Employee Discipline In A Labor Relations Context

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Two school district attorneys who formerly served as in-house legal counsel for the largest public school employees union in Wisconsin will provide valuable insights into effective supervision and discipline of school district employees in a labor context with a particular emphasis on the “just cause” standard. The role of documentation, progressive discipline, performance improvement plans, last chance agreements and resignation agreements (including OWBPA) will be discussed, as will the importance of recognizing the legal protections afforded to probationary employees.

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Employee Discipline in a Labor Relations Context

This paper focuses on discipline and dismissal of employees in the context of labor relations. It covers common standards for discipline and dismissal, including treatment of probationary employees. The paper discusses how evaluation and performance improvement plans relate to discipline and dismissal. However, the paper is not a detailed overview or discussion of evaluation or performance improvement principles. Finally, the paper discusses last chance and separation agreements.

I. Standards for Discipline or Dismissal

In many states, state law establishes the standard by which school district employees may be disciplined or dismissed. Where state law is silent as to a standard for discipline or dismissal, state law might establish that the standard is a subject of collective bargaining. In states where the standard for discipline or dismissal is a prohibited subject of collective bargaining, school districts are generally able to establish such a standard by board policy, individual contract, or employee handbook. Generally, where a state provides the right for districts to collectively bargain over discipline and dismissal, that discipline or dismissal is subject to grievance arbitration as set forth in the collective bargaining agreement (CBA).

A. Examples of Standards for Discipline or Dismissal

1. Statutory Standards for Discipline or Dismissal

State laws regarding discipline and dismissal vary widely. Some statutes contain broad standards such as “just cause,” while others attempt to enumerate a variety of circumstances that would justify discipline or dismissal. In most cases, these statutes do not provide a specific definition for each of the relevant terms for the standard, and instead leave important terms such as “just cause” or “unsatisfactory performance” to be defined by a CBA, the district, a court, or an arbitrator. However, these definitions must be consistent with state law. See, e.g., Ex parte Wilson, 984 So. 2d 1161, 1170 (Ala. 2007) (holding that the Daugherty test for just cause was inconsistent with Alabama’s Teacher Tenure Act).

Below are some examples of state laws that specify standards for discipline and/or dismissal of school district employees.

Tenured teachers and nonprobationary classified employees may be terminated at any time because of a justifiable decrease in the number of positions or for incompetency, insubordination, neglect of duty, immorality, failure to perform duties in a satisfactory manner, or other good and just cause, subject to the rights and procedures hereinafter provided.


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2 Enterprise Wire Co., 46 LA 359 (Daugherty, Arb. 1966), See Section I.A.4.a).
A permanent employee shall not be dismissed except for one or more of the following causes:
(1) Immoral conduct, including, but not limited to, egregious misconduct. …
(2) Unprofessional conduct.
(3) Commission, aiding, or advocating the commission of acts of criminal syndicalism…
(4) Dishonesty.
(5) Unsatisfactory performance.
(6) Evident unfitness for service.
(7) Physical or mental condition unfitting him or her to instruct or associate with children.
(8) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the state board or by the governing board of the school district employing him or her.
(9) Conviction of a felony or of any crime involving moral turpitude.
(10) [advocating communism with the intent of indoctrinating pupils].
(11) Alcoholism or other drug abuse that makes the employee unfit to instruct or associate with children.


[All contracts with instructional staff] shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, two consecutive annual performance evaluation ratings of unsatisfactory …, two annual performance evaluation ratings of unsatisfactory within a 3-year period …, three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory …., gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.


The notification and the recommendation to terminate shall contain a short and plain statement of the reasons, which shall be for just cause, why the recommendation is being made.

Iowa Code Ann. § 279.15.

The trustees of any district may dismiss a teacher before the expiration of the teacher's employment contract for good cause.


No person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause…

N.Y. Educ. Law § 3020 (McKinney)
The contract of any teacher … may not be terminated except for good and just cause.
Ohio Rev. Code Ann. § 3319.16.

Any teacher may be dismissed at any time who shall fail, or who may be incompetent, to give instruction in accordance with the directions of the superintendent, or who shall otherwise manifest an evident unfitness for teaching…. Evident unfitness for teaching is manifested by conduct such as, but not limited to, the following: persistent neglect of duty, willful violation of rules and regulations of district board of trustees, drunkenness, conviction of a violation of the law of this State or the United States, gross immorality, dishonesty, illegal use, sale or possession of drugs or narcotics.

A teacher employed under a continuing contract may be discharged at any time for good cause as determined by the board of trustees, good cause being the failure to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts in this state.

2. Court Standards for Discipline or Dismissal

When a statutory standard for discipline or dismissal is broad or non-existent, state courts may provide appropriate standards and definitions of standards for discipline or dismissal. In Alabama, for example, a state court rejected the Daugherty test3 for just cause and adopted its own standard for dismissal based on a legal treatise.

‘[G]ood cause’ in a statute of this kind [Tenure Act] is by no means limited to some form of inefficiency or misconduct on the part of the teacher dismissed, but includes any ground put forward by a school committee in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the committee's task of building up and maintaining an efficient school system. Limited only by the statutory provision that they must be good and just causes, the jurisdiction and discretion to determine what these causes may be rests in the hands of the school authorities.

Ex parte Alabama State Tenure Comm'n, 555 So. 2d 1071, 1074 ( Ala. 1989) (quoting 68 Am.Jur.2d Schools § 183 (1973)).

In Wisconsin, prior to the passage of any state law regarding collective bargaining for teachers, a state court explained that a school board had the implied power to dismiss a teacher for “good and sufficient cause.” Millar v. Joint Sch. Dist. No. 2, 2 Wis. 2d 303, 312, 86 N.W.2d 455, 460 (1957). Such cause might include a teacher’s failure to perform duties under the contract, annulment of a teacher’s certificate to teach, or insubordination. Id.

3 Collective Bargaining Agreement Standards for Discipline or Dismissal

3 Enterprise Wire Co., 46 LA 359 (Daugherty, Arb. 1966), See Section I.A.4.a).
When permitted by state law, teacher unions and school districts may agree to a standard for discipline or dismissal via a CBA. While districts may have significant latitude to agree with the union on a standard, a court might not enforce a standard that would permit a district to act arbitrarily because an employee’s due process rights cannot waived through a CBA. See, e.g., Phillips v. State Pers. Bd., 184 Cal. App. 3d 651, 660, 229 Cal. Rptr. 502, 509 (Ct. App. 1986). However, generally, a grievance procedure that includes a full evidentiary hearing, when coupled with a sufficient pre-termination hearing, will satisfy due process. See Catlett v. Woodfin, 13 F. App'x 412, 416 (7th Cir. 2001) (unpublished) (citing Chaney v. Suburban Bus Div. of Reg'l Transp. Auth., 52 F.3d 623, 630 (7th Cir. 1995)).

If desired by the parties, the standard should include a definition of the standard that will be used by the arbitrator in any grievance. If a CBA adopts a generic “just cause” standard, in the absence of state law, the arbitrator may adopt the Daugherty test or any other test for just cause when ruling on a grievance for discipline or dismissal. The district bears the burden of proof that the standard for discipline or dismissal has been met, which makes it important for a district adopting a “just cause” standard to understand the significant burden it faces in any grievance relating to discipline or dismissal under that standard. The CBA should specify to which employees or positions the just cause protection applies. For example, the CBA should explain whether just cause protection exists for an employee’s extracurricular activity supervision assignments.

A CBA might also include references to specific conduct that would provide “just cause” for discipline or dismissal, not unlike what some state statutes do. The CBA provision could include terms such as “misconduct,” “unsatisfactory performance,” “insubordination,” or similar terms. However, failure to define these terms could lead to further ambiguity that leads to increasingly difficult legal challenges. See, e.g., Khan v. Delaware State Univ., No. CV N14C-05-148 AML, 2017 WL 815257, at *4 (Del. Super. Ct. Feb. 28, 2017) (describing a three-year legal battle over the proper definition of “professional responsibilities” in a CBA).

If a district seeks a standard lower than “just cause” for discipline and dismissal for employees, that standard should be established explicitly in the CBA so that an arbitrator does not read just cause protection for employees into the CBA. See Herlitz, Inc., 89 LA 436 (Allen, Jr., Arb. 1987) (reading a just cause standard into a CBA). However, not all arbitrators will read a just cause standard into a CBA. See M.M. Sundt Constr. Co., 81 LA 432 (Zachar, Arb. 1983).

4. Arbitral Definitions of Standards for Discipline or Dismissal

Where state law and the CBA are silent regarding a standard for discipline or dismissal, or when state law and the CBA use the terms, “good cause,” “just cause,” or “cause” without definition, an arbitrator is likely to have to adopt a test for demonstrating whether cause has been established when ruling on a discipline or dismissal grievance.

a) Daugherty Test
One of the best-known tests for just cause comes from arbitrator Carroll Daugherty back in 1966. *Enterprise Wire Co.*, 46 LA 359 (Daugherty, Arb. 1966). This test originated in the private sector, but has been adopted by arbitrators in school law grievance arbitrations. Even when an arbitrator does not explicitly adopt the Daugherty test, the questions contained in the Daugherty test are often referred to either implicitly or explicitly in an arbitrator’s ruling regarding whether just cause exists for discipline or dismissal. The test consists of seven separate questions. Note that Daugherty used the term “company” to represent the employer, which in the case of a school case would be the school district.

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?

2. Was the company’s rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company’s business and (b) the performance that the company might properly expect of the employee?

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the company’s investigation conducted fairly and objectively?

5. At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?

The Daugherty test has somewhat fallen out of favor in the context of school district employee arbitration for several reasons. First, the Daugherty test judges the employer for its decision to discipline or dismiss an employee, rather than judging the employee’s conduct or performance. Second, the test was designed for an appellate process whereby the arbitrator reviews the employer’s decision-making process. The test, therefore, reviews the procedures used by the employer but not the substance of the reasons for discipline or dismissal. However, many school district grievance arbitration proceedings contain a full fact-finding de novo hearing, which by its nature would assess the substance of the employer’s reasons for discipline or dismissal. Third, the test was designed for blue-collar employees, rendering it less appropriate for professional employees who must exercise their professional judgment based on training and experience. See, e.g., *Johnson Creek Sch. Dist.* (Malamud, arb. 1994).

b) Other Arbitrator Standards for Discipline and Dismissal
One arbitrator defined just cause as whether “[a] reasonable man taking into account all relevant circumstances, would find sufficient justification in the conduct of the employee to warrant discharge.” *RCA Communications, Inc.*, 29 LA 567 (1957) (Harris, Arb. 1957).

Another arbitrator defined just cause to include three tests:

1) Was the charged offense(s) proved by clear and convincing evidence? 2) Was the employee afforded fundamental due process rights implicit in the just cause clause—e.g., did he or she have forewarning or foreknowledge that his or her conduct would lead to discipline, and was a fair investigation conducted; and was the employee treated fairly—e.g., were the employer's rules consistently enforced? And 3), was the penalty imposed reasonably related to the seriousness of the offense(s), the employee's disciplinary record and any mitigating or extenuating circumstances?


A third arbitrator established a simple two-part test for just cause. First, the employer must establish that the employee engaged in conduct in which the employer has a disciplinary interest. Second, the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. *Outagamie Cty.*, MA-12730 (McLaughlin, Wis. Emp’t Relations Comm’n Arb. 2005).

