



Options and Considerations: Tuition and Staffing Concerns **During COVID-19**

COVID-19 (coronavirus) has presented a series of complex issues, not only in America, but globally. It has affected, and perhaps changed well into the future, the economy and provisions of a multitude of services. Christian schools and early education programs are not exempt from the challenges presented, and to some degree face unique circumstances. This memo will endeavor to address these circumstances and how ACSI member schools can address legal and practical issues including employment and contracts, tuition income and provision of education services now and into the future.

Because schools and early education programs throughout the country have closed, generally pursuant to an emergency order, they typically do not need the same staffing numbers normally required. Even if the school provides online or remote classes, those services still do not usually require staffing at the same levels. It also is unclear how long emergency orders will require closure. This raises the first issue of how to address staff issues and what legal requirements the school must meet.

I. Employment

There are two frameworks schools will need to sort their staff through. First, is the exempt and nonexempt framework. Exempt vs. Non-exempt deals with the type of work and level of pay for each employee. The classification of the employee will determine the framework of rules that apply. The second is whether an employee is an “at-will” or “contract” team member. If at-will, then the exempt and non-exempt standards will apply but if working under a contract, your contract may have modified the federal/state standards.

A. Non-Exempt and Exempt Classifications

Non-Exempt (Hourly) Staff – Start with your handbooks and policies. What have you promised and what rights or duties have you created? Next, what does the law require? The Fair Labor Standards Act (FLSA) sets the baseline standards, although states can enact more stringent

standards. FLSA does not require employers to pay hourly employees for hours they do not work even if the hours were scheduled. Closing your school does not generally require you to continue paying hourly staff if they are not working. You also have the flexibility to reschedule employees based on the work need. Be aware of new legislation that just passed providing paid leave time for staff impacted by COVID-19, guidance on this new legislation is available at the [ACSI Coronavirus Resource Page](#).

Exempt Staff – Again, start with your handbooks and policies. What have you promised and what rights or duties have you created? In addition, what does the law require of you? An employer must pay an exempt employee the full salary amount "free and clear" for any week in which the employee performs any work without regard to the number of days or hours worked. However, there is no requirement that the salary be paid if the employee performs no work for an entire workweek. The significant exception to this standard is for teachers. Teachers, in educational institutions, are not subject to any salary requirements, from a federal standpoint (some states do have minimum pay requirements). Deductions from their salary or pay will not result in loss of the exemption. The safest route is to pay their regular salary if they work at all during the workweek.

B. "At-Will" and "Contract Employees"

All employment falls into two categories – "at-will"¹ and "contract"².

At-Will Employment – An at-will employee can resign at any time, with or without cause and with or without notice. By the same token, the employer can terminate an at-will employee at any time, with or without notice and with or without cause, as long as the termination does not violate an anti-discrimination statute or violates a public policy. Thus, because of the lack of work and closure of the program, the school or preschool can rotate, terminate or furlough an at-will employee. However, there may be statutory issues, even with at-will employees, that will be explained below.

Contractual Employment – In this case, the employee works pursuant to a contract that typically is for a definite period of time, pay and duties. The employer can only terminate the employment "for cause", as stated in the contract. In most K-12 programs the school issues contracts for the school year to teachers and assistant teachers. An employer can face liability for breach of contract if it terminates employment for an "unjust cause" or "no cause". Meaning, if the school terminated the employee for a reason other than those outlined in the

¹ "At-will" employment is different from and not the same as "right to work".

² When we use the term "contract" we do not mean an independent contractor. Independent contractors are not employees but third parties performing a specific service. When we use the term "contract" we mean an employee who has an employment agreement with the school.

employment contract. With the COVID-19 pandemic the question is whether school closure is appropriate cause to terminate the contract.

In answering this question there are several legal issues that may apply. For example, a contract can have a force majeure clause specifically that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. However, most schools – unless in a hurricane zone or more particularly in an earthquake zone – don't have such clauses.

