



Latest and Greatest Legal Updates and Practical Guidance for Tackling Your District's Greatest Challenges



WASBO
2023 Accounting
Conference



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Embracing Challenge. Delivering Opportunity

AGENDA |

Budgetary Tools of the FLSA

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Construction Contracts

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Relationships and Communications

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Education Foundations

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Takeaways, Call to Action, Questions

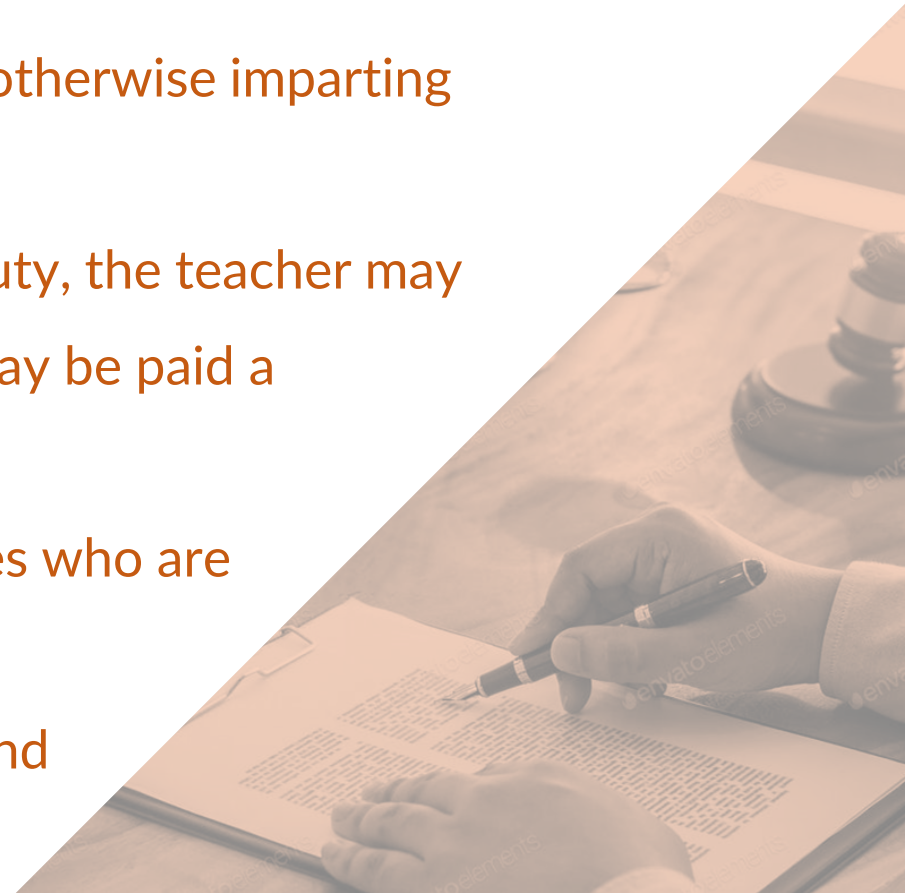
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The Fair Labor Standards Act and Coaches/ “Extra” Roles



Teacher as Coach

- Teachers have a primary duty of teaching, lecturing, or otherwise imparting knowledge. 29 C.F.R. §541.303(b)
- Because coaching is secondary to a teacher's primary duty, the teacher may continue to be exempt for purposes of the FLSA, and may be paid a nominal fee (stipend) for coaching activities.
- DOL acknowledges in a 2018 opinion letter that coaches who are full-time teachers in a school satisfy the "primary duty" requirement and are exempt from the minimum wage and overtime requirements (may be paid a stipend).



