

Legal Issues in Employment

Salary Schedules, Overtime, and Students First Act
(Plus a Whole Lot More)

ALABAMA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS

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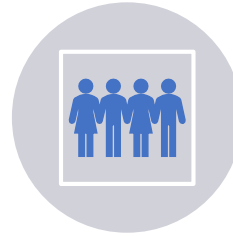
First things first...



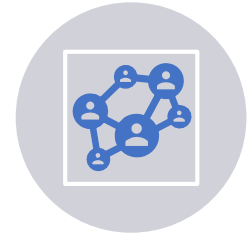
FOCUS AND PURPOSE OF
SCHOOL BOARDS – TO
TEACH KIDS



TAKES PEOPLE TO TEACH



TAKES OTHER PEOPLE TO
CREATE AN
ENVIRONMENT
CONDUCTIVE TO LEARNING



ALL EMPLOYEES ARE
THERE TO SUPPORT
LEARNING IN ONE WAY
OR ANOTHER (INCLUDING
YOU)



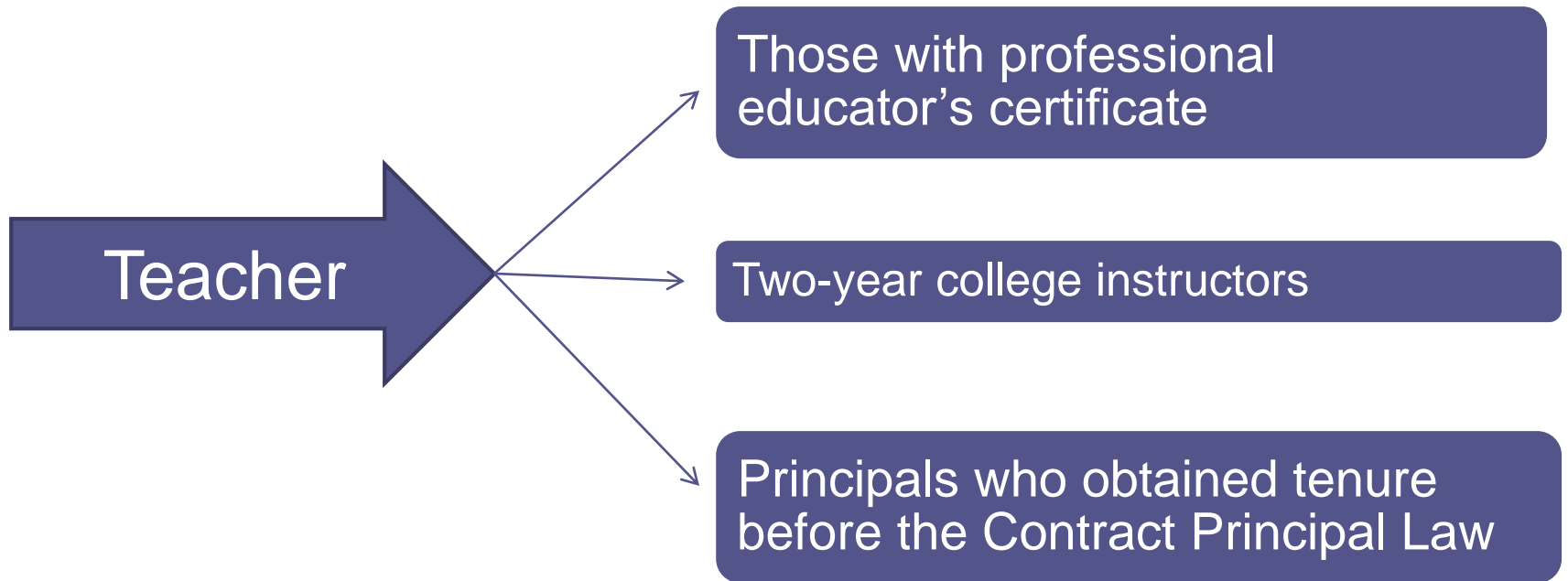
THE EMPLOYMENT
PROCESS SHOULD
SUPPORT LEARNING AS
WELL AND SHOULD NOT
BE A DISTRACTION

Students First Act

Students First Act

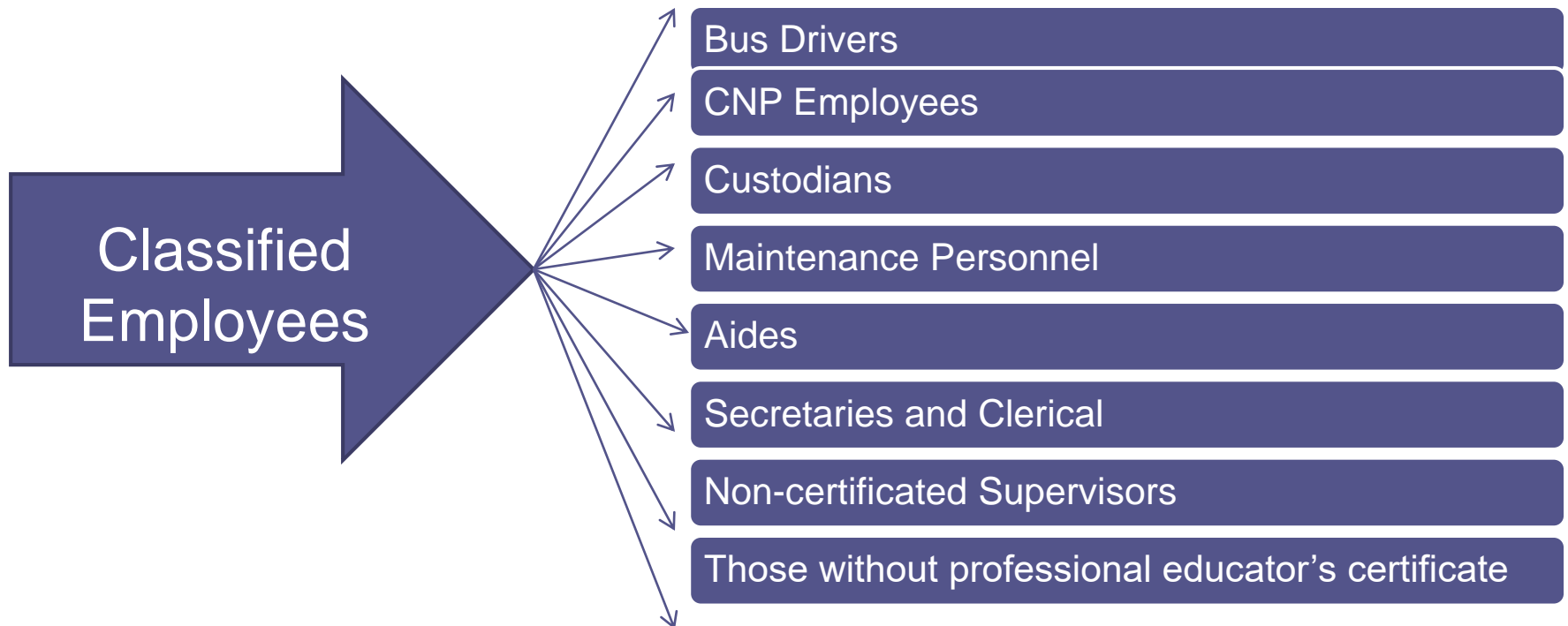
Who is Covered?