**B. Elements of Just Cause**

Where state law and the CBA are silent with regard to the definition of just cause, the arbitrator will define just cause and decide if just cause exists for discipline or dismissal, provided the arbitrator draws the essence of his/her definition from the CBA. Cf. *Bethel Park Sch. Dist. v. Bethel Park Fed’n of Teachers, Local 1607*, 55 A.3d 154, 158 (Pa. Commw. Ct. 2012) (holding that an arbitrator’s award was not derived from the CBA when the award was based on procedures required under a sexual harassment policy that was not a part of the CBA).

Regardless of the precise standard included by state law, the CBA, or the arbitrator, just cause is generally divided into two components, substantive just cause and procedural just cause. Depending on the exact definition of just cause the arbitrator adopts, the arbitrator may consider any number of factors within the broader categories of substantive and procedural just cause.

1. **Substantive Just Cause**

Substantive just cause requires that the employee actually engage in the conduct for which the District is seeking to discipline or dismiss the employee. Substantive just cause also requires the level of discipline to be commensurate with the severity of the misconduct. When making this determination, arbitrators will give at least some consideration to the employee’s length of service, his/her past disciplinary record, and, of course, the nature of the misconduct. A long tenure of service without discipline could result in an arbitrator shortening a suspension or overturning a dismissal. See, e.g., *Local No. 7 United Food & Commercial Workers Int'l Union v. King Soopers, Inc.*, 222 F.3d 1223, 1226 (10th Cir. 2000).

2. **Procedural Just Cause**
Procedural just cause requires that the employee knew or should have known that his/her conduct could result in discipline or dismissal, and requires a reasonable connection between the behavior and the punishment. Notice generally requires that a rule be written down before an employee will be deemed to have notice of the rule. See, e.g., Donaldson Mining Co., 91 LA 471 (Zobrak, Arb. 1988). Notice of the rules also generally requires notice of the potential consequences for violating the rules. See, e.g., Pacific Offshore Pipeline Co., 106 LA 690 (Kaufman, Arb. 1996) (holding that an employee could not be dismissed for failing a drug test when the company failed to inform the employee that the policy had been changed to permit dismissal for a first offense). Lax enforcement of rules in the past can also limit an employer’s ability to discipline or dismiss an employee for just cause. See Middleton Educ. Ass’n v. Middleton-Cross Plains Area Sch. Dist., 2013 WI App 115, ¶ 10, 350 Wis. 2d 507, 838 N.W.2d 137 (unpublished) (per curiam) (upholding an arbitrator’s decision that reduced the dismissal of a teacher to a fifteen-day suspension based on evidence that the district did not dismiss other teachers who also viewed sexually explicit materials on school computers).

Questions of procedural just cause may also arise in the context of off-duty misconduct by an employee. Generally, an employer must prove that a nexus exists between the employee’s conduct and the employee’s job duties. At least part of the justification for the nexus rule is affording proper notice to employees. Absent a nexus between the conduct and the employee’s job duties, a district might be committing an unwarranted intrusion on a teacher’s right to privacy if it disciplines or dismisses based on off-duty conduct. See, e.g., Powell v. Paine, 221 W. Va. 458, 463, 655 S.E.2d 204, 209 (2007). This nexus could be proved with evidence that the conduct directly affects the performance of the employee’s job or with evidence that the conduct became “the subject of such notoriety as to significantly and reasonably impair the capability of the [employee] to discharge the responsibilities...” Id. at 465.

For example, in a case regarding whether a guidance counselor was dismissed in violation of the First Amendment, a court remarked, “Particularly as a guidance counselor, Craig must maintain a safe space for his students in order to ensure they remain willing to come to him for advice. If Craig fails to create the appropriate environment for his students, they will not approach him and he cannot do his job.” Craig v. Rich Twp. High Sch. Dist. 227, 736 F.3d 1110, 1119–20 (7th Cir. 2013). Ultimately, the guidance counselor’s inability to create an appropriate environment for students in the wake of his publication of a relationship advice book containing sexual content meant that the district’s decision to terminate his employment was justified, and there was no violation of the First Amendment.

In another case, an employee got into a bar fight with a student after-hours. Monroe County Bd. of Educ., 129 LA 948 (Wolfson, Arb. 2011). In his decision, the arbitrator explained that had the fight been with anyone other than a student, the employee would not be subject to discipline because of a lack of work-related consequences stemming from the behavior. Id.

Where no nexus with the school community exists, the private conduct of a school employee is not a proper basis for discipline or dismissal. Jarvella v. Willoughby-Eastlake City Sch. Dist. Bd. of Ed., 12 Ohio Misc. 288, 291, 233 N.E.2d 143, 146 (Com. Pl. 1967) (holding that a teacher writing private obscene letters to a former student had no effect on the school community until another party other than the teacher disclosed the letters to newspapers).
The ability to discipline or dismiss teachers for conduct that takes place off-duty may also be regulated by state law. See, e.g., Wis. Stat. § 111.35 (governing the discipline or dismissal of employees for their use or nonuse of lawful products such as cigarettes and alcohol during nonworking hours).

II. Probationary Employees

It is common for probationary employees to be treated differently from tenured or permanent employees for purposes of discipline and dismissal either by statute or in a CBA. However, some unions may seek to provide “just cause” or similar protection to probationary employees through a CBA. Unions may seek to provide such protection applicable to discipline or dismissal during the term of a contract as well as for non-renewal of a contract.

Where a district intends to treat probationary employees differently than tenured or non-probationary employees, the CBA should expressly distinguish these categories of employees in the section of the CBA on discipline and dismissal. Districts should be cautious of the use of general terms in a section on discipline and discharge. Use of general terms that might apply to tenured, non-probationary, and probationary employees could lead all district employees, including probationary employees, to have an expectation of continued employment with all the due process to which that entitles such employees. See generally, In re Lisbon Reg’l Sch. Dist., 143 N.H. 390, 394, 727 A.2d 974, 976 (1999). Further, if a district grants just cause protection to tenured, non-probationary, and probationary employees, what purpose does the probationary status serve? At a minimum, probationary employees should be treated differently in a CBA either with respect to evaluations or with respect to the standard for discipline and discharge. Otherwise, the distinction between classifications is without meaning.

Additionally, the CBA should be explicit regarding the duration of probationary status, including the duration of probation for employees hired mid-way through a school year. For example, be sure the CBA is clear about whether an employee hired in November completes a full probationary year in June.

III. Practices that Support Elements of “Just Cause”

A. Supervision

Administrators need to actively supervise employees and document misconduct, poor performance, or other grounds for potential discipline or dismissal. This supervision should be continuous and distinct from the formal evaluation process. The importance of supervision increases when teachers are not formally evaluated very often. Documentation of misconduct from routine supervision can provide the basis for discipline and dismissal even when the misconduct has not yet been included in a formal evaluation. This documentation should be included in the employee’s next formal evaluation. In addition, this document should be placed in the employee’s personnel file.

When districts fail to supervise by documenting and taking appropriate disciplinary action over misconduct, districts run the risk of a court or arbitrator finding that the district did not consider past misconduct to constitute just cause for discipline or discharge. See Badertscher v. Liberty-Benton Sch. Dist. Bd. of Educ., 2015-Ohio-1422, ¶ 54, 29 N.E.3d 1034, 1050 (holding that administrators’ failure to take any corrective action against a teacher for past classroom
management and student discipline issues meant that these issues could not be used to prove the employee’s intentional disregard of board policy because employee was not on notice that his past conduct violated board policies).

B. Evaluation

The primary purpose of evaluation is to improve employee performance whenever possible. While an evaluation may be used as evidence to justify dismissal, this should not be considered an evaluation’s primary purpose. Evaluations should not be “set ups” for future dismissal. Evaluators should also be aware that it is often easier from a practical perspective to raise a low evaluation score in the future than to lower one in future years. As a result, evaluators should be cautious about evaluating certain employees too generously from the onset.

Evaluation provisions can be included in a CBA, including both the substantive and procedural aspects of evaluation. However, state law will determine the extent to which the procedural and substantive aspects of evaluation are mandatory subjects of bargaining. Procedural aspects might include frequency of evaluation, delineation of appropriate evaluators, and any meetings that will follow an evaluation. Substantive aspects of evaluation may include the criteria by which employees are evaluated and the scoring rubric by which employees may be evaluated. Evaluation provisions may properly differentiate between probationary and tenured employees, such as with respect to frequency of evaluations. Substantive and procedural evaluation procedures may also be established by state law, as well as the federal Every Student Succeeds Act. Failure to follow state evaluation requirements could result in the invalidation of a dismissal. See, e.g., Buchna v. Illinois State Bd. of Educ., 342 Ill. App. 3d 934, 939, 795 N.E.2d 1045, 1049 (2003) (holding that a district’s use of two levels of evaluation scores in a CBA where state law required three levels justified overturning a teacher’s dismissal).

Performing effective, accurate, and defensible evaluations is critical to discipline and dismissal. A well-performed evaluation is Exhibit A for the district. A poorly-performed evaluation is Exhibit A for the union. Properly documented performance evaluations can provide a non-discriminatory basis for discipline and dismissal. See e.g., Sickels v. Cent. Nine Career Ctr., No. 1:10-CV-00479-SEB, 2012 WL 266945, at *11 (S.D. Ind. Jan. 30, 2012) (holding that a teacher’s evaluation that noted seven areas in which the teacher was not meeting expectations, two of which were also present in a previous evaluation, provided a non-discriminatory basis for the district’s non-renewal of his contract).

Evaluations must follow state and federal law, board policy, and applicable CBAs, individual contracts, and employee handbooks. Past evaluation practices may also be relevant if the results of the evaluation will be the basis for dismissal for just cause. Any deviation from these sources could form the basis for a challenge to discipline or dismissal stemming from the evaluation. See Scheckel v. Sch. Dist., No. 92-3121, 1994 WL 36060 (Wis. Ct. App. Feb. 10, 1994) (unpublished) (explaining that a district is bound to follow its own board policy regarding evaluations). Absent a state-law requirement that employees are entitled to a pre-termination performance review or performance improvement plan, employees who are denied such a review or plan are not deprived of a property right protected by the Due Process Clause of the Fourteenth Amendment. See Simpson v. Enlarged City Sch. Dist. of Newburgh, No. 05 CIV. 5144 (CM), 2005 WL 2647947, at *6 (S.D.N.Y. Sept. 30, 2005).
Evaluation systems should establish clear standards and expectations based on specific behavior that evaluators can observe and measure. These standards and expectations should apply equally to all employees, regardless of their status as tenured or probationary employees, so all teachers feel that they have been treated fairly throughout the process. Evaluations should be completed in time to inform personnel decisions for subsequent school years, particularly if state law requires notice of non-renewal by a specific date. Evaluations should include specific examples of observed conduct, rather than general statements. “Frequent tardiness” should be replaced by “Employee was five minutes late to work on January 1, ten minutes late on January 8, and thirty minutes late on February 14.” When possible, evaluations should be based on multiple evaluations by multiple evaluators. Consistency between multiple evaluators on multiple dates is strong evidence in support of discipline or dismissal. Prior to an observation, the evaluator should review the employee’s personnel file. The evaluation should cover whether the employee has made progress on any deficiencies identified in past evaluations. The evaluation should use neutral and constructive language, rather than inflammatory or derogatory language. A copy of an employee’s evaluation, signed by the evaluator and the employee, should be placed in the employee’s personnel file. Finally, the formal evaluation should not mark the end of teacher’s evaluation for the year. Administrators should continue to regularly supervise employees and document any misconduct or performance issues.