Community Member as Coach

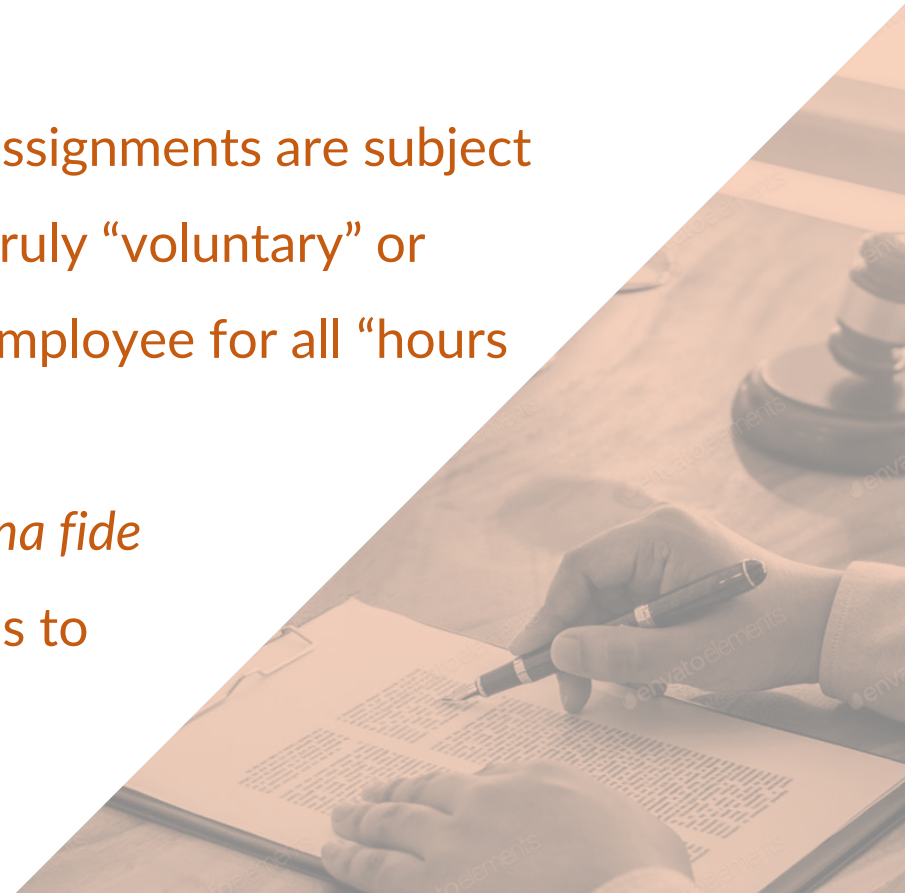
DOL Opinion Letter – FLSA 2018-6

- The DOL concluded that non-district employees who coach, *i.e.*, community members who, for instance, work at another job and serve as a coach simply because they desire to be involved in a school’s athletic program – also qualify as teachers under the FLSA and are exempt from the minimum wage and overtime requirements (*i.e.*, may be paid a stipend) because their “primary duty” while working with student-athletes is instructional (teach rules and fundamentals) in nature.



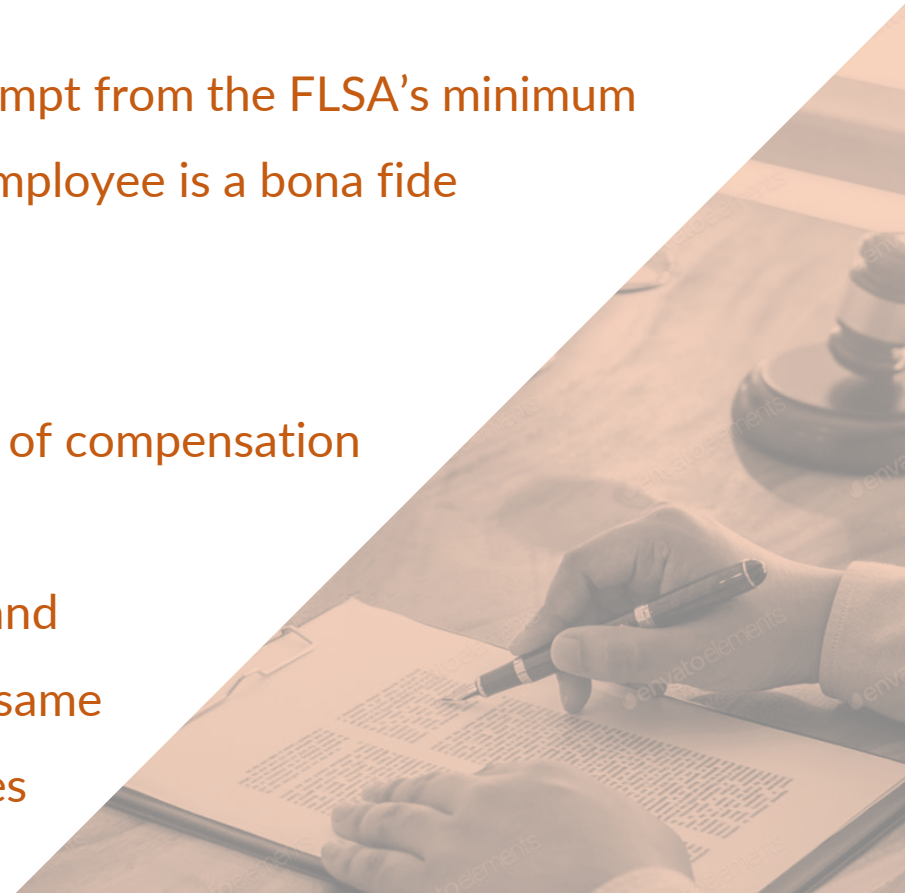
Nonexempt Employee as Coach

- Nonexempt employees who undertake extracurricular assignments are subject to the FLSA rules in determining whether their work is truly “voluntary” or whether the school district will be required to pay the employee for all “hours worked” as a coach.
- A district may pay a nonexempt coach a stipend as a *bona fide* volunteer, if applicable, or must comply with the FLSA as to minimum wage and over time pay.