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Students First Act

Who is Covered?



Students First Act

Earning “Tenure” & “Nonprobationary Status”

- Three consecutive complete school years
- Complete school year is anytime before October 1st through end of year
 - If hired after October 1st, that year doesn't count
- Earn it unless written notice is given :
 - For teachers, on or before last day of third consecutive school year
 - For classified employees, on or before June 15th following that third year (except for 1st year of legislative quadrennium, then June 30th).

Students First Act

Earning “Tenure” and “Nonprobationary Status”

- Only complete school years count
- Includes creditable leave time
- Tenure/nonprobationary status as teacher or classified employee separate and not transferrable or interchangeable between categories
- Not transferrable between boards, except for annexation, school district formation, consolidation, or a similar reorganization

Students First Act

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Earning “Tenure” and “Nonprobationary Status”

Tenure is not earned in:

Position

Rank

Title

Work Site

Location

Assignment

or Rate of Compensation

Students First Act

Termination

Probationary Classified Employees

- May be terminated any time upon written notice (recommendation by Superintendent, vote of Board) before nonprobationary status is earned
- If terminated, get 15 days pay and benefits from issuance of notice
- Decision not appealable

Students First Act

Termination

Non-tenured Teachers

- May be terminated any time upon written notice (after recommendation of Superintendent and vote of the Board) on or before June 15th unless it is the third year and then the deadline is the last day of the school year
- During school year, requires 30 days notice
 - Teacher can submit written statement to Board
- Decision not appealable

Students First Act Termination Tenured and Nonprobationary Employees

- Reasons for Termination
 - Justifiable decrease in number of positions
 - Incompetency
 - Insubordination
 - Neglect of duty
 - Immorality
 - Failure to perform duties in a satisfactory manner
 - Other good and just cause
- Cannot be for political or personal reasons

Students First Act

Termination

Tenured and Nonprobationary Employees

1. Recommendation by Superintendent – written notice of proposed termination
 - Reason
 - Short and plain statement of facts
 - Statutory grounds for termination
 - Opportunity to request hearing within 15 days of notice
2. No hearing request, Board can go ahead and vote
3. If hearing requested, Board sets hearing between 30 and 60 days of issuance of notice of hearing (can be rescheduled by agreement or good cause)

Students First Act

Tenured and Nonprobationary Employees

Termination Hearings

- Superintendent has burden of proof
- Employee can present testimony, evidence, and argument, and can cross examine witnesses
- Can have an attorney
- Court reporter paid by State
- Hearing can be private or public (employee choice)
- Subpoenas may be issued
- Board acts as a deliberative body

Students First Act

Tenured and Nonprobationary Employees

Appeal of Board Decision

- After hearing or vote (if no hearing requested), notice from Superintendent within 10 calendar days
- If after hearing, notice of right to appeal should be included
- Appeal is to State Superintendent (15 days of receipt of decision)
- Goes to hearing officer (retired judges trained in ADR)
- Notice of appeal contains grounds and served on Superintendent
- Superintendent will prepare record and send within 20 days of receipt
- Hearing officer holds hearing with deference to Board's decision and renders decision within 5 days
- Can appeal that decision to Court of Civil Appeals

Students First Act Pay

- Employee decisions are effective immediately
- For tenured and non-probationary classified personnel, pay continues until the sooner of:
 - (1) 75 days
 - (2) When the hearing officer rules
- Termination based on moral turpitude, immorality, abandonment of job, incarceration, or neglect of duty – pay may cease immediately
- If employee wins appeal, can receive back pay