Evaluation is an on-going process. As a result, an effective evaluation includes suggestions for improvement in the areas identified as weaknesses in an evaluation. Ultimately, it is in the district’s best interest for a struggling employee to develop into a successful one. Addressing an issue with tardiness promptly during an employee’s first year could enable that employee to rectify the issue and become a long-term successful employee. Notice and opportunity to rectify conduct may also be required by state statute prior to dismissal. See, e.g., Cal. Educ. Code § 44934.1 (requiring written statement of charges of egregious misconduct prior to dismissal or suspension of a permanent employee). When appropriate (or when required by state law, CBA, board policy, or employee handbook), employees should be placed on a performance improvement plan if such a plan might facilitate the employees’ improvement in the areas noted in a poor evaluation. See Section III.D below.

Districts should resist efforts by a union to establish in a CBA that negative evaluations would constitute discipline that would be subject to the grievance procedure. Absent such a provision, employees cannot grieve a negative evaluation, even when that evaluation is used as the basis for dismissal. See City of Mentor, 94 LA 486 (Graham, Arb. 1990). However, an evaluation system (and in some cases a state law) may provide that an employee may issue a rebuttal to a negative evaluation to be included in the personnel file. An employee’s failure to rebut a negative evaluation might constitute an acceptance of the negative evaluation by the employee and that acceptance may allow the district to more easily use the negative evaluations to prove just cause for dismissing an employee, particularly when the employee fails to rebut several negative evaluation or many years. See New Lisbon Sch. Dist., MA-9134 (Crowley, Wis. Emp’t Relations Comm’n Arb. 1997).

C. Progressive Discipline

1. Progressive Discipline Generally
Progressive discipline is designed “to give employees notice and an opportunity to correct any deficiencies.” *Anderson v. Stauffer Chem. Co.*, 965 F.2d 397, 403 (7th Cir. 1992). Under a progressive discipline regime, districts discipline teachers based on the severity and repetition of the misconduct. Ideally, progressive discipline remains a matter of district discretion. However, a CBA may impose standards such as just cause on the district when a district wishes to impose certain types of discipline, particularly when that discipline results in a monetary cost to an employee. Additionally, if a progressive discipline system is incorporated into a CBA, any discipline imposed as part of the system might be subject to the CBA’s grievance procedure. If a CBA provision enumerates conduct that is subject to progressive discipline, the CBA should expressly state that the list of such conduct is illustrative and not exclusive. No progressive discipline regime can capture the full range of misconduct that could potentially occur, and districts need the flexibility to respond to unique situations. Additionally, any work rules promulgated by the district must be consistent with the terms of any applicable CBA provision regarding progressive discipline. *See Regional Transit Dist.*, 116 LA 826 (DiFalco, Arb.2001).

When appropriately implemented, progressive discipline can be documentation to show that a district had just cause for more severe discipline or dismissal upon future incidents of misconduct by the employee. Progressive discipline also helps demonstrate that the employee was on notice that his/her conduct was in violation of work rules. However, a CBA might also provide that an employer can only “look back” and consider past disciplinary conduct through a certain period of time, even if the past conduct resulted in discipline. *See, e.g.*, *Thomson Multimedia, Inc.*, 118 LA 4 (Duff, Arb. 2002). Additionally, progressive discipline, like any discipline or dismissal action, must be implemented uniformly among similarly situated employees to prevent claims of illegal discrimination or lack of just cause.

2. **Steps of Progressive Discipline**

An oral warning is usually the lowest level of discipline in a progressive discipline regime. For minor isolated acts of misconduct, oral warnings may be sufficient. However, from a practical perspective, a truly oral warning is of little use to the district in establishing just cause for further discipline should the conduct continue because the district will have limited evidence that an oral warning was given without documentation. However, once a supervisor documents that an oral warning was given, it becomes in effect a written warning. From a practical perspective, there is no such thing as a “written oral warning.” Either the warning is documented in writing or it is not. Nevertheless, if a progressive discipline regime requires providing an oral warning as a first step, the administration must document that the warning has been given. *See, e.g.*, *Goshen Rubber*, 99 LA 770 (Briggs, arb. 1992) (finding that failing to document an oral warning could result in the employee viewing an oral warning as “friendly advice” rather than formal discipline). An oral warning must be distinct from general counseling and assistance that an administrator might provide to an employee such as providing tips for successful classroom management. This distinction is not always clear.

Written warnings are often the first step in progressive discipline regimes (except where oral warnings are required). In the context of progressive discipline, a written warning means a written reprimand that constitutes discipline. This type of written reprimand is different from an
informal, non-disciplinary written warning that an employer might give an employee to provide notice of a minor work rule of which an employee is not aware. Formal written warnings are useful in establishing that an employee had notice that future specified misconduct will result in discipline or dismissal. Evidence of notice is often a prerequisite to proving that just cause exists for discipline or dismissal. Written warnings also show that an employee’s misconduct was repeated and not isolated. Evidence of repeated conduct can be useful evidence in showing that the amount of discipline an employee received was appropriate.

To be effective, a written warning must detail the conduct at issue with specificity. Written warnings should include a provision expressly stating that future misconduct of a certain type will result in further discipline up to and including dismissal. To justify stronger discipline upon future violations, the written warning must give clear notice of the nature of the conduct that will justify additional discipline if repeated. See Maryland Jockey Club of Balt. City, 99 LA 1025 (Farwell, Arb. 1992) (explaining that a warning for throwing water on a customer was not comparable to playing a prank on a co-worker). From a practical perspective, written warnings should be signed by the district and the employee. The warning should clearly indicate that it is a disciplinary written warning so the employee has no confusion that this warning is a step of progressive discipline.

Following a written warning, the next step is generally either a paid or unpaid disciplinary suspension of a length rationally related to the severity and repetition of the conduct. This step may be broken into multiple steps comprised of suspensions of various lengths of paid suspension followed by unpaid suspensions.

The final step in a progressive discipline system is dismissal, which generally would be imposed after continued misconduct by the employee after appropriate progressive discipline has been imposed. However, for severe misconduct, progressive discipline may be bypassed in favor of immediate dismissal.

A district need not always go through each step of progressive discipline every time an employee engages in misconduct. However, some arbitrators have held that failing to provide warning prior to discharge could result in an employer not having just cause for discipline, particularly dismissal. See, e.g., Albertson’s, 111 LA 630 (Eisenmenger, Arb. 1998) (explaining that employer’s failure to provide a written warning for absenteeism prohibited the employer from dismissing an employee for chronic absenteeism). Depending on the nature of the conduct, the district can skip straight to more severe disciplinary steps. For particularly egregious conduct such as sexual misconduct with a student, the district can appropriately proceed directly to dismissal with the employee being placed on paid or unpaid suspension pending a full investigation. See, e.g., Sertik v. Sch. Dist. of Pittsburgh, 136 Pa. Cmwlth. 594, 598, 584 A.2d 390, 392 (1990).

D. Performance Improvement Plans (PIPs)

1. Purpose and Use of PIPs

The purpose of a Performance Improvement Plan (PIP) is to improve an employee’s performance, usually following a performance evaluation that identifies deficiencies. It is not to be used to secure evidence for dismissal. Framing a PIP as potential evidence for dismissal
presupposes that the employee will fail to improve. Ideally, the PIP will work and the district and employee are spared the lengthy, contentious dismissal process. Additionally, employees will likely detect the district’s intent of using a PIP solely as a “set up” for dismissal, which undermines the employees’ ability to improve and could be toxic to the district’s climate. Nevertheless, PIPs place employees on notice that they are failing to meet the district’s standards, which is important if the employee is eventually dismissed for poor performance or misconduct. Additionally, should an employee fail to improve, the PIP can provide evidence that a district did not discriminate against an employee when it disciplines or dismisses such an employee. See, e.g., Sickels v. Cent. Nine Career Ctr., No. 1:10-CV-00479-SEB, 2012 WL 266945, at *11 (S.D. Ind. Jan. 30, 2012).

PIPs are only appropriate when an employee can remediate a deficiency. For example, an employee’s failure to document classroom management in accordance with a district’s student discipline model might be an appropriate basis for a PIP. PIPs are generally more appropriate for non-probationary employees who need redirection than for newer probationary employees who may just lack fundamental skills. Any PIP should align with the district’s evaluation criteria.

PIPs are not appropriate when based on immutable traits of an employee. Employees who are not a “good fit” for the district or who lack the requisite and fundamental skills for the position are not good candidates for PIPs. For example, if a teacher lacks even basic subject area knowledge, a PIP is unlikely to lead to performance improvement. Further, placing employees on PIPs for immutable traits might leave those employees feeling harassed when administrators try to fix traits that simply cannot be fixed. This is not conducive to performance improvement. Finally, PIPs are not appropriate for severe misconduct that would justify immediate termination such as violent behavior, extreme insubordination, harassment, or gross neglect of duties.

When implementing a PIP is appropriate, the PIP should notify the employee of the district’s expectations and standards and the need for the employee to improve to meet these expectations by established deadlines. If the district is providing support through the PIP, such as training, observations, meetings, etc., the district should ensure that it is not overpromising with this support and subsequently under-delivering. If that is the case, the PIP will be Exhibit A (or B) in the Union’s grievance or litigation. The PIP should be established at the onset of performance problems so the employee has adequate time to improve, and the district has adequate time to potentially non-renew the employee prior to any statutory or CBA deadline if the employee does not improve. The PIP should provide detailed information to the employee about the problem and give clear, concise direction with specific goals and timeframes to the employee. The PIP should encourage communication between the district and the employee and offer the assistance of the district to the employee. The district should keep an open mind and listen to the employee during the course of the PIP. The PIP should require that administrators document all interactions with the employee regarding the subject matter of the PIP. Administrators should keep detailed notes, including the date and time of the meetings, what was discussed, and any specific agreements made by the employee. The PIP should require that the district follow up on agreed upon times to evaluate what, if any, progress has been made by the employee. Finally, the PIP should clearly communicate the consequences for failing to meet the plan’s expectations. Importantly, while on a PIP, an employee is still subject to progressive discipline, up to and including dismissal for conduct that relates to the PIP. A PIP is not a safe harbor period for employees that are underperforming.
## 2. Samples of Performance Improvement Plans