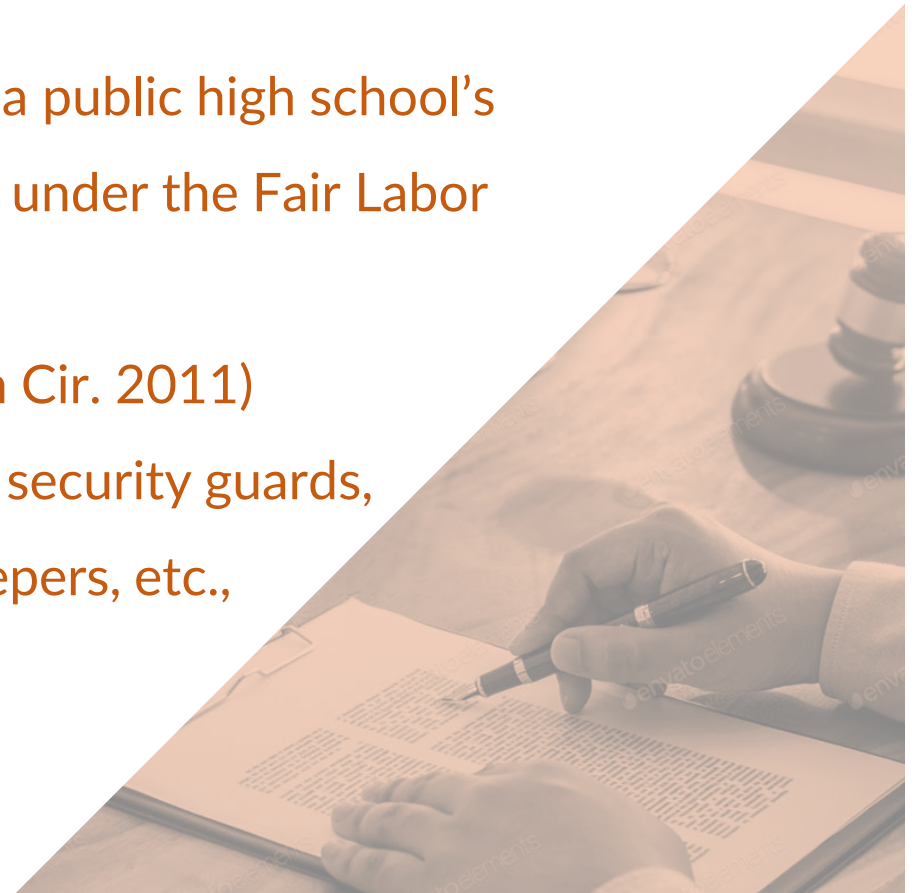
Classifying Employees as Volunteers

- Non-district and district employees may volunteer and be exempt from the FLSA's minimum wage and overtime requirements so long as the nonexempt employee is a bona fide volunteer.
- Must be a bona fide volunteer under the FLSA
 - Performs service without promise, expectation or receipt of compensation
 - for services rendered;
 - Offers services freely and without pressure or coercion; and
 - Is not otherwise employed by the district to perform the same type of services as those for which the individual proposes to volunteer.



Nonexempt Employee as Volunteer

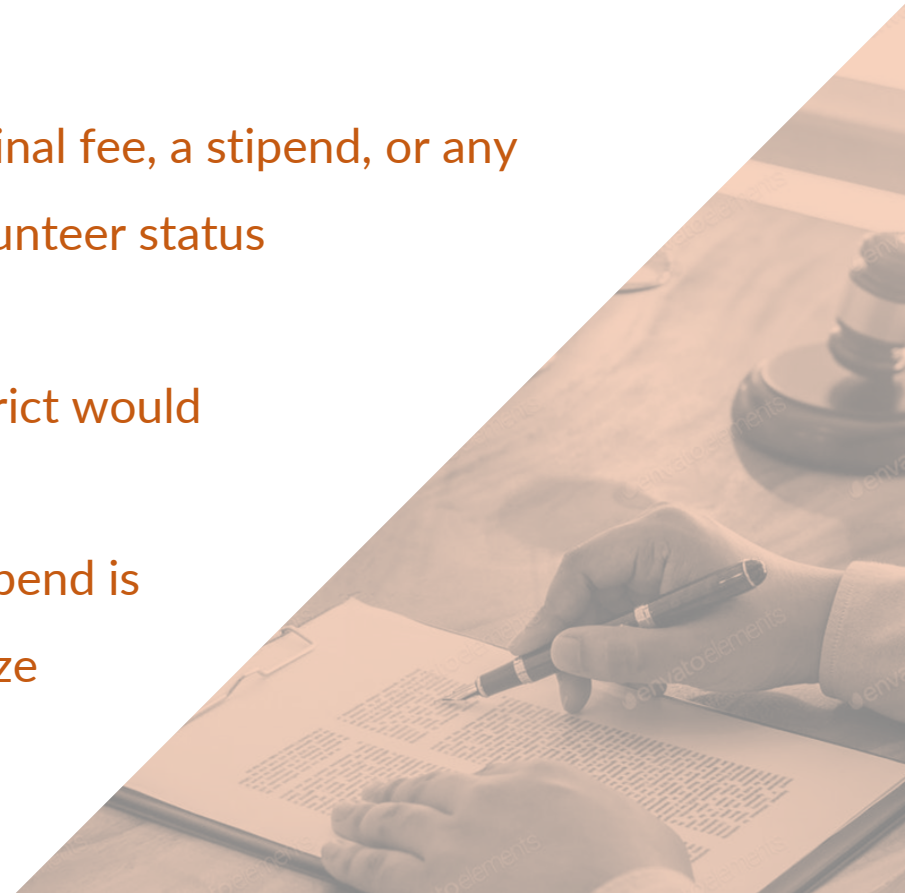
- School safety officer who also served as a golf coach for a public high school's golf team is a volunteer and not entitled to overtime pay under the Fair Labor Standards Act.
 - *Purdham v. Fairfax County Sch. Bd.*, 637 F.3d 421 (4th Cir. 2011)
- DOL considered various scenarios—ticket taker, ushers, security guards, chaperones, proctors, crowd-control monitors, scorekeepers, etc., may all qualify as *bona fide* volunteers under the FLSA.
 - DOL Opinion Letter – FLSA 2006-40



