

The New York City Charter School Center  
together with McCarter & English LLP present

# Employment Law 101

## *Hiring Employees & Avoiding the Pitfalls*

**McCARTER  
& ENGLISH**  
ATTORNEYS AT LAW

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## POTENTIAL ISSUES

- Legal Issues Impact All Stages of the Hiring Process:
  - Recruiting
  - Job applications
  - Interviewing
  - Hiring Decisions
  - Compensation

## WHAT PITFALLS?

- Non-discrimination laws (federal, NYS, NYC)
- Unemployment insurance, workers compensation, income tax laws (federal, NYS)
- NY Education Law (Charter Schools Act)
- NY Public Employees' Fair Employment Act (Taylor Law)
- Contracts law

## SUNY Charter Renewal Benchmarks

### *Is the School an Effective, Viable Organization?*

- Organizational Capacity
  - The school's management has successfully recruited, hired and retained key personnel, and made appropriate decisions about removing ineffective staff members when warranted.
- Legal Requirements
  - At the time of renewal, the school is in substantial compliance with the terms of its charter and applicable laws, rules and regulations.

## FISH OR FOWL?

Persons hired to perform services are either:

- Employees

*or*

- Independent contractors

a/k/a free-lancers, consultants, per diems, 1099s

## IMPORTANT DISTINCTIONS

- **Employees**
  - Income tax withholding (federal, NYS, NYC)
  - Social Security withholding & contributions
  - Unemployment insurance fund contributions
  - Workers compensation coverage
  - Minimum and other wage laws
  - Fringe benefit plans, policies
- **Independent Contractors**
  - None of the above

## WHICH IS WHICH?

- **Employee:** An individual who performs services for you, who is subject to your control regarding what will be done and how it will be done.
- **Independent Contractor:** An individual who performs service for you – but you control only the result of the work.



## VARIOUS TESTS

- **IRS**
  - Behavioral control
  - Financial control
  - Type of relationship of the parties
- **NYS Dept. of Labor**
  - Multi-factor test for independent contractor status





## *WHEN IN DOUBT...*

- Safest approach is to classify as employee
- Reinforce to greatest extent possible the independence of independent contractors
  - Written agreement
  - Limit control & supervision
  - Invoices
  - Other indicia of independence (tax ID no., business cards, other clients)

## RISKS OF GUESSING WRONG

- Unemployment insurance contributions
- NYSDOL audit
- Workers compensation penalties
- IRS and NYS Dept of Tax'n wage reporting and filing penalties
- Potential income tax, FICA liabilities
- Benefit plans

***CHARTER SCHOOLS ACT:  
Who is the employer?***

“An employee of a charter school shall be an employee of the education corporation formed to operate the charter school and not an employee of the local school district in which the charter school is located.”

§ 2854(a)

## *CHARTER SCHOOLS: Private or public employers?*

“An employee of a charter school shall be deemed to be a *public employee solely for purposes of article fourteen of the civil service law [the Taylor Law] ... and for no other purposes unless otherwise specified in this article.... [A] charter school shall be deemed to be a *public employer solely for purposes of [the Taylor Law] ... and for no other purposes unless otherwise specified in this article....*”*

§ 2854(a)

## *EMPLOYMENT AT WILL*

- Employee has no right to continued employment or employment for any specific term.
- Employment may be terminated at any time, with or without advance notice, for any reason or for no reason, so long as not an unlawful reason.
- Can be undermined or overcome by oral or written contract or promise of job security.
  - “We don’t fire people without cause.”
  - “You’ll have a job here as long as you do good work.”
  - “We need you in this position until June.”

## ADVERTISING/RECRUITING

- BFOQ - Bona Fide Occupational Qualifications
- Advertisements must not express/imply unlawful requirements for applicants, such as age or sex
- Word of mouth – lack of diverse network?

## INTERVIEW PITFALLS

What *not* to ask about:

- Age
- Race, national origin
- Religion
- Pregnancy
- Marital status
- Sexual orientation

## INTERVIEW PITFALLS

What *not* to ask about (cont'd):

- Citizenship (vs. work authorization)
- Medical history, genetic information
- Disability
- Financial history
- Union membership, views about unions
- Arrest records, convictions?