Students First Act

Tenured and Nonprobationary Employees

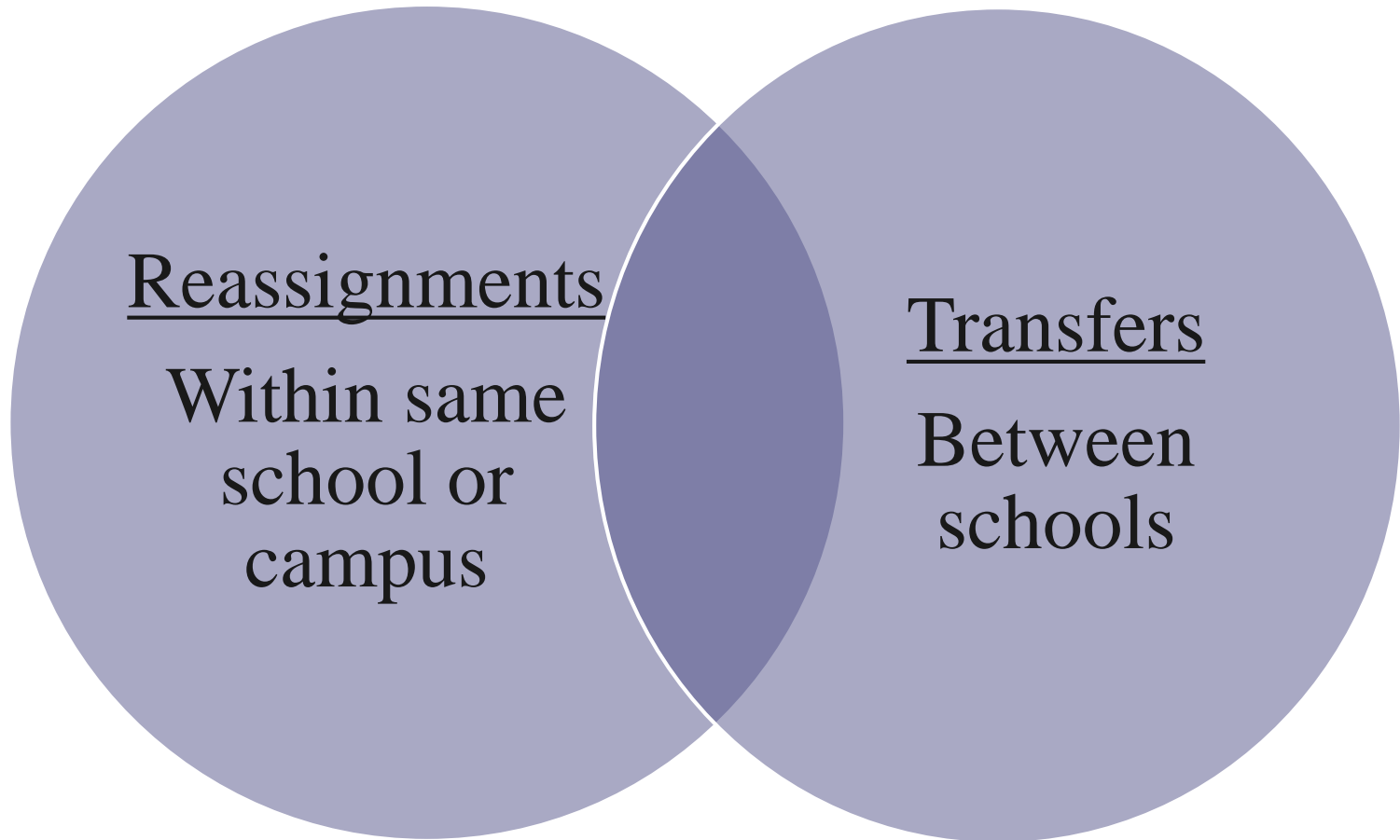
Suspensions

- Can suspend for 20 work days without pay
- Notice has to be given and an opportunity to present evidence and argument to the Board
- If over 20 days, notice, hearing, and review process for terminations apply

Students First Act

Reassignments and Transfers

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Students First Act Teachers Reassignments

Superintendent can reassign

- Within same school, campus, or facility
- By 20th calendar day after school begins
- Teacher must have certification
- Only once per year
- Without loss of compensation

No challenge or appeal

Students First Act Transfer – Tenured Teacher

Conditions for transfers to another school

- Employee must hold appropriate certification
- No reduction in compensation
- First 20 calendar days of school
- Only once per school year
- Must be Board approved
- If within high school feeder pattern, meeting before vote
- If outside high school feeder pattern, hearing before vote

Students First Act

Transfer – Non-probationary Classified

- Can be transferred if no reduction in compensation, written notice is issued not less than 15 days before decision, and transfer is effective not less than 15 calendar days from decision
- If to a work site outside of high school feeder pattern, have opportunity to appeal in same manner as termination
- Only one transfer per year

Students First Act

Transfer – Reduction-in-Pay

Probationary and non-tenured employees

- Can be transferred to a position that pays less or shorter term if:
 - Appropriate certificate
 - Written notice is given with explanation of effect on the compensation of the employee
 - Opportunity to object in writing before the vote
- Transfer effective not less than 15 calendar days from vote

Non-probationary and tenured employees

- Transfers to positions with lower rate or shorter term may be challenged like a termination

Transfers in conjunction with RIFs or made in order to comply with state or federal law are not subject to challenge or review

Students First Act

Tenured and Nonprobationary Employees

- The following are not considered terminations or transfers
 - Reduction or modification of compensation or benefits
 - Reduction or modification of work or school year
- IF**
- Prospective
 - Recommended by Superintendent and approved by Board
 - Applied uniformly to similarly situated employees within system, division, department, or employment classification
- Layoffs or RIFs due to decreased enrollment or shortage of revenues

Students First Act

Paid Administrative Leave

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Acknowledges and
authorizes paid
administrative leave



Paid administrative leave
– Superintendent decides

Students First Act Certification

- Revocation of certificate ➡ termination
- Similarly, no certificate (if revoked, denied, suspended, forfeited, or ineligible) ➡ no rights under Act
- “Rights, remedies, and procedures . . . shall not apply or be available to such employee.”
- Challenge is by way of certification appeal

The Employment Process

An Uphill Battle . . .

1. Superintendent recommends/Board approves
2. Most superintendents were principals or supervisors
3. Board members depend on principals for support
4. Part of being principal or supervisor – get to hire who you want
5. “Local Management”
6. Principals/Supervisors (and even Superintendents) aren’t trained to be sensitive to trouble spots

The Employment Process

The Fix



Get a plan and follow it



Let the experts do their jobs (let teachers teach, let principals manage, let custodians clean, let accountants account and let HR/Personnel do their thing)



Make it structural



Know where YOU fit in the process

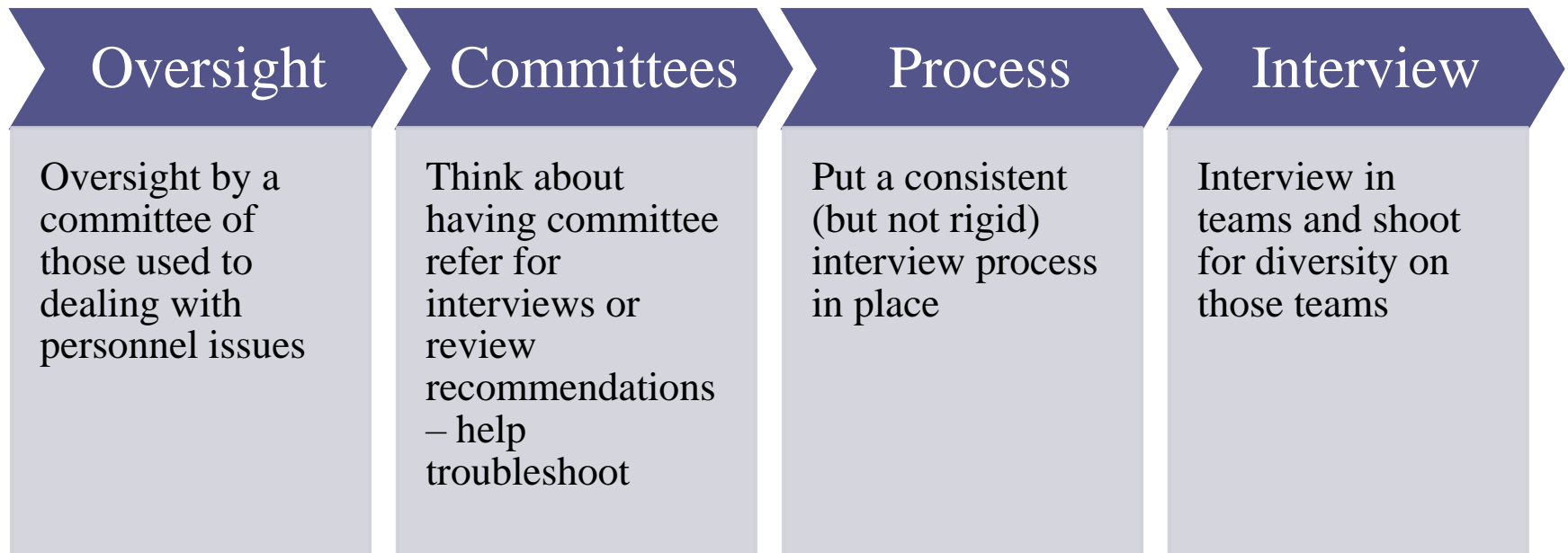
The Plan

Some Possible Options

- Have a consistent application process and make it centralized
- All materials should be submitted to Central Office
- Limit “informal” submissions to local schools or departments
- Keep consistent materials on candidates
- Get a process for deciding who gets interviewed