“Paying” Volunteers

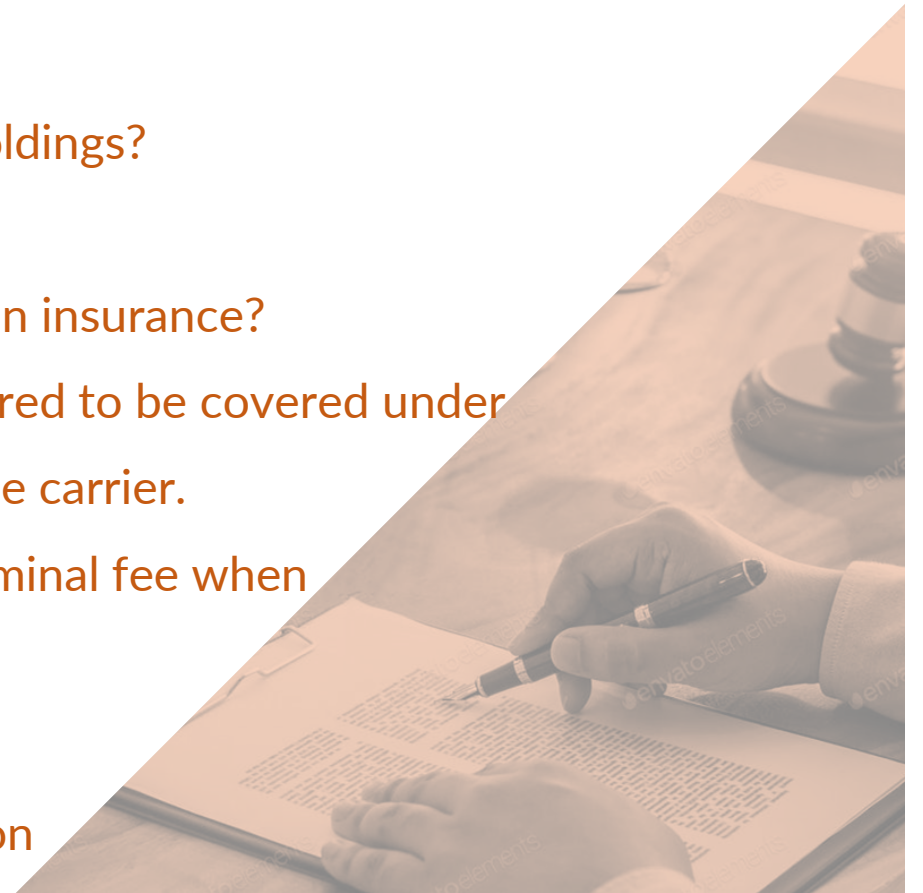


- Volunteers may be paid expenses, reasonable benefits, a nominal fee, a stipend, or any combination thereof, for services rendered without losing volunteer status
 - Pay cannot be based on productivity or performance
 - Fee is nominal if it does not exceed 20% of what the district would pay for a full-time person in that position.
- Reimbursing expenses or providing a stipend (as long as the stipend is not connected with productivity) does not necessarily jeopardize an individual's status as a volunteer for overtime purposes.