### PLAN OF ASSISTANCE for Custodian [Sample]

**DATE:**

**EMPLOYEE NAME:**

**SUPERVISOR NAME:**

<table>
<thead>
<tr>
<th>Performance Deficiency</th>
<th>Performance Expectation (Framework for Teaching Domain/Component)</th>
<th>Time Table</th>
<th>Actions to be Taken by Employee with Corresponding Documentation</th>
<th>Administrative Assistance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Take all necessary and reasonable steps to insure that the building is clean at all times.</td>
<td><strong>Operational Responsibilities</strong>&lt;br&gt;<strong>Snow removal and spreading sand and salt takes precedence</strong>&lt;br&gt;– SAFETY FIRST!</td>
<td>Begins 4/3/17 and will occur daily, weekly and monthly as needed</td>
<td>Completes all custodial duties expectations as outlined in the Custodial Expectations document (attached).</td>
<td>Meeting with the Principal/supervisor, custodian where we will discuss and address observation, questions, concerns and comments as needed.</td>
</tr>
<tr>
<td>Perform all duties as outlined daily, weekly and monthly</td>
<td><strong>Daily: Classrooms</strong>&lt;br&gt;– Clean windows and door glass&lt;br&gt;– Empty garbage and recycling, change liner when it’s dirty&lt;br&gt;– Empty pencil sharpeners&lt;br&gt;– Chalkboards erased, chalk trays wiped/washed&lt;br&gt;– Dust mop floors and damp mop floors&lt;br&gt;– Vacuum carpets&lt;br&gt;– Clean sinks, check and fill paper towel dispensers and wipe counter tops&lt;br&gt;– Check and clean marks on walls and floors&lt;br&gt;– Clean all tables and student desk tops&lt;br&gt;– Before turning out the lights make all windows are closed and locked. Glance over the room to make sure you check over your work</td>
<td></td>
<td>Complete daily custodial checklist prior to leaving each evening.</td>
<td>Complete list of daily job responsibilities provided by supervisor.</td>
</tr>
<tr>
<td>Assist the Facility Technician with pre-planned evening events as directed.</td>
<td></td>
<td></td>
<td>Disinfect desks/tables every night after student day and clean up after meals/snacks.</td>
<td>Unannounced observation(s) will occur at least weekly for the first four weeks and feedback will be given as deemed appropriate by administration.</td>
</tr>
<tr>
<td>Be flexible in coping with changes in duties as indicated by after school events, weather conditions, etc.</td>
<td></td>
<td></td>
<td>Request assistance when needed.</td>
<td>Protocol for obtaining assistance or other custodial protocols will be communicated with you upon request by the principal to help you to better adapt to the needs of the building.</td>
</tr>
</tbody>
</table>

**Concerns over proper chemicals and custodial equipment will be**

**Meetings will be held weekly for the first four weeks and biweekly thereafter with ____ which may include other custodians where we will discuss effective strategies and processes to utilize, as well as custodial procedures.**
### Performance Deficiency

**Performance Expectation**
(Framework for Teaching Domain/Component)

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</tr>
</thead>
</table>
| **Daily: Building**
- Disinfect all water fountains and sinks
- Locker tops dusted and fronts cleaned
- Sanitize bathrooms and floors; check and clean feces, body fluid,
- Clean mirrors, check stalls and walls for writing and finger marks
- Fill all paper products
- Dust all flat surfaces, including computers, countertops, window ledges
| Rinse out scrub buckets and mops – hang up mop | brought to the facility technician or supervisor. | Feedback will be provided verbally through our weekly meetings for the first month and at least bi-weekly after that. |
| **At least weekly:**
- Help set up and take down, clean for events including putting away chairs and equipment after events and after school programs
- Dust classroom and ledges in doorways, stairwells and halls |

My signature acknowledges that this Plan of Assistance has been reviewed with me and that I understand the expectations and the timelines. I understand that if I have any questions about this Plan of Assistance, it is my responsibility to seek clarification from my supervisor.
### PLAN OF ASSISTANCE for Teacher [Sample]

**DATE:**

**EMPLOYEE NAME:**

**SUPERVISOR NAME:**

<table>
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<tr>
<th>Performance Deficiency[^1]</th>
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<tbody>
<tr>
<td><strong>1e: Designing Coherent Instruction</strong></td>
<td>Learning activities are poorly aligned with the instructional outcomes, do not follow an organized progression, are not designed to engage students in active intellectual activity, and instructional groups are not suitable to the activities or student needs. Structured lesson plans are not consistently being completed and/or submitted as due.</td>
<td>Daily by 3:45 for more detailed plan for following day; Weekly by 3:45 Friday an outline for the following week</td>
<td>Daily Lesson Plan for the following day will be submitted to Principal and into the 2016-2017 Lesson Plan folder by 3:45. Daily Lesson Plan will include the following: - Daily program schedule - Learning targets - Activities and materials based on learning targets - Formative assessments based on learning targets - Eventually there should be a plan for remediation and enrichment when needed</td>
<td>Daily Lesson Plan will be reviewed and feedback will be provided minimally once per week. Weekly Lesson Plan will be reviewed and feedback will be provided minimally once per month. Classroom observations will be completed and formative feedback will include data specific to questioning, minimally once per month.</td>
</tr>
<tr>
<td><strong>1f: Designing Student Assessments</strong></td>
<td>Assessment procedures are not congruent with instructional outcomes and lack criteria by which Instructional outcomes may be assessed by the proposed assessment plans. Assessment criteria and standards are clear. The teacher has a well-developed</td>
<td>Daily and weekly, examples should be written into plans</td>
<td>Daily Lesson Plan will include the following: - Formative assessments based on learning targets</td>
<td>Teacher can gather ideas for formative assessment from mentor, colleagues, or administration.</td>
</tr>
</tbody>
</table>

[^1]: Performance standards based on the District’s adoption of the Charlotte Danielson evaluation framework.
<table>
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<td>student performance will be assessed. The teacher has no plan to incorporate formative assessment in the lesson or unit.</td>
<td>strategy for using formative assessment and has designed particular approaches to be used.</td>
<td>Complete by 2/16/17; maintained weekly</td>
<td>Formative assessments should be ongoing (planned or unplanned) to assess if students understand the material. Summative assessments should be incorporated into unit plans (and daily plans as appropriate). Teacher should attend any professional development offered at school or in district on formative assessment.</td>
<td>Classroom observations will be completed and feedback specific to any forms of formative assessment observed, minimally once per month. Teacher can also ask for assistance in creating formative assessments. Administrator will share information on any professional development offered at school or in district on formative assessment.</td>
</tr>
<tr>
<td>2c: Managing Classroom Procedures</td>
<td>Students are productively engaged during whole group, small group and/or independent work. Transitions between activities are smooth. Routines work efficiently.</td>
<td>Learning Environment will be organized. Daily schedule will be visibly posted. Classroom Procedures will be directly taught to students, as reflected in daily lesson plans, and will be posted within classroom learning environment. You will have established attention signals.</td>
<td>Photos of learning environment will be taken and reviewed during formative feedback, minimally once per month. Lesson plans will be reviewed. Sample templates will be provided upon request. Post observation feedback will include what signals are observed, what the student</td>
<td></td>
</tr>
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<td>------------------------------------------------------------------</td>
<td>----------------------------</td>
</tr>
<tr>
<td>2d: Managing Student Behavior</td>
<td>Student behavior is generally appropriate. The teacher monitors student behavior against established standards of conduct. Teacher response to student misbehavior is consistent, proportionate, and respectful to students and is effective.</td>
<td>Daily, teachers need follow school procedures for behavior.</td>
<td>Daily, use the establish protocols and rubrics for behavior data and follow the procedures for notifying families of their child’s behavior.</td>
<td>Administrator may require weekly updates on point sheets and copiers of information sent home. Feedback will be given weekly.</td>
</tr>
<tr>
<td>3b: Using Questioning and Discussion Techniques</td>
<td>While the teacher may use some low-level questions, he poses questions designed to promote student thinking and understanding. The teacher creates a genuine discussion among students, providing adequate time for students to respond and stepping aside when doing so is appropriate. The</td>
<td>Daily</td>
<td>Student Questioning will demonstrate an opportunity for each student to respond through a variety of structures such as use of whiteboards, think-pair-share, stand up-hand-up pair-up, hand signals, turn and talk, etc. Questions will not be answered</td>
<td>Classroom observations will be completed and formative feedback will include data specific to questioning, minimally once per month.</td>
</tr>
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<td>---------------------------------------------------------------</td>
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<td>-----------------------------</td>
</tr>
<tr>
<td>questions and answers, and in some cases, answering questions for students; the teacher accepts all contributions without asking students to explain their reasoning. Only a few students participate in the discussion.</td>
<td>teacher challenges students to justify their thinking and successfully engages most students in the discussion, employing a range of strategies to ensure that most students are heard.</td>
<td></td>
<td>for them - students will answer their own questions</td>
<td></td>
</tr>
<tr>
<td><strong>4f: Showing Professionalism</strong> The teacher makes decisions and recommendations that are based on self-serving interests. The teacher does not comply with school and district regulations by reporting late for work.</td>
<td><strong>4f: Showing Professionalism</strong> The teacher maintains an open mind in team or departmental decision making. The teacher complies fully with school and district regulations.</td>
<td>Daily, teachers need to report on time (be at work station/area at 7:15 AM.)</td>
<td>Daily, report to work on time. Report to any meetings on time.</td>
<td>Administrator will provide weekly feedback on punctuality.</td>
</tr>
</tbody>
</table>

My signature acknowledges that this Plan of Assistance has been reviewed with me and that I understand the expectations and the timelines. I understand that if I have any questions about this Plan of Assistance, it is my responsibility to seek clarification from my supervisor.
Plan of Improvement for Paraprofessional [Sample]

TO: __________
FROM: __________
RE: Plan of Improvement
DATE: January 11, 2017
CC: Personnel File

Since the 2015-16 school year, I have met with you on a number of occasions to clarify your role as paraprofessional and discuss how you can improve on job performance. During this time, you have worked with three different staff members that shared the same theme of concerns. As there have continued to be concerns after our attempts to improve performance, I am placing you on this Plan of Improvement effective January 11, 2017 for the rest of the 2016-17 school year. We will meet periodically to assess your progress on this Plan with a final summary meeting in June 2017.

I have identified the areas of improvement needed based on the DPI Paraprofessional Competencies identified below, along with three goals for you to complete by the end of this Plan.

This Plan is intended as a means to support you to improve your performance. The District wants to do all that it can to ensure your success. You are a valuable member of the team. However, I am required to inform you that if you do not successfully complete this Plan, disciplinary action may be issued including termination.

**DPI Paraprofessional Competencies: Areas of Improvement**

1. **Support and Collaboration**: The paraprofessional has an understanding of the respective roles and responsibilities of licensed staff (teachers, administrators, education specialists, etc.) in supporting students and collaborating with each other
   1.4 Assist the teacher in preparing necessary instructional materials.
   1.6 Follow written and oral instructions.
   1.7 Organize time, materials, and workspace.

2. **Communication**: The paraprofessional has the ability to communicate with colleagues, follow instructions, and use problem-solving and other skills that will enable him/her to work as an effective member of the instructional team.
   2.1 Interact effectively in the workplace.