The Plan

Some Possible Options



The Plan

Some Possible Options

1

Review job descriptions
before interviews/referrals

2

Screen for qualifications
and don't make exceptions
(don't make rules and then
not follow them)

3

Train on trouble spots or
things not to talk about in
interviews

- “You sure are in good shape for your age”
- “Where do you attend church?”
- “Are you married? Have kids?”
- Disability questions, etc.

The Plan

Some Possible Options



Think about way to communicate recommendations to Superintendent as part of the process – have good information so Superintendent can be well informed of options



Idea is to avoid “rubber stamp” perception



Have (and be able to articulate) reasons for making decision and challenge each other about the reasons

The Plan Advantages



So . . .

- What is the big deal – as long as we follow Students First, aren't we ok?
- Students First is just part of the picture – we also have federal laws to deal with...

What is Discrimination

- Discrimination means unfair or unequal treatment of an individual or group based on certain characteristics.

Federal law makes it unlawful to discriminate on the basis of

- Race
- Color
- Gender
- Age
- Disability
- National Origin
- Religion
- Pregnancy
- Genetic Information

Cannot discriminate in ...

- Hiring and firing
- Compensation
- Assignment or Classification/Segregation
- Transfer, promotion, layoff or recall
- Job Advertisements
- Recruitment
- Testing
- Use of Facilities
- Training
- Benefits
- Pay, retirement plans, and disability leave
- Other terms and conditions of employment

Discriminatory practices also include:

- Harassment on the basis of race, color, religion, sex, age disability or national origin
- Retaliation for filing a charge of discrimination, participating in an investigation or opposing discriminatory practices
- Employment decisions based on stereotypes or assumptions about the abilities, traits or performances of individuals with a disability or of a certain sex, race, age, religion, or ethnic group
- Denying employment opportunities to a person because of marriage to, or association with, an individual belonging to a protected class

Equal Employment Opportunity Policies

- All of you have an EEO policy like...
- Unlawful Discrimination Prohibited – The Board is an equal opportunity employer. Personnel actions and decisions will be made without regard to factors or considerations prohibited by federal or state law (as such laws may from time to time be amended), including but not limited to race, gender, age, disability, national origin, citizenship, and religious preference.

Equal Protection Clause

- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

14th Amendment to the U.S. Constitution

Title VII Discrimination

- Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating in employment on the basis of:
 - Race
 - Color
 - Religion
 - Sex
 - National origin

Title VII of the Civil Rights Act of 1964

- Title VII makes it illegal to discriminate in any aspect of employment, including:
 - Hiring and firing;
 - Compensation; assignment or classification/segregation or employees;
 - Transfer, promotion, layoff or recall;
 - Job advertisements;
 - Recruitment;
 - Testing;
 - Use of company facilities;
 - Training and apprenticeship programs;
 - Fringe benefits;
 - Pay, retirement plans and disability leave; or
 - Other terms and conditions or employment.

Title VII of the Civil Rights Act of 1964

- Discriminatory practices under Title VII also include:
 - Harassment on the basis of race, color religion, sex or national origin;
 - Retaliation against an individual for filing a charge or discrimination, participating in an investigation or opposing discriminatory practices;
 - Employment decisions based on stereotypes or assumptions about the abilities, traits or performances of individuals of a certain sex, race, age, religion or ethnic group and;
 - Denying employment opportunities to a person because of marriage to, or association with, an individual or a particular race or national origin.

Title VII Discrimination

- A plaintiff/complainant must file a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act.
- The EEOC issues a Right to Sue letter. Title VII requires that the plaintiff file a civil action within 90 days after receipt of the EEOC Right to Sue letter.
- “Direct evidence” of discrimination (*i.e.*, you can have the promotion because I do not like working with women).

Title VII Discrimination

- Most cases are “circumstantial” cases, which means that based on all the facts, it would seem that discrimination was the reason for an employment decision. In these cases, to establish a prima facie case under Title VII, the Plaintiff must prove the following:
 - belong to a protected class
 - was qualified for the position they applied or held
 - they were subjected to an adverse job action
 - they were replaced by someone outside the protected group

Title VII Discrimination

- The burden shifts to the defendant to articulate some legitimate non-discriminatory reason for the employment decision. If a legitimate, non-discriminatory reason is established by the employer, the burden shifts back to the employee to prove that the alleged legitimate reason is a front or pretext to hide discrimination.
- Referred to as the McDonnell-Douglas burden shifting analysis

Age Discrimination

- The Age Discrimination in Employment Act (“ADEA”) was enacted by Congress with the express intent to prohibit arbitrary discrimination in employment and to promote employment of America’s older population based on ability rather than age.

Age Discrimination

- The current law protects all employees over the age of 40 who are employed by an employer subject to the ADEA. The law generally prohibits an employer from compelling an employee to retire due to age subject to a very narrow exception.

Age Discrimination

- To establish a claim under the ADEA, a plaintiff must prove the following:
 - membership in the protected class (*i.e.*, over the age of 40);
 - the employee was qualified or performing up to the employer's expectations, but nevertheless was either not hired or was subjected to an adverse personnel action;
 - job was given to a younger employee or a younger employee was treated more favorably; and
 - the plaintiff had the same qualifications as the younger employee.

Americans With Disabilities Act

- The ADA protects employees and prospective employees with disability from discrimination by employers based on their disabilities. All boards of education in Alabama are subject to the ADA since all boards have more than fifteen employees.
- The ADA prohibits employers from engaging in discriminatory and other unlawful practices in the hiring, managing and termination process of disabled individuals and imposes an affirmative obligation on employers, in some instances, to reasonably accommodate disabled applicants and employees.
- Employee must request the accommodation.
- To fall within the scope of the ADA, a person must have a disability and be a qualified employee or applicant.

Americans With Disabilities Act

- “Disability” is defined as follows:
 - a physical or mental impairment that substantially limits one or more major life activities;
 - a record of such impairment; or
 - being regarded as having an impairment.