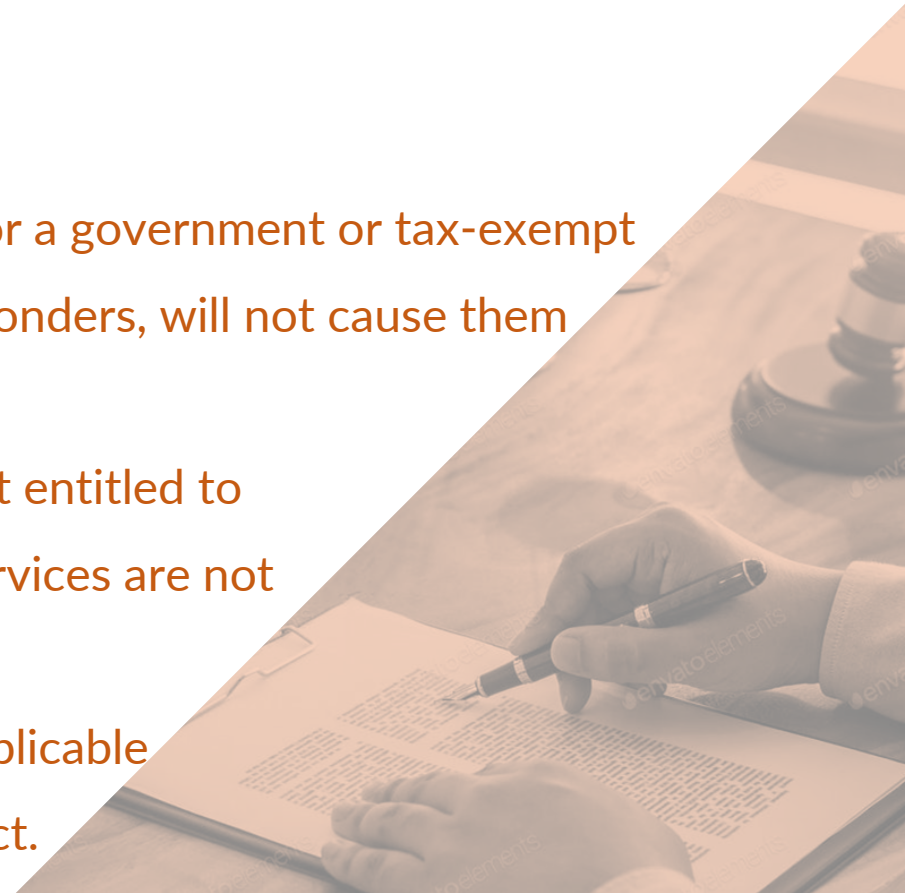
Additional Considerations for Volunteers

- If paid a stipend, must I deduct payroll taxes and other withholdings?
 - Generally, yes!
- Are volunteers covered by the district's worker's compensation insurance?
 - Maybe. Check with your carrier. Volunteers are not required to be covered under Wisconsin law but may be through an endorsement by the carrier.
- May an individual "volunteer" for a position and waive the nominal fee when a district would ordinarily provide such a fee?
 - Yes
 - Issues may arise if the individual "volunteers" for a position which is ordinarily held by a *bona fide* employee



What about PPACA and Volunteers?

- The final regulations provide clarification:
 - Volunteers: Hours contributed by bona fide volunteers for a government or tax-exempt entity, such as volunteer firefighters and emergency responders, will not cause them to be considered full-time employees.
- Hours worked by a volunteer who does not receive (and is not entitled to receive) compensation in exchange for the performance of services are not treated as hours of service for purposes of the PPACA.
- Thus, the 30 hour per week threshold of the PPACA is not applicable to those who volunteer for various positions in a school district.



Construction | Contracts |



Design and Budget Phase

- Use of RFP/RFQ process to find the right consultant
 - Architect, Construction Manager or Design-Builder?
- Pay careful attention to the RFP/RFQ form
- Competitive bidding requirements do not apply to school districts.
 - HOWEVER, a school district is legally compelled to follow its own policies with respect to procurement.
 - Be sure to review Board policies and procedures to ensure compliance prior to engagement.



The RFP/RFQ Process

- An RFP is a written request to prospective contractors to basically:
 - demonstrate they are qualified to perform the work,
 - provide the project delivery method on a common set of conditions, and
 - competitively bid the cost.
- The RFP process introduces competitive bidding on costs of the Project and is the best procedure to get the most project for the least cost.
- It is critical to ask the right questions in the RFP
- The RFP should provide you with enough information to evaluate
- Sales vs. Performance