7. **Technology**: The paraprofessional has knowledge and skills necessary to support instruction using technology.
   7.5 Use administrative and technical skills necessary to assist the implementation of programs
<table>
<thead>
<tr>
<th>Goal</th>
<th>Resources, Tools, Activities</th>
<th>Timeline</th>
<th>Evidence</th>
</tr>
</thead>
</table>
| 1. Support and collaboration | a. Para will follow written and oral instructions as provided by the ________.  
   b. Para will complete assigned tasks in a timely manner.  
   c. Para will log out on time unless overtime is approved by ________ in writing in advance (prior to Para performing the work). Para shall not perform any job duties after logging out. | Para will maintain the work log daily.  
   Para will follow the Educator ’s prioritization of work assignments.  
   Re-read the full packet for your job description.  
   Read the Paraprofessional Competencies & Professional Development Options published by DPI  
   Call LifeMatters at (800) 634-6433 to discuss ways to manage time at work. | Effective Immediately  
   Effective Immediately  
   Effective immediately  
   By February 9, 2017 | Completed work logs  
   Completed work logs and completed assignments; Feedback from Educator  
   Accurate time entries in Veritime.  
   Para will email Administrator when completed  
   Confirmation from Life Matters to ____ |
| 2. Communication | a. Para will utilize positive communication strategies.  
   b. Para will only make positive comments about the classroom and/or the Educator to other staff members and students. | Read Crucial Conversations, Chapter 7: STATE My Path: How to Speak Persuasively, Not Abrasively  
   Any concerns about the classroom or Educator shall be addressed to the Educator directly in a collaborative manner or to Ms. Administrator. | February 9, 2017  
   effective immediately | Para will meet with Administrator to discuss three things learned from the chapter and at least one thing to do differently |
| 3. Technology | Para will support the learning and advancement of the classroom as directed | Technology training to include:  
   • Chromebooks  
     o Use of Chrome touchpad | February 9, 2017 | Para will meet with ____ to learn updates for the technology currently used in |
<table>
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</table>
| by the Educator and building administrators. | o Use of various types of Chromebooks used in the classroom  
• Google Platform (Apps)  
o Use of Google docs / spreadsheets  
  ▪ including sharing docs  
  ▪ organizing, sorting and color coding spreadsheets | the building.  
Summary by _______.  
Para will meet with ______ to review AESOP and Veritime login and absentee procedures.  
Summary by _______. |
E. Last Chance Agreements

When a district is uncertain if it can prove just cause for dismissal based on an incident of misconduct, or if a district wishes to avoid the expense and contention of the grievance process, the district may choose to enter into a last chance agreement with an employee and a union. This agreement typically provides that a subsequent act of misconduct, generally related to past misconduct, will constitute just cause for dismissal. A last chance agreement at its essence waives an employer’s right to pursue the dismissal of an employee for the present misconduct in exchange for the employee’s waiver of the right to have the district prove just cause if the employee engages in additional misconduct that is in breach of the agreement.

Last chance agreements are particularly common in response to alcohol or substance abuse by an employee. Usually in these situations, last chance agreements require the employee to participate in a course of treatment including periodic screening for drug and/or alcohol use.

Last chance agreements are contracts and can be challenged under the principles of general contract law. However, an employee cannot claim he or she was coerced into signing a last chance agreement just because failure to do so would result in the district commencing termination proceedings. See, e.g., Palmer v. Cacioppo, 429 F. App’x 491, 498 (6th Cir. 2011) (holding that an employee’s consent to random drug testing was not the product of coercion just because she would have been terminated unless she agreed to such a condition).

Offering last chance agreements to some employees but not others based on legally protected classes could constitute discrimination. Mayflower Vehicle Sys., Inc. v. Cheeks, 218 W. Va. 703, 710, 629 S.E.2d 762, 769 (2006) (explaining that when a black employee was denied a second-case agreement for absences while similarly situated white employees had been granted such agreements in similar situations constituted discrimination). However, when an employee violates a last-chance agreement, the district has strong evidence that its decision to terminate was for non-discriminatory reasons. See, e.g., Boyko v. Anchorage Sch. Dist., 268 P.3d 1097, 1104 (Alaska 2012).

Last chance agreements may be subject to the grievance procedure. However, generally the scope of the grievance will be limited to the enforceability of the agreement and whether the employee’s conduct violated the terms of the agreement. See Minnegasco Inc., 110 LA 1077 (Jacobowski, Arb. 1999). A last chance agreement might include an agreement that the employee and union will not bring a grievance challenging a breach of the last chance agreement. See Clearwater Paper Co., 136 LA 1056 (Latsch, Arb. 2016). However, arbitrators and state laws may prohibit the waiver of an employee’s right to grievance arbitration through a last chance agreement. See Minnegasco Inc., 110 LA 1077 (Jacobowski, Arb. 1999) (holding that a last chance agreement was not void because it precluded the filing of a grievance, while also holding that arbitrator had jurisdiction to determine whether the employee’s conduct violated the last chance agreement).

Districts need to enforce last chance agreements if the employee breaches or at a minimum notify an employee when the employee breaches. Failure to do so could result in an arbitrator
holding that an employee did not have notice that his/her conduct breached the agreement. See Standard Products Co., 112 LA 76 (Brodsky, Arb. 1999) (explaining that because the employee did not tell an employee that absences constituted breach of the last chance agreement, the employee did not have reason to expect that dismissal was imminent).

1. Terms

The terms of each last chance agreement will vary based on the individual circumstances of the employee and the underlying CBA. However, common terms include:

- The time period during which the agreement will be in effect;
- A description of what further employee conduct will result in automatic dismissal;
- An agreement that the district will forego its right to seek termination for such conduct (this is the district’s consideration);
- An agreement that the employee stipulates that further such conduct will constitute just cause for dismissal;
- Conditions (such as random drug testing), if any, that will be placed on the employee during the term of the last chance agreement;
- A statement that the last chance agreement is not precedent for future employees; and
- The signatures of the employee, union representative, and district representative.

2. Sample Last Chance Agreement

The following Agreement is in two related parts. First, it consists of a Discipline and Release of Claims Agreement for past discipline. Second, it also includes a separate Last Chance Agreement that is incorporated by reference into the initial Discipline and Release of Claims Agreement.
This Discipline and Release of Claims Agreement ("Agreement") is entered into by and between the School District (hereinafter “District”) and Jane Doe (hereinafter “Ms. Doe”) as settlement of the November 14 and 15, 2017, matters regarding Ms. Doe’s interactions with a middle school students at Middle School and any and all other claims and causes of action by and between the parties.

1. Ms. Doe’s teaching assignment commencing with the date of this Agreement through the end of her 2017-2018 Individual Educator Contract shall be as a substitute teacher. The District shall provide communication to Ms. Doe regarding her substitute teacher assignment(s) in a reasonable manner.

2. The District shall assign Ms. Doe to a position consistent with her licensure and qualifications for the 2018-2019 school year. Such position shall become Ms. Doe’s “position of record” for purposes of the Employee Handbook and Board of Education Policy and Procedure.

3. Ms. Doe shall be issued a Second Level Written Warning for her conduct of November 14 and 15, 2017. Such Written Warning is attached hereto as Exhibit A.

4. Ms. Doe’s employment with the District shall be governed by a Last Chance Agreement for the following school years: 2017-2018, 2018-2019, and 2019-2020. During the duration of the Last Chance Agreement, Ms. Doe shall not be permitted to apply for alternate positions in the District. Such Last Chance Agreement is attached hereto as Exhibit B.

5. Ms. Doe agrees not to knowingly and intentionally disparage or retaliate against, or cause to be disparaged or retaliated against, the District, its employees, Board members, representatives or students in any manner.

6. Subject only to the performance by the District of its promises in this Agreement, Ms. Doe hereby releases the District, its officer; directors; agents; members; attorneys and its affiliates; predecessors; successors; assigns; and all persons acting by, through, under, or in concert with them (the “Released Parties”), from any and all charges, claims, demands, damages, or causes of action whatsoever which Ms. Doe has, had or might have been able to assert or claim based on any act, omission, or conduct of any kind on the part of the Released Parties from the inception of any relationships or dealings between Ms. Doe and any of the Released Parties up through the execution date of this Agreement including, without limitation, any and all claims arising under federal, state, or local laws; the Individuals with Disabilities Education Act (IDEA), Every Student Succeeds Act (ESSA), Family Education Rights and Privacy Act (FERPA), Title VII of the Civil Rights Act of 1964 (42 U.SC. § 2000e et seq.), Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.), Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.), the Rehabilitation Act of 1973 (29 U. S.C. § 791 et seq.), the Americans With Disabilities Act (42 U.S.C. § 12112 et seq.), and the Wisconsin Fair Employment Act, all as amended; refusal to rehire claims; Older Worker Benefit Protection Act; under any other applicable federal, state or local laws or regulations (which claims, if proven, provide for remedies that may include back pay, front pay, liquidated damages, attorney’s fees and reinstatement); any claims for wrongful discharge or
termination of employment whether arising under a tort, contract, promissory estoppel or statutory basis or any other legal or equitable theory; or any claims in any way arising directly or indirectly out of Ms. Doe’s services to the District.

7. While nothing contained in this Agreement shall be interpreted to prevent the United States Equal Employment Opportunity Commission from investigating and pursuing any matter which it deems appropriate, and the Employee has the right to participate in any Equal Employment Opportunity Commission investigation, the Employee understands and agrees that, by signing this Agreement, the Employee is waiving any and all rights the Employee may have to reinstatement, damages, remedies or other relief as to any claims the Employee has released and any rights the Employee has waived as a result of the Employee’s execution of this Agreement.

8. To the extent applicable, Ms. Doe waives any rights under Wis. Stat. § 118.22, or any other provision of law, and any Board or administrative policy or collective bargaining agreement with respect to renewal or non-renewal of her Individual Educator Contract.

9. Acknowledgements/Revocation Rights. Each party acknowledges that it has entered into this Agreement knowingly, freely and voluntarily. Ms. Doe acknowledges that:

a. She has been advised by the District to consult with legal counsel before signing this Agreement.

b. She has twenty-one (21) days from the date of receipt of the Agreement within which to consider it. If Ms. Doe does not execute and return this Agreement to the District’s Chief Human Resources Officer by the end of that period, this Agreement shall be void and withdrawn.

c. She understands that this Agreement includes a final general release of the District, its officers, directors, agents, board members, affiliates, predecessors, successors, assigns and all persons acting by, through, under or in concert with them.

d. She understands that she may, within seven (7) calendar days following the date of Ms. Doe’s execution of this Agreement, revoke the Agreement by delivering a written notice of revocation to _______. For this revocation to be effective, written notice must be received by the District’s Chief Human Resources Officer no later than the close of business on the 7th day after Ms. Doe signs this Agreement. If Ms. Doe revokes this Agreement it shall not be effective or enforceable, and Ms. Doe will not receive the benefits described in this document.

10. By entering into this Agreement, Ms. Doe acknowledges that she is waiving any rights and/or benefits that she may have under any and all employment agreements she entered into with the District.

11. This Agreement sets forth the entire agreement between the parties hereto. This Agreement may not be changed orally, but only by an agreement in writing signed by the parties hereto.

12. It is further understood and agreed that the consideration furnished for this Agreement by the District or Ms. Doe is not to be construed as an admission of any liability by either party.
13. This Agreement shall be governed for all purposes by the laws of the State of Wisconsin. If any provision of this Agreement is declared void, such provision shall be deemed severed from this Agreement which shall otherwise remain in full force and effect. Proper venue for any actions arising out of the breach of this Agreement shall be in Circuit Court, Brown County, State of Wisconsin.

14. Ms. Doe agrees that she will not file any claims and/or grievances relating to this matter, including the investigation of the facts which led up to this Agreement, and/or any other actions relating to this matter that have been taken by the District.

15. All parties recognize that this Agreement is non-precedent setting and limited to its unique facts. As such neither this Agreement nor any of its terms can be used as evidence by any party to support its respective position in any other matter, except as necessary to enforce this Agreement.