Without an applicable “for cause” or force majeure clause, the question becomes whether the school otherwise has a legal defense to a breach of contract claim. The answer is likely yes, but certain circumstances must apply, and you would have to convince a judge or jury that the legal defense applies in this particular case. These defenses include financial exigencies beyond the control of the school (also known as impracticability), impossibility or illegality. To illustrate, when there are unforeseen or extraordinary circumstances beyond the control of a party such that it becomes impossible or impracticable, due to an event or effect that could not have been anticipated or controlled. The COVID-19 pandemic would appear to constitute such an unforeseen or extraordinary circumstance. Moreover, in most states the governors have issued emergency declarations requiring the closures of schools. For a school or early education program to remain open in the face of the orders is illegal. Finally, the closure should result in the requisite “compelling economic exigencies”. Not having any school for a period of time, resulting in loss of income, should constitute compelling economic exigencies. thereby allowing the school or early education program to suspend contracts while closed. However, Congress passed, and the President signed on March 18, 2020, the Families First Coronavirus Response Act (FFCRA). The Act amended the FMLA, adding a section referred to as Public Health Emergency Leave (PHEL). FFCRA also created the Emergency Paid Sick Leave (EPSL) related to COVID-19. The FFCRA takes effect on April 1, 2020. ACSI has a separate guidance document covering the requirements and aspects of this emergency legislation which can be accessed on the [ACSI Coronavirus Resource Page](#). Please note other federal and state legislation is pending and likely will pass that could further modify the guidance in this document. Check the resource page frequently.

II. Tuition & Enrollment

Many of the same legal principles involved in employment contracts, also apply to student enrollment in the school or early education program. For example, if the school has an actual enrollment contract signed by parents or guardians, does the contract have a force majeure clause? If so, does it not only provide for circumstances involving closure, but also include language addressing remote learning under certain circumstances or payment of tuition if there is a natural disaster, a pandemic or other emergency? Likely not.

Without a signed enrollment contract with the requisite language, the school can still address closure and tuition by policy, although not as helpful. The student handbook can articulate the policy requiring continued payment of tuition if it provides remote learning, or even in

circumstances where it is impossible to provide remote learning. For example, internet access is non-existent due to unforeseen circumstances.

In circumstances such as the current COVID-19 pandemic, the school (usually K-12) providing online courses and remote learning that is equivalent academically should still be able to enforce a tuition contract with families. Ultimately, families are paying for an appropriate grade level education for their child. For early education programs, the age group involved and the general nature of the program can call into question whether the benefit of the enrollment contract is still being received by the family. The answer can be “yes” and likely should be “yes”. There are already many public and private online schools that provide educational opportunities for K-12 students and even early education students. (See the ACSI Coronavirus resource page for more aids on messaging and teacher assistance for early education programs.)

Each program must assess whether families are primarily receiving childcare services or educational services within the school. You may even determine childcare services are such a significant part of the agreement that a partial refund or partial discount is warranted but we would caution against automatically assuming this. This is a case-by-case judgment call based on the specifics of the program. Likely after-school and before-school care would be deemed childcare and not enforceable against the family but early education might.

Schools should consider additional fees like busing, school lunch and other similar fees for reimbursement.

Recommendations

A. Consider Furlough, Staff Rotations or Pay Cut Firsts

At-Will, Non-Exempt – For these hourly staff their pay cannot go below state/federal minimum wage limits. Furloughs or staff rotations can be done based on the needs of the school but should be done as equitably as possible.