In addition, the employee or applicant must be capable of performing the essential job functions with reasonable accommodations if necessary.

Americans With Disabilities Act

- In pre-employment inquiries, the employer is
 - prohibited from asking questions concerning an individual's disability or questions likely to illicit information about an individual's disability.
 - The employer is permitted to determine whether the employee can perform the functions of the job. Focus should be on the specific job related functions when interviewing applicants.
 - The ADA permits an employer to establish job related qualifications standards, but those standards must not screen out or tend to screen out individuals on the basis of a disability unless they are job related and consistent with business necessity.

Americans With Disabilities Act

- What are Major Life Activities?
 - Major life activities are those basic activities that the average person in the general population can perform with little or no difficulty. These include caring for one's self, performing manual tasks, walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, learning, working, thinking, concentrating and interacting with other people. More recently, the Supreme Court has determined that the "ability to procreate" is a major life activity.

Americans With Disabilities Act

- Reasonable accommodation does not include
 - hiring additional employees;
 - creating a new job;
 - reallocating the “essential functions” of the job;
 - reallocating duties to other employees so they must work harder or longer than the impaired employee;
 - allowing indefinite light duty; and
 - allowing an indefinite leave of absence.

Americans With Disabilities Act

- What constitutes Undue Hardship?
 - Undue hardship is a defense generally defined as “requiring significant difficulty or expense.” The criteria for establishing this defense include the:
 - Size of the company;
 - Size of the company’s budget;
 - Nature of the company’s operation;
 - Number of employees;
 - Composition and structure of the workforce; and
 - Nature and cost of the accommodation.

Americans With Disabilities Act

- What constitutes “Undue Hardship”?
 - Undue hardship refers not only to financial difficulty, but to accommodations that are unduly extensive or disruptive, or to those that would fundamentally alter the nature or operation of the business.

Americans With Disabilities Act

- The employer has a duty to reasonably accommodate an employee.
- The duty to accommodate is subject to exceptions and is excused when it imposes an “undue hardship on the employer.”

The Attendance Dilemma or

“How to Work Without Coming to Work”

- How to handle the employee who has made a career of “working” without having to come to work
- How to structure the workplace so that consistent attendance is expected, required and fairly evaluated
- Have to start at square one – the basics

Impediments to Proper Attendance Management



Local management



Casual school environment



“Professional” culture



Lack of training



Lack of communication



Incompatibility & lack of coordination



Generous leave under law



“Managers” that don’t come to work either...

Planning Keys

- Make good decisions – when do people NEED to be there and why?
- Stagger schedules?
- What are expected work hours
 - 40 per week? 37.5 per week? How many days?

SOMETIMES WE DEFINE JOBS BY THE PEOPLE WHO HOLD
THEM . . .
DON'T

Planning Keys - Schedules

- Work hours (both number and specific hours to be worked) should be clear and documented
- Schedule (what employee does during day) should be established
- Lunch needs to be at a set time and staggered for employees doing like duties
 - (Please don't schedule all custodians to eat at the same time)

Planning Keys - Schedules

- Ideally, don't schedule at times when there is no supervision (early morning, night)
- The "honor system" doesn't work
- Break times and lunch have to be 30/20 minutes or they count as paid time
- Break time and lunch should be scheduled
 - (That does not mean take it when you can)

Schedules

Typically left to local administrators

Should have a document showing what schedules are

Communicate the schedule to employees!!

How do you deal with extracurricular activities?

How much flexibility do you want to allow?

Needs to be consistent and clear

You Can't Enforce What You Don't Explain!

- What work hours are
- How to account for being there
- That records have to show when at work
- What signing a timesheet/accounting for leave means
- How to address inaccuracies
- Leave

The Basics of Attendance

Attendance is
necessary and
essential

Being on time is
necessary and
essential

Have to either be
there or be on leave

Leave can only be
used for authorized
reasons-needs to be
certified

Board needs to be
notified when won't
be there

Relate all of this back
to core educational
function-Teaching and
Learning

Salary Schedules

We have some things to think about . . .

- The salary schedule itself
- Overtime
- Policy/handbook conflicts
- Other fundamental or structural issues

Salary Schedules

- Typically contain job titles and chart of salaries
- Most often salaries reflected as annual rate
- Schedules must meet (or exceed) state matrix for some employees
- Schedules must have “steps”
- Typically “x axis” is degree, qualification, or responsibility related
- Typically “y axis” is experience-based
- Some are quite detailed – some are quite simple

Salary Schedules

- In addition to charts of numbers, most schedules have some terms and conditions which impact salary, such as:
 - Number of days salary covers (e.g., 187)
 - Number of hours each day that salary covers (e.g., 7.5, 8)
 - Holidays, vacations, sick days
 - Formulas for overtime, salary reduction
 - Supplement information
 - “Conversion” data
 - How to apply data
 - Expectations for earning salary

Salary Schedules

- Much litigation over salary schedules
 - Placement, conversion, form
 - Equal protection
- Establishes “expectations” related to pay
- Changing salary schedules always needs to be carefully considered – changes have a “ripple” effect
- “Contractual” language
- If changed in any way to raise compensation, very difficult to lower it back down
- Also, make sure and review State law – if there is a required schedule, can’t pay below it...

Policy/Handbook Conflicts

- Board materials matter – employees, students, parents, and community rely on them
- If the work day or work period changes, there is much to modify – work schedules, class schedules, bus schedules, etc.
- Provisions are in memos, letters, handbooks
- Policies and handbooks sometimes include specific definitions of work week, school day, work day, hours of work, etc. – have to resolve conflicts

Overtime

- FLSA compliance still an issue in some schools
- Overtime has to be managed
- How you manage is extremely important
- Mistakes can have exponential costs
- Overtime will continue to be part of the dialogue in schools from a fiscal responsibility standpoint

Overtime Basics

- 1 ½ times regular rate of pay
- Only for more than 40 hours in week
- Paid as cash or time off (compensatory time)
- Regular rate includes all pay

Calculating the Regular Rate

Practical Tips

- Get a good formula in place and stick with it
- Use technology
- Remember the fundamentals

| | |
|-------------------------|----------------|
| All Compensation Earned | = Regular Rate |
| All Time Worked | |

- Don't assume anything when it comes to time worked
- The variables that go into the formula are based on “contractual principles” and understandings
- A salary can be based on more than 40 hours in a week—in that case, only pay overtime premium of 1/2 time

Is Overtime Due ?

