

SPECIAL BULLETIN

March 3, 2009

LAYOFFS.

Due to the recent economic downturn, many independent and private schools are now confronted with unanticipated budgetary issues. Some of the challenges faced by independent and private schools include decreased enrollment, increased student need for financial aid, dwindling endowments and inability to increase tuition. These financial pressures have left schools struggling to balance the need to respond to these budgetary concerns with maintaining the same high quality educational programs for their communities. While many of the financial issues facing private schools are not particularly legal in nature, legal issues can arise depending on the manner in which schools choose to respond.

This Special Bulletin is intended to address some of the questions we have been receiving related to the topic of layoffs. It is the first in a series of special bulletins which will address issues facing our independent and private school clients as the economic crisis deepens.

A. The General Rule of Layoffs for Private Schools.

While the California Education Code contains strict guidelines and requirements with regard to public school layoffs, independent and private schools are not subject to those provisions. Private schools thus retain the freedom to effectuate a layoff as they deem best, subject to certain caveats. The largest caveat is that while a private school has great discretion to conduct a layoff, a layoff cannot be effectuated for illegal purposes. For example, while a school may view a layoff as an opportunity to terminate certain employees who are not considered to be best for the school, layoffs that are effectuated for seemingly improper or even illegal motives can result in a variety of legal claims, such as claims made pursuant to Title VII, California's Fair Employment and Housing Act ("FEHA"), the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). It is therefore important to consider whether a well-reasoned legal basis for laying off a particular employee could be viewed as biased and therefore illegal. By following some key principles private schools can better shield themselves from potential liability and the possible additional expenses associated with defending a lawsuit.

B. Principle One: Consider Whether You Need a Policy.

The first principle is for a school to determine whether a layoff policy is necessary. If a school believes there will be a need to conduct layoffs for an extended period of time, LCW recommends that the school develop and implement a layoff policy. Having a clear policy in place, and consistent application of that policy, is the most effective way of shielding a school from potential legal liability resulting from layoffs. The principle reason for this is because a layoff policy prevents a layoff from appearing arbitrary or capricious. In fact, in the event that legal claims arise due to a layoff, adherence to a layoff policy may also provide a strong defense. For this reason, even if a school does not contemplate the need for layoffs for an extended period of time, a school may still wish to consider adopting a layoff policy. Note, however, that adopting a policy places an additional burden on the school. As will be discussed below, if a school

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chooses to adopt a layoff policy, the school must adhere to the policy. The failure to abide by an existing layoff policy is likely to create legal issues for a school.

C. Principle Two: Decide Which Criteria to Include in Your Policy (or to Use and Document if Not Adopting a Policy).

In developing a policy, there are several aspects that should be considered, such as what criteria will be used to determine which individuals are laid off, whether any special skills or other desirable qualities would exempt a certain employee from a layoff, and the related procedures a school must abide by during the school year to effectuate a layoff pursuant to a developed policy. Note that even if a school is contemplating a layoff, but does not have a layoff policy in place, the school is not precluded from conducting a layoff. Schools that either do not have or do not want (sometimes for marketing or other reasons) a layoff policy should carefully consider the criteria and processes that will be used. Whether or not a policy is in place a school should document the process. The following discussion of the possible aspects of a layoff policy may be useful for those schools contemplating layoffs.

1. Seniority

Generally, in determining which criteria to include in a layoff policy, the most risk-adverse option is to use seniority. This is also the legally safest approach for schools contemplating a layoff. Under this option, schools develop a seniority list of its employees by job classification and lay off individuals based on their seniority with the School. For example, individuals who have been employed with the school for the least amount of time are the first to be laid off, and individuals who have been employed with the school for the most amount of time are the last to be laid off. This method of selection is calculated and objective, and not based on any subjective criteria. As a result, this method is the least likely to be successfully challenged by a disgruntled former employee.

In addition, this method places a very small burden on the School. The School simply must ensure that it maintains adequate records reflecting individual employees' start of employment dates in order to generate a seniority list.

2. Performance

Another option is for a school to use performance as the criterion for selecting individuals to be laid off. Under this option, schools can decide to lay off individual employees who perform below expectations, and retain employees whose performance exceeds expectations, regardless of seniority. When appropriately using this criterion, a layoff can be an effective tool to separate employees who consistently perform poorly.

However, this criterion bears a strong caveat. If a school chooses to select employees to be laid off based on performance, the school must ensure that it has a history of conducting timely, periodic and well documented performance evaluations. The school must also ensure that it documents performance issues that may arise throughout the school year. If a school is consistently tardy in conducting evaluations, or does not maintain clear and sufficient records of evaluations, counseling, or reprimands, then using performance as a layoff criterion is fraught with risk.

For example, if an individual who was laid off for performance deficiencies is able to demonstrate that his or her performance evaluations were randomly, and not consistently, undertaken, that individual may successfully challenge his or her separation. Additionally, a long term employee who is laid off because of a recent one time negative evaluation may successfully challenge his or her separation by showing years, or perhaps decades, of positive performance evaluations. This situation raises an inference that the recent evaluation is not an accurate reflection of performance but is rather a "trumped up" document designed to be used for termination of employment. Likewise an employee with a history of no evaluations may successfully argue that his or her re-employment each year was reasonably interpreted as confirmation of satisfactory performance.

For all of the above reasons, using performance as a layoff criterion can carry a higher risk of successful legal challenges. The subjectivity of performance evaluations is one factor that raises the level of risk. If the school's performance evaluation program has not been well administered it is not advisable to utilize performance as a criterion. Conversely, performance can be very effectively used as a criterion where a school has a history of timely well executed performance evaluations.

