



## Legal Danger Zones

Protected Persons	Protected Actions
<ul style="list-style-type: none"><li>• Disability</li><li>• Race</li><li>• Creed</li><li>• Color</li><li>• Sex</li><li>• Sexual orientation</li><li>• Gender identity</li><li>• Gender expression</li><li>• Marital status</li><li>• Religion</li><li>• Age (over 40 years)</li><li>• National origin</li><li>• Ancestry</li></ul>	<ul style="list-style-type: none"><li>• Requesting an accommodation for a disability or a pregnancy-related disability</li><li>• Asking for a religious accommodation</li><li>• Submitting a workers compensation claim</li><li>• Requesting or taking family or medical leave</li><li>• Making a wage claim</li><li>• Being a whistleblower</li><li>• Reporting harassment or discrimination</li><li>• Participating in any legal proceeding, whether as a claimant or witness</li></ul>

An employee cannot be discharged, not promoted, demoted, harassed or otherwise discriminated against in matters of compensation, terms, conditions or privileges of employment “because of” their protected status or protected activities.

Documentation of performance issues will be especially important if an employee is a protected person or has engaged in a protected activity. Consulting with legal counsel is also a good idea.



## Documentation: Employment Contracts

*“It is understood and agreed that your employment under this agreement is for a stated term and in no way implies or creates any right to continued employment beyond the stated term of the agreement. This Agreement will not automatically renew upon the expiration of the term. The conditions and obligations of this Agreement are expressly contingent upon employee fulfilling all of the requirements of any prior year’s Agreement, if any, to the satisfaction of the Head of School. In the event any existing employment agreement is terminated prior to expiration, this Agreement shall be null and void.”*

*“Your employment with school is ‘at will,’ meaning that you may terminate your employment with school at any time with or without cause, and with or without notice, and school reserves the same rights to terminate your employment.”*

*“It is agreed that this appointment and the monthly payments provided are conditioned upon and subject to your assumption of the duties which may be assigned to you, to your performance of these duties in a professional and satisfactory manner, to your observance of and compliance with our policies and procedures as they may be amended from time to time, to your promotion of the best interests of school and its students, and to your fulfillment of any prior year’s agreement. In the event you fail to meet any of these requirements, to the satisfaction, and in the sole discretion, of the Head of School, school reserves the right to immediately terminate your employment and to cancel this agreement without notice, and to pay you only the pro-rata portion of the academic year actually fulfilled prior to the termination of your employment.”*

*“It is further agreed that this appointment is contingent on student enrollment and you agree that your employment may be modified, reduced or terminated at any time that the school determines, in its sole discretion, that enrollment figures require that a particular program or class be modified or eliminated.”*

TIP: Please check with supervisors regarding performance issues before issuing a new contract to employees.

**Signed employment contracts should reside in an employee’s personnel file.**



## **Documentation: Employment Contracts**

*“It is further agreed that all controversies and claims in any way related to this agreement, or any other aspect of your employment relationship with the school, shall be submitted to confidential binding arbitration. The only disputes not covered by this arbitration provision are claims that an employee or former employee may have regarding workers’ compensation or unemployment compensation benefits. ‘Confidential binding arbitration’ shall mean that you may not discuss the facts and circumstances underlying any claim, or the fact that there is a claim, with any third party other than your counsel, tax advisor, licensed healthcare provider(s), the arbiter or any local, state or federal government agency. This prohibition includes any public forum, as well as social media outlets such as Facebook, Instagram, Twitter, Snapchat and/or LinkedIn. Unless otherwise agreed, the arbitration will be conducted in Denver, Colorado by the Judicial Arbiter Group, Inc., before a single arbitrator, in accordance with the Colorado Uniform Arbitration Act of 1975 as it may be amended from time to time [the “Act”]. The arbitrator’s fees and expenses will be borne by school. School will provide you with a copy of the Act upon request.”*



## **Documentation: Employee Handbooks**

Employee Handbooks should identify the range of possible disciplinary consequences without committing to a progressive disciplinary process.