Calculating Hours Worked

- Overtime must only be paid if more than 40 hours are worked in a work week (usually Sunday – Saturday)
- Only count compensable hours, NOT including holidays, vacation or sick leave
- Work hours can NOT be averaged across two or more weeks to avoid overtime:
 - It is NOT acceptable to average work hours at the end of the month
 - It is NOT acceptable to work over 40 hours in one week and take the time off, hour for hour, the next week
- Overtime does NOT accrue simply because an employee works beyond his/her regular schedule on a given day

Exemptions

- Certain positions meet exemption criteria from FLSA regulations based on the nature of work performed and the amount and type of pay received
- Positions “exempt” under the FLSA are not entitled to overtime compensation regardless of the number of hours worked
- There are detailed tests for exemption
- Exemption tests are complicated – decisions should not be made by local administrators

Application of Exemption Tests

1

Job titles alone are insufficient to establish exemption

2

Job descriptions alone are also insufficient to establish exemption

3

Have to look at salary and duties performed

Exemption Categories Commonly Seen in Education

- Executive
- Administrative – regular and academic
- Professional

“EAP”

What about teachers?



Teachers are “Professional” employees =
Professional Exemption



Special Rule for “bona fide teachers” –
do not have to meet the salary threshold

Bona Fide Teachers

- Primary duty – teaching, tutoring, instructing, lecturing in activity of imparting knowledge
- Employed and engaged as a teacher in an educational establishment
- Includes classroom teachers, career tech teachers (“skilled and semi-skilled trades and occupations), preschool teachers, kindergarten teachers, coaches

So, Who is Exempt?

- Certificated personnel
 - Teachers
 - Principals
 - Directors
- Executive Level Employees
 - Superintendent
 - CSFO
 - Other Directors
- Administrative Employees
- Nurses (R.N.'s)
- Accountants

And Who is Not?

- Administrative Aides
- Bookkeepers
- Custodians
- Maintenance Crews
- Bus Drivers
- LPN's and other nurses with two year degree or less
- CNP Personnel

Exempt Positions

A few things to remember . . .

- NOT eligible for overtime compensation
- Can still be required to complete time records
- Board can still schedule work hours
- Exempt employee pay NOT subject to hourly pay deductions, except for:
 - Major workplace rule violation
 - Unapproved leave of absence
 - Exhaustion of accrued leave or FMLA
 - Mandatory furlough for budgetary reasons
- Exempt employees may be required to use accrued leave to cover work absences
- Improper pay reductions can render employee non-exempt

Dual Employees

Two jobs – can result in more than 40 hours

Don't calculate based on the job which "caused the overtime"

Use a blended rate, have to custom calculate

Salary schedule/agreements become important

Think about establishing an hourly rate and paying overtime using it

Volunteers

- Use caution!
- General rule: A classified employee cannot work for free as a volunteer
- Cannot waive overtime
- Cannot volunteer for same type of services which employee is employed to perform
- This is tricky and has to be carefully analyzed

Substitutes

Avoid using employees as substitutes



Think of it as two jobs



Can cause recordkeeping problems

Lump Sum Payments

- Lump sum payment counts as additional base compensation
- If results in overtime, have to pay overtime on the lump sum
- Lump sum cannot serve as the overtime compensation
- Can substantially raise the hourly rate

Keep Good Records

- Can use timesheets or electronic means
- Either way, must have ability to record all time worked
 - Bus drivers
 - Weekend Work
 - Special projects
 - Start time and end times for work
- Sign in and out for lunch/breaks

Compensable Work Hours

- All hours an employee is required to work, including idle and certain on-call times
- Waiting time is work time if period of waiting is :
 - Unpredictable
 - Short duration
 - Employee unable to use time effectively for own purposes

Meeting and Training Time

- Mandatory meeting/training time is work time
- Voluntary training during work hours is work time, IF:
 - Approved by appointing authority
 - Directly related to employee's job
 - Designed to enhance employee's performance
- Voluntary training after hours to gain additional skill or knowledge is NOT work time, even if job related

Travel Time



Ordinary travel to and from work is NOT work time



Travel from work site to work site is work time



When required to travel substantial distance to perform a job away from regular work site, travel is work time

Calculating Time – Lunch Breaks

- Lunch breaks – bona fide lunch breaks of more than 30 minutes
 - If on duty, have to pay
 - If interrupted, have to pay
 - Good idea to have employee sign out for lunch
- Other breaks
 - If less than 20 minutes, compensable
- Cannot count two 15-minute breaks as “lunch break”
- Breaks are not required by FLSA
- Remember, overtime is by week, not by day
 - Don't automatically get overtime for missing lunch

Compensatory Time

- Boards may offer compensatory time in lieu of cash payments
- Comp time is NOT leave, but a form of compensation:
 - Entitled to use time as if using cash compensation
 - Must be able to use for personal use
 - Appointing authority may require use of comp time

Compensatory Time

- “Paid” at 1.5 times
 - Get 1.5 hours comp time for every hour of overtime
- Employee is to use for personal use
- Cannot say no to use, unless the absence would unduly disrupt business

Comp Time and School Boards

Common practice to have informal “comp time” plan

Usually not comp time as referred to in FLSA

Usually consists of trading days or hours – one for one

Time records are informal and cannot cash out

Informal comp time plans are fine *IF* employee does not work overtime

Should not refer to as comp time and should not mix (maybe call flex time or just discretionary scheduling)

Remember, cannot set off time across work weeks without paying overtime – perfectly fine to do it within work week

If You Want to Use Comp Time

- Agreement with employee *in advance* (before the overtime is worked)
- Can be policy
- Keep solid records
- Make sure calculated correctly – 1.5 hours for every overtime hour worked

CAN BE A GREAT TOOL IF MANAGED CORRECTLY

Monitor Time Entry

- Every so often, monitor time entry
 - Either as time is entered or just afterward
- Don't delegate this
- Will deter fraudulent entry and provide basis for testimony, if needed

Communication



Communicate expectations to employees



Document those expectations



Be vigilant in following up when expectations are not met

Essential Communication Areas

- What work hours are
- How to complete time records
- That time records have to show actual times worked
- Time has to be accurate
- What signing a time sheet means
- How to address inaccuracies
- How leave fits in