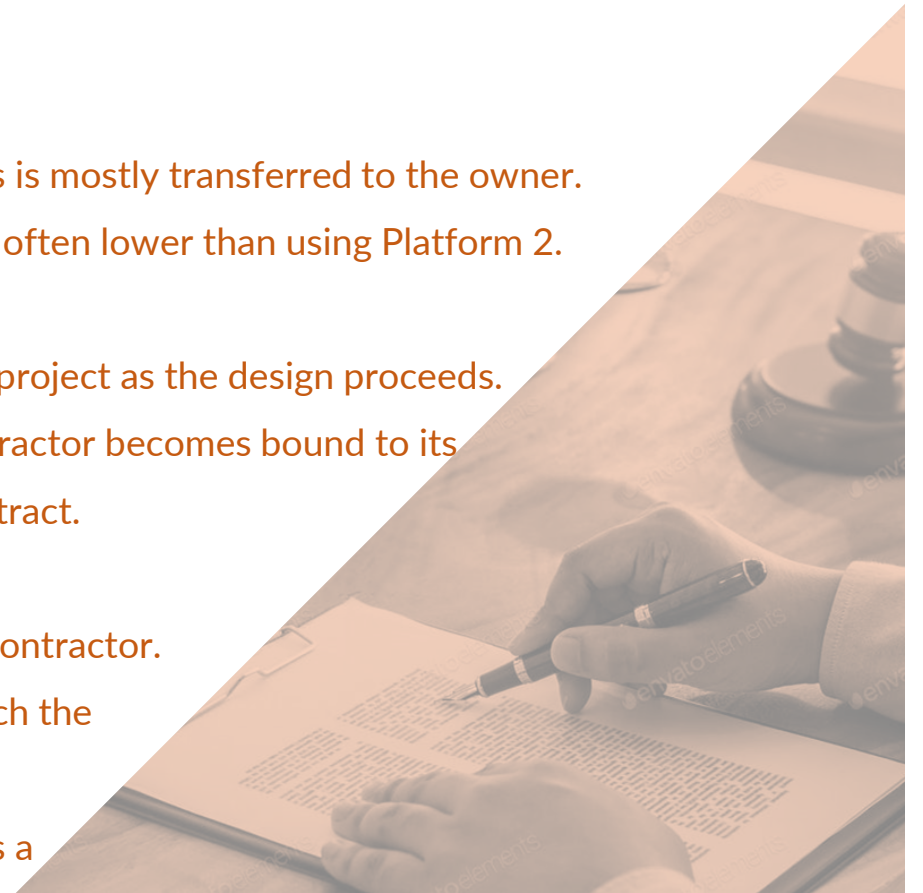
AIA Document Set

- The American Institute of Architects has created a set of architect and contractor agreements to deliver design and construction services using several different platforms. The agreements are integrated to work together for each platform utilized.
- Different platforms allocate risk differently between the owner and the contractor.
- The AIA is a trade association for architects so its forms protect the architect first, then the contractor and lastly, the owner. The standard contract should be significantly modified to protect the owner.
- The choice of project delivery method should be made **PRIOR** to the referendum...



Various Platforms

- Platform 1 – Architect Designs and Contractor Builds
 - Issue with this platform is that the risk of cost over-runs or schedule delays is mostly transferred to the owner.
 - Reason to use this platform is that the architect's and contractor's fees are often lower than using Platform 2.
- Platform 2 – Contractor Involved with Design from Beginning
 - The contractor, rather than the architect, develops costs estimates for the project as the design proceeds.
 - The contractor usually has a better idea of cost than an architect. The contractor becomes bound to its cost estimates when it delivers a Guaranteed Maximum Price (“GMP”) Contract.
- Platform 3 – Design/Build
 - Under this method, the Owner engages one entity to act as architect and contractor.
 - The primary advantage to this method is the single point of contact to which the Owner can turn with issues.
 - The primary disadvantage is the “all eggs in one basket” syndrome. There is a lack of checks and balances – if the single point of contact fails, the project fails.





AIA Doc Tip #1: Control bids from subs to bring a project in below the GMP



- A contractor may win a bid with the lowest Guaranteed Maximum Bid but it has a financial interest in bringing a project in as close to that GMP as possible, rather than under it, because its fee is often a percentage of the cost of the work.
- Modify the contract to require sealed bids from multiple contractors that are given directly to the owner. Specify the amount of mark-up the contractor may receive on the subcontractor's invoice. Require that no contractor fee be taken on the mark-up.
- Practical suggestion: The review of the bids by an owner's representative may reduce your cost if you do not have an experienced in-house facilities group who know material and labor costs. The rep may find that all of the bids are above market and recommend a sub that can do the work for less.



AIA Doc Tip #2: Control the cost of self-performed work



- The contractor may self-perform work rather than have a subcontractor do it (for example, installing dry-wall).
- The standard AIA contract allows the contractor to self-perform work at a cost that is not subject to competitive bidding. This can be a profit center with inflated costs for the work.
- Recommend the contractor bid on self-performed work with other subs in the sealed bid process.
- Practical tip: If this change of the AIA contract is not possible, use an owner's rep or your experienced facilities group to assess the charges.



AIA Doc Tip #3: Control the cost of contractor supplied rental equipment



- It is typical for a contractor to supply the project with equipment that it owns and charge a rental rate for the equipment. This is another profit-center for the contractor. The standard AIA contract allows the contractor to charge whatever it wants.
- There are many modifications that must be made to this section to control costs. One common modification is to tie the contractor's rental rates to the AED (Associated Equipment Distributors) Green Book of national rental rates for equipment.
- Practical tip: Sometimes it's cheaper to buy a used machine than pay for rental charges. The rental rate section is one of the most heavily modified sections because there are so many ways to lose money in equipment rentals.