## CRIMINAL BACKGROUND CHECKS

- Fingerprinting and criminal background checks required of applicants for employment if:
  - Term of employment is greater than five days,
  - Employment involves direct contact with students under the age of 21, and
  - Employee is not otherwise exempt.
- NYS Office of School Personnel Review and Accountability
- Not required of volunteers



## EXEMPT vs. NON-EXEMPT

- Federal (Fair Labor Standards Act) and NYS laws govern
  - Minimum wages (\$7.25/hr as of 7/09)
  - Overtime pay of 1½ the regular hourly rate for hours worked >40 in a workweek
- “White collar” employees exempt
  - Fact specific analysis; titles do not control

## EXEMPT CRITERIA

- Duties and “salary basis” tests
- Exempt employee must be paid on a “**salary basis**,” not less than \$543.75/week as of 7/09.
- Salary is a predetermined, fixed amount of pay that constitutes all or part of the employee's compensation for the pay period, which may not be reduced based on the quality or quantity of the work performed. Generally expressed as an amount paid per week, per month or per year.

## WHITE COLLAR DUTIES TEST

- **Executive, administrative and professional**
  - **Administrative** - primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer and include the exercise of discretion and independent judgment with respect to matters of significance.
  - School administrators, principals will usually satisfy the administrative exemption

## WHITE COLLAR EXEMPTIONS, cont'd

- **Professional** - primary duty must be the performance of work requiring advanced knowledge
  - Teachers often satisfy criteria for exempt professionals
  - Teachers assistants, teachers aides, etc. unlikely to meet the professional exemption test

# VOLUNTEERS

“Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar **non-profit** organizations that receive their service.” -- *US DoL*

“*Volunteer* means a person who works for a nonprofitmaking institution under no contract of hire, express or implied, and with no promise of compensation, other than reimbursement for expenses ....” -- *NYS DoL*

## NEW YORK STATE LABOR LAW

### New requirements of written notice at time of hire:

- Employee's rate of pay, regular payday, and (for non-exempts) regular hourly and overtime rates;
- Basis for the rate of pay (e.g., hourly, salary or other);
- Any allowances claimed by the employer as part of the minimum wage (e.g., tips, meals);
- Employer's name, any "DBA", main office or principal place of business, and telephone number; and
- Must obtain a signed and dated written acknowledgment from each employee.

## *UNION ORGANIZING 101*

- Charter schools generally not subject school district's labor contract
- Generally not automatically subject to any duty to bargain with a union
- Employees' choice whether or not to unionize



## FACTORS GOVERNING UNION STATUS: *Converted vs. Non-Converted Schools*

- If not converted from existing public school, employees “shall not be deemed members of any existing collective bargaining unit representing employees of the school district in which the charter school is located,” and not subject to existing collective bargaining unit.
- Contrary is true if public school conversion.

## FACTORS GOVERNING UNION STATUS: *Student Enrollment*

Instructional employees deemed to be in a separate unit represented by school district teachers union, IF:

- Student enrollment on 1<sup>st</sup> day of instruction >250,

OR

- Avg. daily student enrollment >250 at any point during 1<sup>st</sup> two years of instruction.

## TAYLOR LAW

- a/k/a Public Employees' Fair Employment Act
- Granted public employees the right to join any union of their choice, as well as right to decline
- Whether members or not, the union representing a unit must represent *all* employees in the unit
- Public employer duty to bargain re terms and conditions of employment
- Public employee unions prohibited from striking

## AUTHORIZATION CARDS

- Method by which employee preferences commonly expressed
- Employee authorizes union as bargaining representative
- Binding legal document
- Likely to result in union's certification without election

# Employment Law 101

## Just Sign Here...

**UNITE** - Bargaining Agent Authorization

Name \_\_\_\_\_  
First Middle Last

Address \_\_\_\_\_  
Street

\_\_\_\_\_

City State Zip

Phone \_\_\_\_\_ Job title \_\_\_\_\_

I am an employee of \_\_\_\_\_

I hereby designate UNITE to represent me, and on my behalf to negotiate and conclude all agreements as to my hours of labor, wages, benefits, and all other conditions of my employment.

Date \_\_\_\_\_ Signature \_\_\_\_\_

**UNITE Representative Authorization**

## PLAYING THE CARDS ...

- Present to *employer* as proof of majority support for purposes of seeking voluntary recognition as employees' bargaining representative
- Present to *PERB* as proof of majority support for purposes of gaining certification as employees' bargaining representative

## PUBLIC EMPLOYMENT RELATIONS BOARD

Established by Taylor Law to administer that law, including certifying employees' representatives, assisting with bargaining impasses, and hearing and ruling upon charges of improper practices by unions and employers.