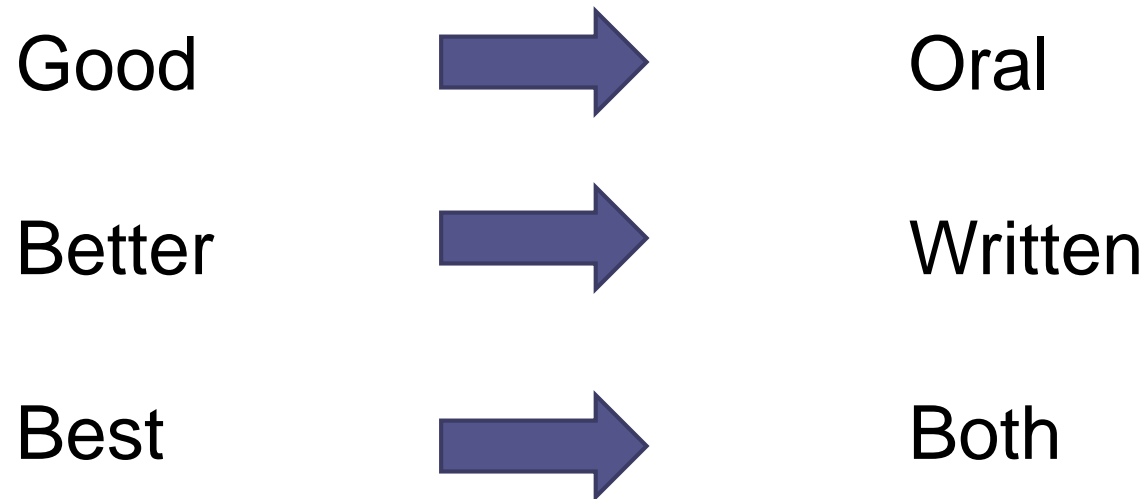
Essential Communication Areas

- When overtime may be worked
- Overtime approval process
- Lunch and breaks – sign in and out
- If lunch missed, how to handle
- Time records – contemporaneous
- Process for reporting request to violate policy on overtime
- Compensatory time

Some Practical Tips

- Don't be "bossy"
 - Just lay it out there
- Avoid a long list of "thou shalt not's"
 - Instead be positive in tone
- Don't slip into educator ease
 - If it starts with "It is the intent of..." delete it and start over
- Be clear and concise on the work rules
- Be nice 😊

Communication Methods



Managing Overtime

- Time clock or electronic time-keeping system
 - Employee controls input and corrections
 - Should require deliberate action/conscious choices
 - Punch in
 - Swipe a card
 - Scan a fingerprint
 - Sign a sheet
 - “Time clock” in an area where can be supervised
 - A timekeeping system where other Board employees (secretaries and payroll clerks) or supervisors complete time records for employees will lead to problems
 - Develop a system where employees tell the Board when they actually worked NOT the other way around
 - Has to reflect actual time worked NOT scheduled time
 - Be cautious about assumptions . . . Including whether or not lunch or breaks taken

Managing Overtime

- Review and Monitoring
 - Time sheets/records should be reviewed (and maybe even certified) weekly, regardless of payroll period
 - Shorter time period promotes accuracy
 - Better chance of remembering
 - Identify problems sooner
 - Eliminate the “hurry up to get paid factor”
 - Can manage time more effectively
 - Timesheets should be reviewed by someone other than the payroll clerk, regularly-look for...
 - Erratic work habits
 - Too much consistency
 - Missed entries
 - Leave issues
 - Lots of overtime
 - Look at service reports
 - Staff write all sorts of things on service reports

Managing Overtime

- Review and Monitoring
 - Visit schools during week
 - Use schedule. Are people where they are supposed to be?
 - Lunch being taken?
 - Everyone signed/clocked in?
 - Talk to employees – not just principal
 - Focus on lunchroom workers and custodians
 - Are posters up? Notices?

Discipline

- If an employer suffers or permits overtime to be worked, must pay for it
- Suffer or permit – If the employer knew or should have known the work is being performed, must either exercise authority to *prohibit* the work or pay for it
- Can't suffer or permit the work and then just not pay for it
- In other words, the discipline cannot be not to pay for the overtime

THE BURDEN IS ON YOU!

Discipline

- What do I do if an employee does not follow the rules or works unauthorized overtime?
 1. Pay the employee
 2. Talk to the employee – be specific and find out what the problem is – there is usually more to the story
 3. Follow up on conversation with written communication
 - a. Describe reason for conversation
 - b. Nature of discussion
 - c. Understanding reached
 - d. Plan moving forward, including ramifications
- Monitor situation – Flag it.
 - If there is a problem, it will surface again

Problem Solving



May weigh risk and determine the best approach is to leave things as they are



Be proactive – solve your problems before they become problems

Consequences

- FLSA liability =
 - Back pay for 2 years
 - or
 - Back pay for 3 years if willfulness is shown
 - +
 - Liquidated damages in amount equal to back pay
 - +
 - Costs
 - +
 - Attorneys fees

Leave

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Sick Leave

Ala Code 16-1-18.1

- Can be used for statutory reasons only
- Not free days off – designed for when too sick to come to work or one of the reasons applies
- Doctor's excuses – not required unless probable cause to believe abuse

Personal leave

Ala Code 16-8-26

- At least two days but can be up to 5.
- At least full pay for 2 of those days
- Don't have to give reasons (they are "personal after all")

Vacation

Ala Code 16-1-18.1

- Authorized but board gets to decide
- Most often found in policies

OJI

Ala Code 16-1-18.1

- Injury while working or on premises
- NOT negligence based (it doesn't matter if it was employee's fault)
- Reporting requirements – 24 hour notification