AIA Doc Tip #4: Control the cost of Change Orders



- Change Orders modify the scope of work that is being done and may increase the GMP and extend the construction schedule.
- The standard AIA contract has no real controls on the cost of a Change Order. Change Orders are probably the single most popular way for a contractor to increase the agreed upon GMP. It is a substantial profit center. Contractors can inflate the cost of labor and materials and take substantial mark-ups.
- Practical tip: We encourage owners to spend more in the pre-construction phase with actions such as team meetings with HVAC, electrical and other major subcontractors. These meetings tend to significantly reduce the amount of Change Orders encountered during construction. In addition, we strongly recommend that an owner have the clarifications and assumptions in the GMP amendment professionally reviewed to avoid Change Orders during construction for items the owner thought were included.



AIA Doc Tip #5: Control the cost of General Requirements (also referred to in the trade as “General Conditions”)



- General Requirements are the cost of items needed for the construction process (portable toilets, fencing, etc.) and the cost of supervisory personnel. It is also a profit center.
- The standard AIA contract puts no limits on General Requirements. It is not bid out and the contractor can increase the cost during construction.
- General Requirements should be fixed as a lump sum when the GMP Amendment is signed.
- Practical tip: Do not permit additional General Requirements to be added to Change Orders unless it can be demonstrated that the Change Order actually increases the cost of the General Requirements.



AIA Doc Tip #6: Control costs and time in the Dispute Resolution Process



- The Standard AIA contract requires the parties to refer the dispute to the Initial Decision Maker, then enter into non-binding mediation, with the American Arbitration Association (“AAA”) as the default mediator, and, if that fails, to binding arbitration, with the AAA as the default arbitrator.
- This process is so long, so unfavorable and so expensive to the owner as to prevent most owners from starting it and to give up on claims. The contractor, on the other hand, merely has to stop working if the owner fails to make payments to enforce its claims. No owner can afford a stoppage of the work.
- Practical tip: Require the litigation to be held in the circuit court of the county where the owner is located.



AIA Doc Tip #7: Control use of the plans and specifications



- The architect owns the plans and specifications it develops for a project in the standard AIA contract. The contract provides that the owner must use the same architect if it renovates the building in the future or the owner cannot use the plans and specifications and cannot update them. The owner cannot easily choose the best architect for the renovation under these terms.
- Obtain a permanent license to do what the owner wants (regardless of any payment to the architect) and delete the requirement that the same architect must be used if the plans and specifications will be modified.
- Practical tip: Always require a record set of plans and specifications from the architect when the work is done. These are updated to show all of the modifications to the documents that were made during construction. It is essential to have the record drawings to guide future work on the building safely and with a minimum of cost.



AIA Doc Tip #8: Obtain builders risk insurance that conforms to the contract



- The standard AIA contract requires the owner to obtain builder's risk insurance and, if the owner doesn't do so, the contractor will obtain it and charge the cost to the owner. Builder's risk insurance will pay for damage to the building by uncontrollable causes such as high winds, tornado or vandalism. It permits the project to proceed since it pays for the repairs.
- The contract requires the insurance to be maintained until the later of final payment or until no one working on the project (contractor, subs, etc.) has a financial interest. These requirements are often at odds with the insurance owners carry. Revise the contract to conform to the coverage requirements of the owner's policy. Otherwise, the owner could be liable to pay for an uninsured loss.
- Practical tip: Sometimes an owner's existing policies of insurance allow the addition of builder's risk for all projects undertaken by the owner so an owner does not have to insure each project separately.



AIA Doc Tip #9: Do not waive consequential damages



- Consequential damages are the damages an owner incurs in addition to the costs of repairing or replacing damaged property.
- The standard AIA contract transfers the cost of consequential damages arising because of the contractor's negligence to the owner. Although consequential damages are much rarer than direct damages, if it happens it is very difficult to explain to an owner's constituency why they are paying for a contractor's negligence.
- Practical tip: Sometimes it's acceptable to cap the damages to the limits of the contractor's insurance. Obtain expert advice to make these modifications.

Takeaways



- One size does not fit all. Different projects require different approaches.
- Process is important.
- Assembling the right team is even more important.
- Feel free to call your lawyer for help – that makes us happy!