16. MS. DOE AFFIRMS THAT SHE HAS CAREFULLY READ THIS ENTIRE DISCIPLINE AND RELEASE OF CLAIMS AGREEMENT, THAT SHE FULLY UNDERSTANDS THE EXTENT AND IMPACT OF ITS PROVISIONS, THAT SHE HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER IT FOR A REASONABLE PERIOD OF TIME, AND HAS HAD THE OPPORTUNITY TO DISCUSS IT WITH HER ATTORNEY. MS. DOE AFFIRMS THAT SHE IS FULLY COMPETENT TO EXECUTE THIS DISCIPLINE AND RELEASE OF CLAIMS AGREEMENT AND THAT SHE DOES SO VOLUNTARILY AND WITHOUT ANY COERCION, UNDUE INFLUENCE, THREAT, OR INTIMIDATION OF ANY KIND OR TYPE.

IN WITNESS WHEREOF, the parties have signed this Agreement as of the dates set forth below opposite their names.

Employee:

______________________________________ ______________________________
Jane Doe  Date

School District:

______________________________________ ______________________________
Chief Human Resources Officer  Date
DISCIPLINE AND LAST CHANCE AGREEMENT [Sample]

This Discipline and Last Chance Agreement is entered into by and between the School District (hereinafter “District”), and Employee Jane Doe (hereinafter “Employee”), hereinafter collectively referred to as “Parties,” and in exchange for mutual consideration, it is agreed to as follows:

A. The District and Employee are committed to ensuring that all students are college, career and community ready, inspired to succeed in our diverse community. To that end, the District shall ensure that staff conduct does not undermine such environment, nor does staff engage in conduct inconsistent with or undermining of the District’s Multi-Level Systems of Support, Board of Education Policy and Rule or conduct that could be perceived as such by staff, students or third-party partners providing services to the District.

B. The District therefore agrees to support Employee’s efforts to resolve or prevent any conduct that would undermine a student’s learning environment.

C. The Parties recognize that Employee received a Second Level Written Warning in December, 2017, attached hereto as Exhibit 1. It is understood that this Second Level Written Warning is precedent for any future discipline and shall remain as part of Employee’s personnel record with precedent value permanently.

D. Employee shall be placed into a position within her area of licensure within the District during the period of last chance as set forth below. The District shall have the right to transfer Employee, without recourse, during the period of last chance.

E. From the date of this Agreement and continuing through the current school year and next two (2) school years, (2017-2018, 2018-2019, and 2019-2020), Employee shall serve a last chance period.

F. During this period of last chance, the Parties agree that the following conduct by Employee shall be “cause” for termination pursuant to the Employee Handbook:

1. Uses her position as an educator and employee of the District to purposefully mislead an administrator, employee, student, or third-party community partner providing services to the District; and/or

2. Engages in a conversation with student(s), parent(s)/guardian(s), staff or administrator(s) that is unprofessional as defined by the Danielson Framework; and/or

3. Provides instruction to students that is not consistent with approved District curriculum and standards; and/or

4. Engages in conduct that constitutes harassment, discrimination, or retaliation as defined by Board of Education Policy and Rule and state and federal law; and/or

5. Engages in any violation of Board of Education Policy or Rule or Employee Handbook; and/or;
6. Fails to follow administrative directive; and/or

7. Engages in any disparagement of the District, its employees or elected officials; and/or;

8. Fails to meet the District’s expected level of performance; and/or

9. Physically lifts or prompts students who are not a danger to themselves or others; and/or

10. Fails to redirect or inhibit sexually inappropriate conversations by and with students; and/or

11. Encourages or allows students to simulate fighting in the classroom resulting in a physical altercation; and/or

12. Shows students age-inappropriate videos outside the curriculum without supervisory or parental approval.

G. If any of the above incident(s) occur during the last chance period, the District reserves the right to terminate Employee, without hearing, before the District Board of Education. In the event Employee files a grievance regarding such termination, the only issue before the Impartial Hearing Examiner will be “did Employee engage in activity in violation of the last chance requirements?”

H. All Parties agree that this Agreement, including the attached Second Level Written Warning, shall be a public record and may be disclosed upon request without prior notice to Employee.

I. Employee agrees not file any further claim, grievance, request for charges, and/or complaint as it relates to the incidents and facts to date concerning her employment, including this Agreement, except as necessary to enforce this Agreement.

J. All Parties agree that they are entering into this Agreement voluntarily, that they have had full opportunity to review this Agreement with legal counsel, and that they agree that the terms are final and binding.

K. In addition, all Parties agree that all terms to this Agreement are non-precedent setting as it relates to any other individual and as they relate to any interpretation or application of the bargaining agreement for any other purpose.

Jane Doe                                        Date  Principal                              Date

________________________________________ ________________________________

Director of Human Resources

Copy: Personnel File
IV. Resignation Agreements

Often the easiest way for a school district to resolve a dispute regarding dismissal of an employee is to seek a resignation of the employee. Often this resignation is secured through an agreement that secures the employee’s voluntary resignation in exchange for consideration such as continued health insurance, separation payments, a neutral letter or reference, agreements regarding unemployment insurance, waiver of tuition reimbursements or liquidated damages owed to the district by the employee upon resignation, or other compensation or benefits to which an employee may not otherwise be entitled. In exchange, the district often receives a waiver of any claims the employee and union might have against the district. If the employee’s union filed (or might file) a grievance regarding the pending dismissal, the district should also receive a release of claims from the union. A separation agreement can also be evidence that an employee’s resignation was not coerced. See generally Albano v. Columbus Bd. of Educ., No. 2:14-CV-0379, 2015 WL 1221347, at *8 (S.D. Ohio Mar. 17, 2015).

In states where the board of education has the sole power to hire or dismiss employees, this agreement must be accepted by the board of education before the agreement is binding. See, e.g., Hart v. Sch. Bd. of Wakulla Cty., 340 So. 2d 121, 122 (Fla. Dist. Ct. App. 1976) (holding that only the school board could accept a teacher’s resignation). State laws and collective bargaining agreements may contain provisions regarding resignations and may provide employees with time to reconsider a resignation after it has been submitted. See, e.g., Harris v. State Bd. of Agric., 968 P.2d 148, 153 (Colo. App. 1998) (explaining that state law allowed an employee to withdraw a resignation within seven days of submission); Folta v. Sobol, 210 A.D.2d 857, 859, 621 N.Y.S.2d 136, 138 (1994) (explaining that a CBA allowed an employee to withdraw a resignation within 5 years and request reinstatement). Additionally, to waive potential claims of age discrimination employees must be provided with seven days to revoke these agreements. See Section IV.C below.

When employees have the ability to revoke a resignation, a separation agreement should provide a mechanism by which the consideration already provided to the employee will be returned to the district upon revocation. However, this raises practical concerns regarding enforcement of the employee’s obligation to return consideration. For example, if an employee is unwilling to return a separation payment, the district may have to pursue collection efforts in small claims court. An alternative approach for the district might be to have the resignation agreement not provide any consideration to the employee until after any applicable revocation period has expired. In addition, where an employee is able to revoke a resignation, the employer might want to consider moving forward with termination or non-renewal of contract notices and proceedings during the revocation period, particularly if statutory deadlines for such actions will pass during the revocation period. See generally Nickerson v. Webster Par. Sch. Bd., 49,435 (La. App. 2 Cir. 11/19/14), 152 So. 3d 247, 248.

Former employees can challenge the validity of a resignation agreement using any contract law defense. Most commonly, employees will claim that they were under duress when they signed an agreement or that the agreement lacked consideration. Courts generally will not review the adequacy of consideration, merely its existence. See, e.g., Olmsted v. St. Paul Pub. Sch., No. CV 14-740 (RHK/JSM), 2015 WL 13309293, at *6 (D. Minn. June 26, 2015) (allowing an employee to use sick leave to receive pay was consideration); Crawford v. Wilmette Pub. Sch. Dist. 39, No. 05 C 3205, 2007 WL 257636, at *5 (N.D. Ill. Jan. 25, 2007) (holding that the threat of discharge from employment alone is not enough to void a resignation agreement).
Employees may also claim that an agreement was not signed voluntarily. In such circumstances, most federal courts apply a totality of the circumstances test that reviews eight factors: (1) the employee's education and experience; (2) the employee's input in negotiating the terms of the agreement; (3) the agreement's clarity; (4) the amount of time given to the employee for deliberation before signing the release; (5) whether the employee actually read the release and considered its terms prior to signature; (6) whether the employee consulted with an attorney before signing the agreement; (7) whether the employee received benefits in exchange for the waiver that exceeded the benefits to which the employee was entitled by law or by contract; and (8) whether the employee's release was induced by the defendant's improper conduct. *Id; see also Baldwin v. Indep. Sch. Dist. No. 1 of Tulsa Cty.,* No. 15-CV-85-FHM, 2017 WL 536838, at *5 (N.D. Okla. Feb. 9, 2017) (holding that an administrator’s alleged misstatement that an employee could apply for future employment did not render a waiver involuntary where the no-rehire clause was not hidden within the agreement).

A. Terms of a Resignation Agreement

Standard terms in resignation agreements include:

- The effective date for a voluntary, irrevocable resignation;

The district should consider whether an employee will be prevented from applying from future employment with the district. At least one Equal Employment Opportunity Commission (EEOC) official has stated that the EEOC might view such no-apply or no-rehire clauses as retaliatory. *See* Tom Gilroy, EEOC Opposes Settlement Clauses That Bar Re-Application and Rehiring, BNA Daily Labor Report, Apr. 4, 2008. When an employee resigns at a future date, the district should be mindful that a court would likely still consider the employee to be the employee of the district until the effective date of the resignation. The district could be potentially liable for any misconduct of the employee during this period.

- A General release of all claims by employee and union based on common law, statute, regulation, CBA, board policy, or any other source of law or rule.;

Districts should also know which types of claims cannot be waived by law without approval by an administrative agency. Workers compensation claims are commonly claims that cannot be waived without agency approval. From a July 15, 2009 guidance document “Understanding Waivers of Discrimination Claims in Employee Severance Agreements,” the EEOC takes the position that a release of claims cannot include an agreement prohibiting the employee from filing a charge with the EEOC or assisting the EEOC with an investigation because such an agreement would be unlawful retaliation. However, the EEOC does permit an employee to waive his or her right to recover damages from the employer in any action brought by the EEOC. As a result, a release of claims should affirm an employee’s right to file a charge with the EEOC and participate in an EEOC investigation, but waive the employee’s right to recover any damages from the district should the EEOC bring a claim against the district on the employee’s behalf.

- A warranty that no grievance, complaint, or lawsuit has been filed by the employee (and a requirement that the employee withdraw any such grievance, complaint, or lawsuit with prejudice);
- Consideration (and acknowledgment of the sufficiency of the consideration by the employee);

When an employee is suspended without pay pending dismissal, the agreement should address whether the employee will or will not be paid for the time of that suspension. The agreement should consider whether any separation payment qualifies for contributions for retirement benefits, and the tax implications of any such payment. If permitted by state law and board policy, the district may wish to consider whether the school board will revoke and expunge from board minutes any notice of non-renewal or dismissal that has already been issued. When a letter of reference is requested, the district should be careful not to provide a favorable letter of recommendation to an employee that the district was considering terminating, particularly if an employee is resigning in lieu of termination for gross misconduct. The agreement should also consider how the district will handle verbal requests from prospective employers for a reference.