*“Occasionally, performance or conduct falls short of our standards and/or expectations. When this occurs, the school takes action which, in its sole and absolute description, is appropriate under the circumstances. Disciplinary actions can range from an informal discussion with the employee about the matter to immediate discharge. Action taken by the school in an individual case should not be assumed to establish a precedent in other circumstances.”*

**Employee acknowledgements of Employee Handbooks should reside in an employees personnel file.**



## **Documentation: Performance Improvement Plans**

Think about a Performance Improvement Plan as something that will be used as evidence in a legal proceeding at a later date:

- Be specific: Identify specific acts or omissions in as much detail as possible
- Be objective: Whenever possible, tie the specific acts or omissions to a job description, school policy or handbook provision

*“Effective immediately, you are placed on a Performance Improvement Plan through DATE. During this time, you will be expected to make regular progress on the plan outlined above. Failure to meet or exceed these expectations will result in further disciplinary action, up to and including termination prior to DATE. In addition, if there is no significant improvement to indicate that the expectations will be met within the timeline indicated in this Performance Improvement Plan, your employment may be terminated prior to DATE. Furthermore, failure to maintain performance expectations after completion of the Performance Improvement Plan may result in additional disciplinary action up to and including termination.”*

*“This Performance Improvement Plan does not alter the employment at-will relationship.”*

**Performance Improvement Plans should reside in an employee’s personnel file.**



## **Documentation: Informal Documentation**

Document, document, document:

- If someone tells you about the action or omission, ask them to send an email summarizing the issue.
- If emails between you and the employee document the action or omission, keep the email.
- If emails from other employees document an action or omission, keep those emails.
- Prepare an outline of what you plan to say before a meeting, and make notes on the outline during the meeting.
- Send an email after a conversation or meeting with the employee to confirm what was discussed.
- If emails between you and other supervisors document a disciplinary or termination decision, keep the email.

**These documents need not reside in an employee's personnel file, but keeping them in a centralized location like a personnel file makes it easier to find when you need them.**



## **Personnel Files**

Employees in Colorado are allowed to see their personnel files while they are employed, and may ask to review their personnel files one time after they are no longer employed.

By statute, “personnel file” does not include

- documents or records pertaining to confidential reports from previous employers of the employee
- documents or records pertaining to an active criminal investigation
- documents or records pertaining to an active disciplinary investigation by the employer, or an active investigation by a regulatory agency
- any information in a document or record that identifies any person who made a confidential accusation, as determined by the employer, against the employee

These documents may be removed before the personnel file is shared with the employee.



## **Documentation: Severance Agreements**

Severance Agreements offer to pay money above and beyond earned wages and accrued but unused vacation in exchange for a release of claims. They should be offered when you are concerned that an employee will assert a claim for discrimination, harassment or wrongful termination. They should also be offered to long term employees, or when there may be other sympathetic reasons to offer a severance.

**TIP:** A severance should typically not be offered without getting a comprehensive release of claims in return.

**There are lots of legal technicalities about what can and cannot be included in a Severance agreement, so consulting with legal counsel is a good idea.**





## **Supervisory Personnel**

Whenever possible, conversations with employees regarding performance issues should be witnessed by more than one supervisor. Oftentimes, the personnel involved are the immediate supervisor and whomever handles human resources matters at the school.

If two witnesses are not present, it is especially important to send a follow up email confirming the substance of the conversation with the employee.

The Head of School should be a part of most termination conversations.



## **Termination Checklist**

- A final paycheck including all wages through the last day of employment, plus all accrued but unused vacation time
  - If you combine vacation, sick and/or personal time in a general “PTO” policy, all accrued but unused PTO time must be part of the final paycheck
  - If you use an outside payroll company, the final paycheck can be issued the next business day
- Colorado Department of Labor and Employment Notice of Potential Availability of Unemployment Insurance Benefits
- COBRA Notice regarding election of benefits
- Severance Agreement, if applicable
  - Do not require the employee to review or sign the Severance Agreement during the termination meeting



## Recent Trends

- (1) Employees are more litigious than they were previously, and they have greater rights under employment laws now.
  - This means documentation of performance issues is more necessary than ever, and more Severance Agreements will be offered
- (2) Your communities want to know why an employee was terminated.
  - PR and messaging about transitions becomes important
  - But employee confidentiality should be honored to the greatest extent possible
- (3) EPL Insurance carriers are refusing to pay any amount of severance that was offered before they were notified of a potential claim.
- (4) Employees are suing schools for comments board members have made about them
  - This trend emphasizes the need to keep operational issues like personnel decisions out of board meetings, and for anything discussed in a board meeting to be kept strictly confidential