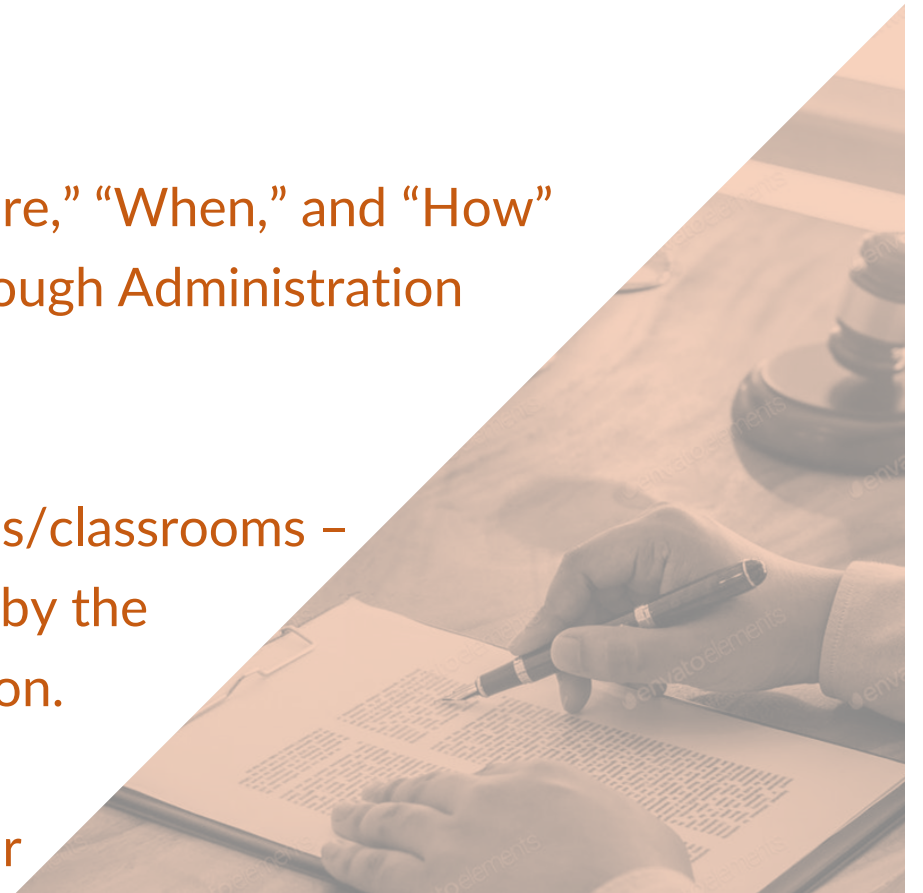


Communications and Relationships |



Relationships and Roles/Responsibilities

- Board versus Administration
 - Board creates policy = “What” and “Why”
 - Administrative is responsible for operations – “Where,” “When,” and “How”
 - Staff also have responsibility for operations through Administration
- Need coordination between Board and Administration
- Ensure consistency in messaging to stakeholders
- Staff have the leadership role in their respective sections/classrooms – within the guidelines of the policies and procedures set by the board and clarified through directives from administration.
- Individual board members have no management or leadership role outside of the board or committees; their authority is collective as a member of the board.



Important Relationships

- Board ⇔ Administration
- Administration ⇔ Staff
- Staff ⇔ Students
- Board ⇔ Staff
- Board ⇔ Parents
- Administration ⇔ Parents
- Staff ⇔ Parents
- Board ⇔ Community
- Administration ⇔ Community
- Staff ⇔ Community
- Administration ⇔ Vendors
- Administration ⇔ Community Partners
- Board ⇔ Vendors
- Board ⇔ Community Partners
- Administration ⇔ Students
- Board ⇔ Students



Communications as to Each Relationship

- Collective commitment to the education of students in a community
- Communications with stakeholders vary depending on stakeholder group
 - Communications by Administration to the Board look very different than communications by Administration with parents, for example.
- Critical to understand the relationship
- Messaging Matters
 - Transparency
 - Trust
 - Integrity
 - Buy-in



Communication Balancing Act

- Considerations
 - What information must be shared with each stakeholder group?
 - What information may be shared with each stakeholder group?
 - What are the legal implications of release of information?



Education Foundations



Growing Popularity of the Education Foundation

“Free of market and political constraints, [foundations] are uniquely able, if they choose, to think the unthinkable, ignoring disciplinary and professional boundaries. They can take risks, consider approaches others say can’t possibly work – and they can fail with no terminal consequences.”

- Helmut K. Anheier and Diana Leat, *Creative Philanthropy*



Purposes of Ed Foundations

- “Charitable, educational, and scientific purposes”
 - 501(c)(3) tax exempt purposes
- Improve education and create equity in education
- Create opportunities for district students and staff
- Effort to create lasting community relationships
- Financial support school districts, staff, and students
- Overall commitment to education



Creation and Management

- Partnership and collaboration are important, but must have separation
- Manner of creation of an education foundation is important
 - Organizational structure
 - Tax status
 - Governing structure
 - Governing documents
 - Bylaws
- Governing Structure
 - Who serves on the Board?
 - Involvement of district staff?



Financial Management

- Who is responsible for management of the education foundation's finances?
 - Need to ensure separation
- Who maintains the books for the education foundation?
- Who has the authority to contract on behalf of the education foundation?
- Transparency with financial position.
- Importance of an annual audit.






Action Items and Takeaways



- Use the tools of the FLSA to manage budgetary constraints
- Consider how to ensure your construction projects can begin, progress, and end in a way most advantageous to the school district
- Relationship building and communication is key
- Education foundations can enhance district operations, but ensuring appropriate partnership is critical
- As the topics of this presentation show—the responsibilities of districts run the gamut from micro to macro!




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Questions |