## CARD CHECK CERTIFICATION

- Stealth campaigns
- Union control of the campaign message
- Deny employer opportunity to present competing message or different views to employees
- Cards rule



## CERTIFICATION → DUTY TO BARGAIN

- Public employers obligated to bargain with employee organizations regarding terms and conditions of employment (mandatory subjects)
- Must meet at reasonable times and bargain in good faith over bargaining proposals
- **No time frame or obligation for a final agreement**

## STRIKES MAY BE PROHIBITED...

*But other kinds of union activity are not, such as:*

- Picketing
- Leafleting
- Rallies
- Demonstrations
- Political/public outreach



## Why Do Employees Choose Union Representation?

Employees are more likely to join unions when they:

- Feel ignored or hurt by their Employer.
- They believe their Employer does not RESPECT them.
- Believe the Employer is treating them unfairly and/or playing favorites.
- Feel they are not significant to the Employer (serial indignities)
- Are unfairly compensated
- Aspire to Power – “a seat at the table”



## A Page from the Organizer's Gamebook

- Use employee or former employees
- Learn employee problems and offer solutions
- Promise leverage to employment relationship
- Circulate literature, authorization cards
- Scare employees with fear of employer retaliation
- Use external/third party pressure

## How to Guarantee Union Representation

- Do not communicate with your employees
- Do not review, update and follow school employment policies (i.e., ditch that handbook)
- Do not set and maintain consistent expectations and standards re performance and discipline
- Ignore inequities in salaries and benefits
- Play favorites!

## How to Guarantee Union Representation

- Do not let your employees believe that they can bring their problems, concerns or complaints to the school administration's attention without fear of retaliation
- Do not build and maintain your credibility and the trust of your employees
- Do not pay attention to employee concerns
- Do not constantly reassess your workplace

## It's not unlawful to...

- Desire to remain union-free
- Educate workforce about unions, authorization cards, and the right to join or not to join a union
- Share facts, opinions, experiences about unions
- “*Employer Neutrality*” -- CSA of 1998

## IMPROPER PRACTICES

- Interfere with, restrain, coerce employees as they form or participate in any employee organization
- Dominate/interfere with employee organizations
- Discriminate against any employee because of participation in any employee organization
- Refuse to negotiate in good faith
- Use State funds to train managers regarding methods to discourage union organizing



## WHAT NOT TO DO

- Do not threaten employees
- Do not interrogate employees regarding union views or sympathies
- Do not make promises
- Do not spy upon or surveil employees' union activities

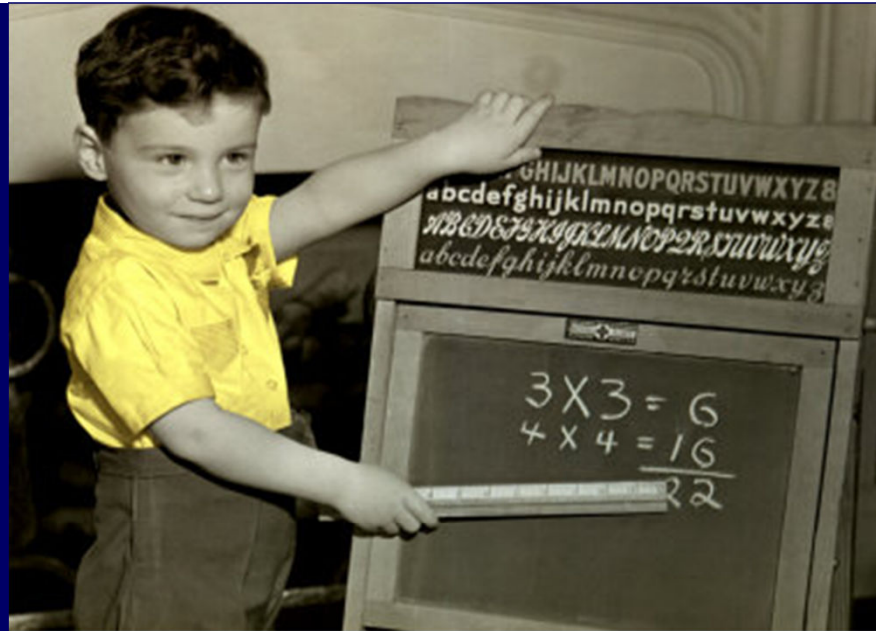
## IMPROPER PRACTICES

“The charter entity, or the board of regents, may terminate a charter upon any of the following grounds: ...

When [PERB] makes a determination that the charter school demonstrates a practice and pattern of egregious and intentional [improper practices] involving interference with or discrimination against employee rights [under the Taylor Law].”

§ 2855, CSA of 1998

# Employment Law 101



There are  
**NO STUPID QUESTIONS**  
or stupid answers.

Employment Law 101

Thank you

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