3. Special Skills

Special skills, in conjunction with other criteria, such as seniority, can be a very effective tool to ensure a diversely skilled faculty and staff. Under this option, individuals who have special skills are "skipped over" and retained during a layoff, even though they may have lower seniority to another individual who is laid off. Examples of special skills include fluency in foreign languages, training or experience working with students with special needs, ability to work in dual capacities (e.g. a mathematics teacher who can also coach softball), or proficiency in certain software.

Whether a special skill is a legitimate criterion to skip over an employee depends on the individual circumstances. For example, a teacher who is proficient in communicating in sign language could likely be legitimately skipped over by a school that has a population of hearing-impaired students. A mathematics teacher who is capable of coaching football, however, would likely be found by a court to not qualify to be "skipped" over if the school does not have a football team. While independent and private schools have broad discretion to effectuate layoffs in the manner that best meets the needs of the school, it is the defensible application of any articulated criteria that will provide the solid defense if challenged. Generally in using this criterion, if the school can demonstrate a genuine need for a special skill, the school can likely skip over an employee who possesses that special skill.

4. Elimination of Programs

Schools may also eliminate whole school programs, such as drama, music, fine arts or outdoor education programs. Under this option, all of the faculty and staff involved with a particular program would generally be laid off. Criteria such as employee seniority or performance should not be factors. So long as the school is able to put forth a reasonable, business-related reason for its decision, these types of layoffs are highly defensible.

D. Principle Three: Follow Your Policy (Or Criteria for a Layoff).

Hand-in-hand with the notion that a layoff policy is the most effective way of reducing liability, the failure to follow a layoff policy is the easiest way for a laid off employee to challenge a separation. Thus, if a school adopts a policy, that school must follow the policy. For example, if a school fails to follow its layoff policy and elects to lay off the school's older workforce with the thought that such an action would result in greater savings in salary costs, those employees could challenge the layoff, arguing that the layoff was a pretext for age discrimination in violation of the ADEA. There has been a rise in age discrimination claims resulting from layoffs, and schools should be prepared to offer documented reasons for laying off any individual, and particularly those who may be able to bring a claim under the ADEA. More often than not, schools that are able to demonstrate adherence to an internal layoff policy and equal and consistent application of that policy, prevail in these types of discrimination claims.

E. Principle Four: Communicate, Communicate, Communicate!

A school's failure to follow internal layoff policies does not only pose legal risks, but also poses other risks. For example, if a school's layoff process appears to be arbitrary, or kept in secret, the overall morale of the school could be affected. Further, the resulting ambiguity in the layoff process may result in a feeling of job insecurity among employees, causing strong, marketable employees to leave. Although there are a variety of approaches to conducting a layoff, a school that engages in open and clear communication with its community, including its Board of Directors, faculty, staff, parents and students, is typically perceived as employing

fair processes and are challenged less. For this reason, it is important to consistently and frequently engage in open communication, so as to avoid uncertainty and fear during these financially difficult periods. A school that decides not to have a policy can still engage in an open and fair dialogue with the community through letters, meetings and other types of communications.

F. Principle Five: Bear in Mind that Even if You Do Everything Right, You May Still Be Challenged.

Unfortunately, one consequence of lean economic times is an increase in lawsuits and claims to protect or regain employment. Thus, bear in mind that even if a school does everything correctly (e.g. maintains proper documentation and records, properly effectuates a layoff using objective criteria, and openly communicates with its faculty and staff), that school may still be challenged with a frivolous lawsuit.

The recent case of *Zhu v. Massachusetts Institute of Technology* (U.S. 2008) 129 S.Ct. 343 highlights this principle. In this case, Zhu, a Chinese-born research scientist employed by MIT, was laid off after MIT lost the funding that paid for the salaries of Zhu and Cho, another research scientist. MIT elected, however, to retain Cho and not Zhu. Zhu challenged the lay off, arguing that it was a pretext for national origin discrimination. In response, MIT was able to offer documented, legitimate and non-discriminatory reasons for its layoff. MIT offered evidence of performance and disciplinary problems with Zhu and offered evidence of its recent loss of funding that justified the layoff. MIT was also able to offer evidence that Cho was more qualified for the position. Although MIT prevailed in the state court level, Zhu persisted to appeal and ultimately unsuccessfully petitioned the United States Supreme Court for a writ of certiorari, which is a request that the Supreme Court review the case. Although MIT appeared to do everything right, it was still forced to defend a frivolous lawsuit up to the Supreme Court level.

G. Principle Six: Document Everything.

Zhu v. Massachusetts Institute of Technology also highlights our final principle - document everything. If a school ultimately decides to effectuate a layoff, the school must remember to document all the steps taken to evaluate employees and all the reasons for selecting an individual to be laid off. In lawsuits involving challenges to layoffs as pretexts for discrimination, schools that are able to offer well documented and legitimate, non-discriminatory reasons for effectuating a layoff of a certain employee, often prevail. For this reason, schools must remember to document every step of the layoff process to overcome challenges.

Navigating the world of layoffs can be very challenging and technical. With these general principles, however, schools can minimize their legal risks and potentially shield themselves from liability in the event of legal challenges. Please note, however, that these principles are intended as informational only. LCW recommends that schools contemplating a layoff contact legal counsel for advice.

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*If you have questions about this issue, please contact our
Los Angeles, Fresno or San Francisco office.*