At-Will, Exempt Staff - For exempt staff it is a bit more complicated. For non-teacher and non-academic administration positions, the school can potentially cut wages (Caution: contract employees will have to be treated differently, see below). Generally temporary pay cuts, of a few weeks, due to a slowdown in business is not allowed and the employee could lose their exemption. Longer periods of economic downturn may be allowed for these exempt employees.³ For those who qualify under the teacher exemption this standard does not apply and their pay could be reduced, unless your state requires a higher standard. We would advise their pay not dip below minimum wage levels regardless. For those who qualify for the academic administration exemption

³ See Department of Labor, “[Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues](#)” for more guidance.

these staff cannot have their paid lowered below a first-year teacher salary without risking the loss of their exemption.

Employees with Contracts – There is less flexibility. You could choose to furlough, rotate staff or institute a pay cut but you would have to look to the same provisions and defenses already covered. Regardless of what you choose, if you are changing the terms of the contract then you must have the right to do so under the contract or through a legal defense.

Whatever the status of an employee, make sure you are treating all similarly situated employees the same otherwise you open yourself up to discrimination claims. For example, if you cut the pay of one early education teacher you should do the same for all others with the same or similar job under this current concern of economic hardship.

If you have to downsize your team, make sure you decide who stays and who remains based on objective criteria. For example, Third grade was hit harder and any other grade with withdraws due to parents losing their jobs. We let one of the two third grade teachers go based on that need. Another example, the school basis for decided who to let go is determined by years of service with the most recent hires being the first to be let go.

If you decide to cut pay make sure you do it moving forward and do not make it retroactive to the current or past pay periods.

B. Before Downsizing Take into Consideration the Impact of Unemployment Insurance

In many states, Christian schools are part of the unemployment insurance program either as regular participant or on a reimbursement system. If part of the regular system, be aware your rates to the state may go up. If your state offers a nonprofit or religious entity reimbursement program then you'll have to pay back the state for the benefits your former employees receive. Look at whether it is worth it in the long term to let employees go or whether you should work with them in the short term.

C. Consider your messaging to families.

Teachers are still hard at work providing core curriculum and content to students to work on. The student is still receiving a grade-level appropriate education, which is the crux of the agreement. Cost for the school have typically not gone down significantly and may have even gone up with the shift to online and distance education.

D. Include a force majeure clause in your future employment and vendor contracts.

Schools should have all employment and vendor contracts (bus, janitorial, food service or other such 3rd party agreements) reviewed by counsel to determine the effect for the school when there is an emergency closure for any length of time or other legal issues.

Sample force majeure clause for enrollment:

The duties and obligations under this Contract may be suspended indefinitely without notice during all periods in which _____ is closed due to any force majeure events, including, but not limited to, any earthquake, fire, flooding, act of God, war, governmental action, act of terrorism, epidemic, pandemic, state of emergency, or any other event beyond its control. _____ has developed a contingency instruction plan to deliver remote instruction as soon as is reasonably practicable and safe under the circumstances. If such a force majeure event occurs, the duties and obligations in this Contract may be postponed for a period of time until _____ can deliver its contingency course instruction or until such time as _____, in its sole discretion may safely reopen. In the event _____ is closed for a period of time or must deliver course work remotely due to an event under this clause, Parent agrees _____ is under no obligation to cancel, waive, or refund, any portion of tuition that is owed or paid to _____.

Sample force majeure clause for employment:

_____ and (teacher or employee) agree that neither shall be liable for any delay or failure in performance resulting from a force majeure event resulting from acts beyond reasonable control, including but not limited to, acts of God, war, governmental action, act of terrorism, epidemic, pandemic, state of emergency, or any other event beyond _____ Christian School's control. The duties and obligations in this Agreement may be postponed for a period of time or terminated depending on circumstances.

Notice: This article is designed to provide accurate and authoritative information in regard to the subject matter covered. It has been provided to member schools with the understanding that ACSI is not engaged in rendering legal, accounting, tax, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought. Laws vary by jurisdiction, and the specific application of laws to particular facts requires the advice of an attorney.

Association of Christian Schools International
731 Chapel Hills Drive
Colorado Springs, CO 80920
Phone: [719.528.6906](tel:719.528.6906)
ACSI.org