- Confidentiality (consistent with state public records laws), including who exactly is bound by the confidentiality agreement;

Binding all district employees to confidentiality is completely impractical and legally risky because the act of a single low-level employee could result in the district being in breach of the agreement.

- The deadline by which the employee must accept the agreement; and

- Acknowledgement by all parties that the agreement is non-precedential for future disputes by other employees.

- Unemployment compensation.

An agreement might include language providing that the employee is resigning in lieu of termination or nonrenewal for purposes of unemployment compensation. The purpose of this language is to facilitate the employee receiving unemployment benefits, even if the state unemployment compensation statute would otherwise provide that an employee who voluntarily resigns does not qualify for benefits. However, typically the state unemployment agency determines if an employee qualifies for benefits, not the parties to a resignation agreement. As such, the agreement should not affirmatively state that the employee will qualify for benefits.

The district should also consider whether or not it will waive its right to contest the employee’s eligibility for benefits. This consideration is particularly important when an employee is resigning in lieu of termination or nonrenewal for misconduct. Even if the district agrees not to affirmatively contest the employee’s eligibility for benefits, the agreement should be clear that the district preserves its right to respond truthfully to the state unemployment agency’s inquiry into the employee’s eligibility for benefits.

- Non-disparagement clauses.
Employers may want to include language that prevents the resigning employee from disparaging the district. Including such a clause might serve as a warning to the employee and might prevent the employee from disparaging. However, two common problems that arise with these provisions are mutuality and enforceability. First, a union or employee may request that a non-disparagement clause be drafted mutually such that neither the employee nor the district is permitted to disparage the other party. Such mutual language generally places a greater burden on the district than the employee because the district includes a large number of people. The district can limit its burden by binding only school board members and enumerated high-level administrators to the non-disparagement clause.

Second, if the employee breaches such a clause, the district has to decide if it will enforce the agreement and if so how. One possibility is filing a breach of contract claim in state court, but given the limited resources of the employee and the difficulty of proving a district’s damages, such a course of action might not be practical. A second possibility is for the agreement to provide that a breach of the non-disparagement clause will result in the district denying the employee the benefit of the agreement. For example, the non-disparagement clause might provide that in the event the employee disparages the district, the district will terminate its bi-weekly separation payments to the employee. However, this type of clause is only effective during the period of time in which the district is providing some form of on-going consideration to the employee.
B. Sample Resignation Agreement

RESIGNATION AND RELEASE AGREEMENT [Sample]

This Resignation and Release Agreement is entered into by and between the School District (hereinafter “District”) and Jane Doe (hereinafter “Ms. Doe”) as settlement of the employment status of Ms. Doe and any and all other claims and causes of action by and between the parties.

1. Ms. Doe hereby submits her irrevocable resignation from her employment pursuant to her individual Educator Contract with the District to be effective January 26, 2016, recognized as the end of Ms. Doe’s 2015-2016 Educator Contract with the District. Such resignation is attached hereto as Exhibit A. Given the authority of the Superintendent of Schools and Learning to effectively recommend non-renewal to the School Board in this case, the parties stipulate that the School Board would affirm the Superintendent’s recommendation. This resignation and the terms and conditions relating to said resignation are irrevocable.

2. Ms. Doe agrees not to knowingly and intentionally disparage or retaliate against or cause to be disparaged or retaliated against the District, its employees, board members, representatives or students in any manner. The District agrees not to knowingly and intentionally disparage Ms. Doe in any manner.

3. As consideration and for settlement purposes only, the Parties hereby agree as follows:
   - The District hereby waives the liquidated damages provision(s) of Ms. Doe’s Educator Contract.
   - The District shall compensate Ms. Doe based upon Ms. Doe’s 2015-2016 Educator Contract for any remaining sick leave balance at the time of Ms. Doe’s resignation. Such payments shall be less required deductions for state and federal withholdings and any and all applicable employee benefit deductions. Such compensation shall be provided to Ms. Doe pursuant to the regular payroll period immediately following the execution of this Agreement.
   - The District agrees to continue salary payments through June 16, 2016, which shall provide pay based upon Ms. Doe’s 2015-2016 Educator Contract. Such payments shall be less required deductions for state and federal withholdings and any and all applicable employee benefit deductions.
   - The District shall continue health, dental and vision insurance benefits and pay premiums in accordance with the individual teaching contract at the District’s percentage of premium payment until March 30, 2016, for Ms. Doe’s health and dental insurance benefits to the extent provided in the applicable District polices paid in accordance as on active employees, less the required employee premium co-pay.
   - Given the authority of the District Administrator to effectively recommend discharge/non-renewal to the school board in this case, the parties stipulate that the Board of Education would affirm the District Administrator’s recommendation for Ms. Doe’s termination.
• The District agrees to conclude its current investigation of issues to date without providing further discipline and or non-renewal except as set forth in this Agreement, and upon non revocation of this Agreement. All such documents related to the investigation shall be held in the office of the Chief Human Resources Officer. Ms. Doe does not waive any rights that she has under the Wisconsin Public Records law, Wis. Stat. § 19.33, et seq., including those rights provided by 2003 Wisconsin Act 47, if a request is made to inspect any of her personnel records.

• The District and Ms. Doe agree that responses to inquiries from, or statements to, third parties regarding Ms. Doe’s employment shall be directed to the Chief Human Resources Officer and shall be limited to the information contained within Appendix B, verification of dates and positions of employment with the District and statements to the effect that Ms. Doe opted to resign unless authorized by Ms. Doe or required by law.

4. Subject only to the performance by the District of its promises in this Agreement, Ms. Doe hereby releases the District, its officers, directors, agents, members, attorneys and its affiliates (as described above), predecessors, successors, assigns and all persons acting by, through, under, or in concert with them (the “Released Parties”) from any and all charges, claims, demands, damages or causes of action whatsoever which the Ms. Doe has, had or might have been able to assert or claim, based on any act, omission or conduct of any kind on the part of the Released Parties from the inception of any relationships or dealing between the Ms. Doe and any of the Released Parties up through the execution date of the Agreement including without limitation any and all claims arising under federal, state, or local laws; The Individuals with Disabilities Education Act (IDEA), No Child Left Behind (NCLB), Family Education Rights and Privacy Act (FERPA), Title VII of the Civil Rights Act of 1964 (42 U.SC. § 2000e et seq.); Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.); Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. § 791 et seq.); the Americans With Disabilities Act (42 U.S.C. § 12112 et seq.); the Wisconsin Fair Employment Act, all as amended; Older Worker Benefit Protection Act; or under any other applicable federal, state or local laws or regulations (which claims, if proven, provide for remedies that may include back pay, front pay, liquidated damages, attorney’s fees and reinstatement); any claims for wrongful discharge or termination of employment whether arising under a tort, contract, promissory estoppel or statutory basis or any other legal or equitable theory; or any claims in any way arising directly or indirectly out of the Ms. Doe’s services for the District.

5. While nothing contained in this Agreement shall be interpreted to prevent the United States Equal Employment Opportunity Commission from investigating and pursuing any matter which it deems appropriate, and the Employee has the right to participate in any Equal Employment Opportunity Commission investigation, the Employee understands and agrees that, by signing this Agreement, the Employee is waiving any and all rights the Employee may have to reinstatement, damages, remedies or other relief as to any claims the Employee has released and any rights the Employee has waived as a result of the Employee’s execution of this Agreement.

6. To the extent applicable, Ms. Doe waives any rights under Wis. Stat. § 118.22, or any other provision of law, and any Board or Administrative policy or collective bargaining agreement with respect to renewal or non-renewal of her employment contract.
7. **Acknowledgements/Revocation Rights** Each party acknowledges that it has entered into this Agreement knowingly, freely and voluntarily. Ms. Doe acknowledges that:

   A. She has been advised by the District to consult with legal counsel before signing this Agreement.

   B. She understands that this Agreement includes a final general release of the District, its officers, directors, agents, board members, affiliates, predecessors, successors, assigns and all persons acting by, through, under or in concert with them.

8. By entering into this Agreement, the Ms. Doe acknowledges that she is waiving any rights and/or benefits that she may have under any and all Employment Agreements she entered into with the District.

9. This Agreement sets forth the entire agreement between the parties hereto. This Agreement may not be changed orally, but only by an agreement in writing signed by the parties hereto.

10. It is further understood and agreed that the consideration furnished for this Agreement by the District or Ms. Doe is not to be construed as an admission of any liability by either party.

11. This Agreement shall be governed for all purposes by the laws of the State of Wisconsin. If any provision of this Agreement is declared void, such provision shall be deemed severed from this Agreement which shall otherwise remain in full force and effect. Proper venue for any actions arising out of the breach of this Agreement shall be in Circuit Court, Brown County, State of Wisconsin.

12. Ms. Doe agrees that she will not file any claims and/or grievances relating to this matter including the investigation of the facts which lead up to the Ms. Doe’s decision to resign and/or any other actions relating to this matter that have been taken by the District.

13. All parties recognize that this Agreement is non-precedent setting and limited to its unique facts. As such neither this Agreement nor any of its terms can be used as evidence by any party to supports its respective position in any other matter, except as necessary to enforce this Agreement.

14. **MS. DOE AFFIRMS THAT SHE HAS CAREFULLY READ THIS ENTIRE AGREEMENT AND RELEASE OF CLAIMS, THAT SHE FULLY UNDERSTANDS THE EXTENT AND IMPACT OF ITS PROVISIONS. THAT SHE HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER IT FOR A REASONABLE PERIOD OF TIME AND HAS HAD THE OPPORTUNITY TO DISCUSS IT WITH HER ATTORNEY. MS. DOE AFFIRMS THAT SHE IS FULLY COMPETENT TO EXECUTE THIS AGREEMENT AND RELEASE OF CLAIMS AND THAT SHE DOES SO VOLUNTARILY AND WITHOUT ANY COERCION, UNDUE INFLUENCE, THREAT, OR INTIMIDATION OF ANY KIND OR TYPE.**

**IN WITNESS WHEREOF,** the parties have signed this Agreement as of the dates set forth below opposite their names.

Ms. Doe

__________________________________________ ______________________________
Exhibit A

[name]
Chief Human Resources Officer
School District
[address]

Dear Chief Human Resources Officer:

Please accept this as my letter of resignation from my position as a teacher in the School District, which I am submitting today to be effective on January 26, 2016. I appreciate being able to work with the students in the School District.

Sincerely,

__________________________________________ ______________________________
Jane Doe  Date

Exhibit B

January 26, 2016

To Whom It May Concern:

Jane Doe was employed as an art teacher with District from August 22, 1991 until her resignation effective January 26, 2016. Ms. Doe was assigned to High School, teaching art.

Sincerely,

Chief Human Resources Officer
C. Older Workers Benefit Protection Act (OWBPA) and Resignation Agreements

The Older Workers Benefit Protection Act (OWBPA) passed in 1990 established specific requirements for separation agreements that waive an employee’s claims against an employer for age discrimination (against employees 40 or older) under the Age Discrimination in Employment Act (ADEA). 29 U.S.C. § 626(f). Failure to comply with the specific requirements of OWBPA could result in a court invalidating a waiver or release of ADEA claims. See, e.g., Santana v. TGI Friday's Inc., No. 2:15-CV-512-FTM-38CM, 2015 WL 7293655, at *4 (M.D. Fla. Nov. 19, 2015).