Leave

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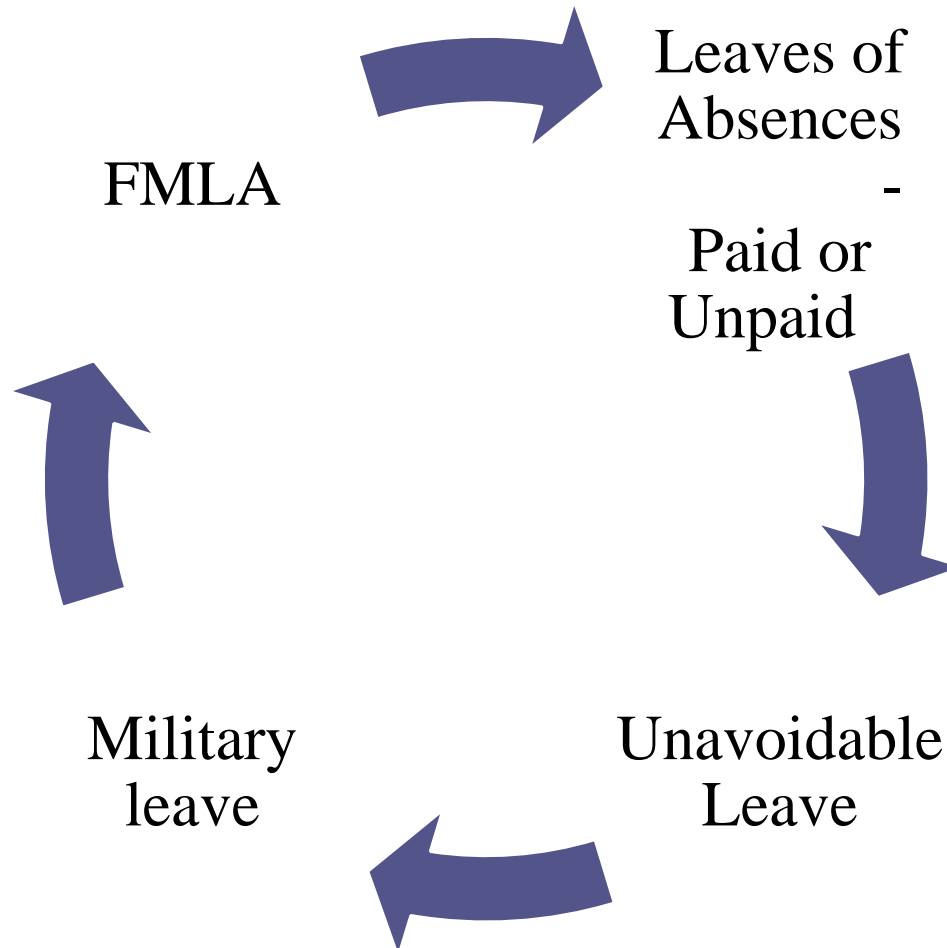
OJI – Ala Code 16-1-18.1

- Injury while working or on premises
- NOT negligence based (it doesn't matter if it was employee's fault)
- Reporting requirements – 24 hour notification
- Can require medical certification

Sick Leave Bank and Catastrophic Leave - Ala Code 16-22-9

- Bank set up by employees for employees
- Deposit days in (Up to 5) and can borrow 10 more
- Elect a Sick leave bank Committee each year (every year!)
- Committee decides rules and regs and membership votes on them
- Bank makes decisions for itself through the Committee-Board only handles accounting and administration
- Catastrophic Leave available – can have days donated by other employees

Leave



Discipline

- What do I do if an employee does not come to work or follow the rules?
 1. Make sure the rules are clear (see earlier slides)
 2. Talk to the employee – be specific and find out what the problem is – there is usually more to the story
 3. Follow up on conversation with written communication
 - a. Describe reason for conversation
 - b. Nature of discussion
 - c. Understanding reached
 - d. Plan moving forward, including ramifications
- Monitor situation – Flag it.
 - If there is a problem, it will surface again

What About Outsourcing?



CAN'T WE SOLVE THESE
PROBLEMS BY
“FARMING IT OUT?”



CAN'T OUTSOURCE
EVERYTHING



COMES WITH OWN SET
OF PROBLEMS

Independent Contractors

The New World of Outsourcing

- Expansion of outsourcing opportunities for school boards
 - Substitute employees
 - Bus Services
 - Nurses
 - Custodial/Support
- Contracts are critical
- How you handle the outsourced employees may be more critical

Independent Contractors

Sometimes need to contract with individuals, companies or small groups of individuals to provide services on periodic or sporadic basis

Do this through the use of a contract – we call them independent contractors.

Contracts are critical – establish the relationship

Independent Contractor

- Often use a clause like the following:
 - Contractor agrees to provide all services as an independent contractor and both the Board and Contractor disclaim any and all employment relationship between the parties. As Contractor is not an employee, she is not entitled to the benefits provided by the Board to its employees, including, but not limited to, group health insurance and pension plan. Accordingly, fees, taxes, administrative costs and any other costs incurred by Contractor in the performance of any of the services mentioned herein shall be the sole responsibility of Contractor. For the purposes of this Agreement, Contractor, her employees, officers, agents, assigns or representatives shall not be considered as employees, officers, agents, assigns or representatives of Board.

Potential Consequences of Ambiguity

Attainment of
tenure or
continuing service
status

Right to benefits

Due process

Employment
Laws

FLSA

Taxes

Penalties

Joint Employment

- Triggers obligations under laws applicable to public agencies (Federal civil rights laws, FMLA, FLSA)
- Worst of all worlds – both are “employers”
- Evaluate using “Economic Realities Factors”
 - Power to Hire and Fire
 - Control Over Wage or Other Employment benefits
 - “wage rate is so fundamental to the ultimate question that... (DOL believes) that any entity that sets a wage rate will likely be considered an employer.”
 - Hours and Scheduling
 - Supervises, Directs or Controls the Work
 - Performs Payroll or Other Administrative Functions
 - Other Factors-they reserve the right to look at other factors

Independent Contractor Tests

Common Law
Test

20 Factor Test

New
“Relationship of
the Parties” Test

Independent Contractor Test

Focuses on relationship of parties

1. Behavioral control
2. Financial control
3. Type of relationship between the parties

Independent Contractor or Not

Behavioral Control

- Evaluate the extent to which the “employer” has a right to control and direct performance – whether employer has retained the right to control the details of performance or has given up that right...
 - **Instructions to worker.** If can tell when, where and how to work=employee
 - Examples:
 - When and where to do the work
 - Tools and equipment to use
 - Hiring assistants
 - Where to purchase supplies
 - Election of who performs work
 - Order or sequence to follow
 - **Does business train worker?** Employers generally train their workers, ICs use their own methods.

Independent Contractor or Not

Financial Control

- Unreimbursed business expenses
 - Will look at fixed ongoing costs
 - IC will have some unreimbursed expenses.
- Extent of independent contractor's investment
 - Significant investment is not determinative though.
- Free agency – whether services available to others
- Payment /compensation
- Who gets profit or bears loss?

Independent Contractor or Not

Type of Relationship

- Written contracts – intent of parties
 - Not determinative but will be given weight
 - If don't have a written contract at all, will work against IC status.
 - Chance to make the case on the front end and define terms.
- Whether benefits provided
- Permanency of relationship
 - Fixed time = IC, Permanent or Open Ended = Employee
- Services key part of regular business or not?

Applying Tests

- DOL, IRS will use the factors and the tests that suit purposes – not bound exclusively by them
- IRS provides some examples in Publication 15-A
- Remember that no one single factor is determinative – they are subject to a balancing analysis

Audits



Some audits may come randomly



DOL and IRS will collaborate in efforts and will share info



So, a misclassification issue may result in overtime and back pay liability as well.

Audit Red Flags

- 1099 and W-2 for the same worker from the same business
- 1099 from only one business or employer
- Unemployment request from a worker who got a 1099
- Rehiring worker as IC after retirement (there are revolving door and ethics law complications here as well)

QUESTIONS... ?