee's performance? Are there evaluations, observations, emails, memoranda or other documents that contradict the decision that an individual is a low performer compared to others? Did the individual consistently receive raises, bonuses, etc., that are indicia of good performance?

Are the individuals under consideration for reduction in protected categories? Have they recently exercised rights under the Family and Medical Leave Act (i.e., taken job protected leave or currently on leave), had a workers' compensation injury, or complained about some inequity, discrimination, or other protected activity? If the school's selection process results in the decision-making having a disparate impact on individuals over the age of 40, minorities, women, or others who have recently exercised rights, the school could find its savings in employee salaries quickly eaten up by the cost of litigating or settling claims.

Once the selection process is complete, there are many other decisions that must be made. Will the school want to have employees sign severance agreements? If so, there are specific state and federal requirements that must be included in a severance agreement for it to validly release claims. For example, the Older Workers' Benefit Protection Act (OWBPA) requires that any release that seeks to release age claims for persons over 40 years old be written in clear, understandable language; it must specifically reference the OWBPA and the Age Discrimination in Employment Act.

Also, the release must: tell employees what they will receive at termination even if they do not sign the release; tell employees that they have the right to review the document for up to 21 days (45 days if the release pertains to a reduction or job elimination); advise employees to consult with counsel; provide certain age-related information about the positions/titles of other employees being considered for separation and the ages of those selected/not selected; specifically state why the school is reducing the workforce or eliminating positions; and provide employees with a 7-day period in which they can revoke their signatures after execution. All of these requirements, and others that may be specified by the state in which the employee works, must be included for a release to be valid.

These are a few of the issues that school administrators must consider before simply making decisions to reduce the workforce. It is far better to invest the time and energy up front to think through as many of these issues as possible, rather than having to scramble after the fact to justify decisions that, at best were rushed and, in the worst case, may have been improper.

For more information email the author at sbogdan@laborlawyers.com or call 954.525.4800.

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the risks involved in participating in that activity.” Relying on these public policy concerns, the Court determined that the pre-injury release signed by the child’s father was not enforceable because it prevented the child’s estate from bringing an action against the commercial establishment that provided the activity that resulted in injury.

What does This Mean For Your School?

While the facts of the *Kirton* decision involve a pre-injury release authorizing the child to participate in a *commercial* activity, the Court



declined to discuss the enforceability of pre-injury releases for *non-commercial* activities. But the Court was clear that its “decision . . . should not be read as limiting [the Court’s] reasoning only to pre-injury releases involving commercial activity.” This, of course, strongly suggests that this Court would invalidate pre-injury releases for children participating in non-commercial activities, such as school-sponsored activities, as well.

Interestingly, later in its opinion, the Court reviewed several out-of-state cases that enforced pre-injury releases executed by parents on behalf of their minor children participating in school or community-sponsored activities, and noted that different policy considerations applied to pre-injury releases in the commercial setting. The Court explained that, in the case of “community and volunteer-run activities, the provider cannot afford to carry liability insurance because volunteers offer their services without receiving any financial return,” and invalidating those releases would discourage volunteer participation. The Court’s indication that its reasoning should not be limited to pre-injury releases for participation in commercial activities is concerning, but it is too soon to tell whether this Court would follow the reasoning of its sister courts to uphold the enforceability of pre-injury releases for non-commercial activities.

Until the Florida courts give more guidance, schools in that state (and indeed in other states, as well) should understand that the releases they ask parents to sign for children to participate in field trips or other extracurricular activities may not be enforceable. It is critically important to ensure that all staff and volunteers are well trained on their supervisory responsibilities while attending trips and that all aspects of the trip are planned carefully, using known outside operators who provide adequate insurance. Schools should also be assessing their insurance coverage to determine who and in what circumstances are covered under their policy in the event an unfortunate accident occurs.

For more information, email the author at across@laborlawyers.com or call 813.769.7500.

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Office Locations

Atlanta

1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, GA 30326
phone (404) 231-1400

Charlotte

Suite 2020
227 West Trade Street
Charlotte, NC 28202
phone (704) 334-4565

Chicago

1000 Marquette Building
140 South Dearborn Street
Chicago, IL 60603
phone (312) 346-8061

Columbia

Suite 1400
1901 Main Street
Columbia, SC 29201
phone (803) 255-0000

Dallas

Thanksgiving Tower
Suite 4343
1601 Elm Street
Dallas, TX 75201
phone (214) 220-9100

Denver

Suite 3300
1999 Broadway
Denver, CO 80202
phone (303) 218-3650

Fort Lauderdale

Suite 800
450 East Las Olas Boulevard
Fort Lauderdale, FL 33301
phone (954) 525-4800

Houston

Two Allen Center
Suite 620
1200 Smith Street
Houston, TX 77002
phone (713) 292-0150

Irvine

Suite 400
18400 Von Karman Avenue
Irvine, CA 92612
phone (949) 851-2424

Kansas City

Suite 400
104 West 9th Street
Kansas City, MO 64105
phone (816) 842-8770

Las Vegas

Suite 650
3993 Howard Hughes Parkway
Las Vegas, NV 89169
phone (702) 252-3131

New Jersey

430 Mountain Avenue
Murray Hill, NJ 07974
phone (908) 516-1050

New Orleans

Suite 3710
201 St. Charles Avenue
New Orleans, LA 70170
phone (504) 522-3303

Orlando

1250 Lincoln Plaza
300 South Orange Avenue
Orlando, FL 32801
phone (407) 541-0888

Philadelphia

Radnor Financial Center
Suite 650
201 King of Prussia Road
Radnor, PA 19087
phone (610) 230-2150

Portland

Suite 1250
111 SW Fifth Avenue
Portland, OR 97204
phone (503) 242-4262

San Diego

Suite 950
4225 Executive Square
La Jolla, CA 92037
phone (858) 597-9600

San Francisco

One Embarcadero Center
Suite 2340
San Francisco, CA 94111
phone (415) 490-9000

Tampa

SunTrust Financial Centre
Suite 2300
401 E. Jackson Street
Tampa, FL 33602
phone (813) 769-7500

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