1. OWBPA Requirements

In order for such a waiver of age discrimination claims to be considered knowing and voluntary the agreement containing the waiver must:

- Be written in a manner calculated to be understood by the employee;

  “Employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.” 29 C.F.R. § 1625.22(b).

- Specifically refer to rights or claims under the Age Discrimination in Employment Act (ADEA) by name. 29 C.F.R. § 1625.22(b);

- Not waive rights that may arise after the date the waiver is executed;

When an employee executes the waiver but remains an employee until a set event (for example the end of the school year), there is some legal risk that the employee could be subject to additional unlawful treatment such as age-based harassment after the signing of the waiver. The waiver would not be valid against claims arising from this unlawful treatment the employee was subjected to subsequent to signing the agreement. If the district anticipates such liability, the district will want to consider securing the employee’s resignation effective at the date of signing the agreement.

- Provide consideration in addition to things of value to which the employee is already entitled;

- Advise the employee in writing to consult with an attorney prior to executing the agreement;

- Provide the employee with 21 days to consider the agreement;

  “Material changes to the final offer restart the running of the … period; changes made to the final offer that are not material do not restart the running of the … period. The parties may agree that changes, whether material or immaterial, do not restart the running of the … period.” 29 C.F.R. § 1625.22(e). An employee may voluntarily and knowingly sign the release prior to the end of the period and start the 7-day revocation period. The Eighth Circuit Court of Appeals has
held that an employer could revoke its separation agreement offer during the 21-day period. *Ellison v. Premier Salons Int'l, Inc.*, 164 F.3d 1111, 1114 (8th Cir. 1999).

- Provide the employee with 7 days following the execution of the agreement for the employee to revoke the agreement; and

  This time period cannot be shortened by the parties. 29 C.F.R. § 1625.22(e).

- If the waiver is requested in connection with an exit incentive offered to a class of employees, special OWBPA requirements will apply.

  2. **OWBPA Cases**

In one case, an employee claimed that a termination agreement that included an OWBPA provision was not written in a manner calculated to be understood by the employee. *Wells v. Xpedx*, 319 F. App'x 798, 800 (11th Cir. 2009) (per curiam) (unpublished). The court disagreed with the employee, noting that he “was an educated business professional” with experience negotiating contracts, and that in the court’s review the agreement would be readily understandable to someone in the employee’s position. *Id.* Additionally, the employee claimed that he never actually received advice from an attorney about the release. *Id.* However, he was advised in writing to do so. *Id.* The fact that the employee chose not to speak to an attorney was immaterial. *Id.*

The U.S. Supreme Court has held that when an OWBPA release is invalid, the employee does not have to return the consideration provided by the employer to the employee prior to bringing suit for age discrimination. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). However, the Court explained that “courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee, and these questions may be complex where a release is effective as to some claims but not as to ADEA claims.” *Id.*
3. **Sample OWBPA Release**

**RESIGNATION AND RELEASE AGREEMENT [Sample]**

This Resignation and Release Agreement is entered into between the School District (hereinafter “District”) and Jane Doe (hereinafter “Employee”) as settlement of the employment status of Employee and any and all other claims and causes of action by and between the parties.

1. Employee hereby submits her irrevocable resignation from her employment pursuant to her individual Educator Contract with the District to be effective _______, (“Resignation Date”), and recognized as the end of Employee’s 2016-2017 individual Educator Contract with the District. Such resignation is attached hereto as Exhibit A. Employee is hereby released of any and all duties and obligations arising under her 2016-2017 Individual Contract with the District. The District agrees that it solicited Employee’s resignation in lieu of termination. Given the authority of the Superintendent of Schools and Learning to effectively recommend non-renewal to the School Board in this case, the parties stipulate that the School Board would affirm the Superintendent’s recommendation. This resignation and the terms and conditions relating to said resignation are irrevocable.

2. Employee agrees not to knowingly and intentionally disparage or retaliate against or cause to be disparaged or retaliated against the District, its employees, board members, representatives or students in any manner. The District agrees not to knowingly and intentionally disparage Employee in any manner.

3. As consideration and for settlement purposes only, the Parties hereby agree as follows:

   A. The District hereby waives the liquidated damages provision(s) of Employee’s Educator Contract.

   B. The District agrees it will not challenge or contest any unemployment compensation application filed by Employee. The District agrees that Employee’s resignation was not voluntary within the meaning of Wis. Stat. § 108.04(7)(a) nor was it for misconduct connected with her work within the meaning of Wis. Stat. § 108.04(5). The District will respond to any inquiries from the State of Wisconsin Department of Workforce Development regarding the basis for Employee’s lack of employment in the District by indicating that she was terminated due to incompatibility of skills and job requirement considerations.

   Given the authority of the District Administrator to effectively recommend discharge/non-renewal to the school board in this case, the parties stipulate that the Board of Education would affirm the District Administrator’s recommendation for Employee’s termination. Therefore, the parties stipulate that the employer discharged Employee but not for misconduct connected with her work within the meaning of Wis. Stat. § 108.04(5).

   C. The District shall continue health and dental insurance benefits and pay premiums in accordance with the District’s percentage of premium payment until May 31, 2017, for Employee’s health and dental insurance benefits to the extent provided in the applicable District polices paid in accordance as on active employees, less the required employee premium co-pay.
D. The parties agree that Employee resigned her employment in lieu of the District terminating Employee’s employment, but not for gross misconduct within the meaning of COBRA. The District agrees that it will not contest Employee’s eligibility for COBRA on the grounds that she was not involuntarily terminated or that she was terminated for gross misconduct. The qualifying event shall be the date of Employee’s resignation in lieu of termination.

E. Employee shall return any equipment or property furnished to her by the District and belonging to the District. As of the date of this Agreement, Employee shall have no further authority whether express or implied to take any action on behalf of the District. Employee shall not be covered by or employed by the District’s workers’ compensation insurance.

F. The District agrees to conclude its current investigation of issues to date without providing further discipline and/or non-renewal as set forth in this Agreement, and upon non-revocation of this Agreement. All such documents related to the investigation shall be held in the office of the Chief Human Resources Officer. Employee does not waive any rights that she has under the Wisconsin Public Records law, Wis. Stat. § 19.33, et seq., including those rights provided by 2003 Act 47, if a request is made to inspect any of her personnel records.

G. The District and Employee agree that responses to inquiries from, or statements to, third parties regarding Employee employment shall be directed to the Chief Human Resources Officer, and shall be limited to verification of dates and positions of employment with the District and statements to the effect that Employee opted to resign unless authorized by Employee or required by law.

4. Subject only to the performance by the District of its promises in this Agreement, Employee hereby releases the District, its officers, directors, agents, members, attorneys and its affiliates (as described above), predecessors, successors, assigns and all persons acting by, through, under, or in concert with them (the “Released Parties”) from any and all charges, claims, demands, damages or causes of action whatsoever which Employee has, had or might have been able to assert or claim, based on any act, omission or conduct of any kind on the part of the Released Parties from the inception of any relationships or dealing between Employee and any of the Released Parties up through the execution date of the Agreement including without limitation any and all claims arising under federal, state, or local laws; the Individuals with Disabilities Education Act (IDEA), Every Student Succeeds Act (ESSA), Family Education Rights and Privacy Act (FERPA), Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.), Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 791 et seq.), the Americans With Disabilities Act (42 U.S.C. § 12112 et seq.), the Wisconsin Fair Employment Act, all as amended; refusal to rehire claims; Older Worker Benefit Protection Act; or under any other applicable federal, state or local laws or regulations (which claims, if proven, provide for remedies that may include back pay, front pay, liquidated damages, attorney’s fees and reinstatement); any claims for wrongful discharge or termination of employment whether arising under a tort, contract, promissory estoppel or statutory basis or any other legal or equitable theory; or any claims in any way arising directly or indirectly out of Employee’s services for the District.

5. While nothing contained in this Agreement shall be interpreted to prevent the United States Equal Employment Opportunity Commission from investigating and pursuing any matter which it deems appropriate, and the Employee has the right to participate in any Equal Employment
Opportunity Commission investigation, the Employee understands and agrees that, by signing this Agreement, the Employee is waiving any and all rights the Employee may have to reinstatement, damages, remedies or other relief as to any claims the Employee has released and any rights the Employee has waived as a result of the Employee’s execution of this Agreement.

6. To the extent applicable, Employee waives any rights under Wis. Stat. § 118.22, or any other provision of law, and any Board or Administrative policy or collective bargaining agreement with respect to renewal or non-renewal of her employment contract.

7. **Acknowledgements/Revocation Rights.** Each party acknowledges that it has entered into this Agreement knowingly, freely and voluntarily. Employee acknowledges that:

   A. She has been advised by the District to consult with legal counsel before signing this Agreement.

   B. She has twenty-one (21) days from the date of receipt of the Agreement within which to consider it. If Employee does not execute and return this Agreement to the District’s Chief Human Resources Officer by the end of that period, this Agreement shall be void and withdrawn.

   C. She understands that this Agreement includes a final general release of the District, its officers, directors, agents, board members, affiliates, predecessors, successors, assigns and all persons acting by, through, under or in concert with them.

   D. She understands that she may, within seven (7) calendar days following the date of Employee’s execution of this Agreement, revoke the Agreement by delivering a written notice of revocation to Chief Human Resources Officer, School District. For this revocation to be effective, written notice must be received by the District’s Chief Human Resources Officer no later than the close of business on the 7th day after Employee signs this Agreement. If Employee revokes this Agreement it shall not be effective or enforceable, and Employee will not receive the benefits described in this document.

8. By entering into this Agreement, Employee acknowledges that she is waiving any rights and/or benefits that she may have under any and all Employment Agreements she entered into with the District.

9. This Agreement sets forth the entire agreement between the parties hereto. This Agreement may not be changed orally, but only by an agreement in writing signed by the parties hereto.

10. It is further understood and agreed that the consideration furnished for this Agreement by the District or Employee is not to be construed as an admission of any liability by either party.

11. This Agreement shall be governed for all purposes by the laws of the State of Wisconsin. If any provision of this Agreement is declared void, such provision shall be deemed severed from this Agreement which shall otherwise remain in full force and effect. Proper venue for any actions
arising out of the breach of this Agreement shall be in Circuit Court, Brown County, State of Wisconsin.

12. Employee agrees that she will not file any claims and/or grievances relating to this matter including the investigation of the facts which led up to Employee’s decision to resign and/or any other actions relating to this matter that have been taken by the District.

13. All parties recognize that this Agreement is non-precedent setting and limited to its unique facts. As such neither this Agreement nor any of its terms can be used as evidence by any party to support its respective position in any other matter, except as necessary to enforce this Agreement.

14. EMPLOYEE AFFIRMS THAT SHE HAS CAREFULLY READ THIS ENTIRE AGREEMENT AND RELEASE OF CLAIMS, THAT SHE FULLY UNDERSTANDS THE EXTENT AND IMPACT OF ITS PROVISIONS, THAT SHE HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER IT FOR A REASONABLE PERIOD OF TIME, AND HAS HAD THE OPPORTUNITY TO DISCUSS IT WITH HER ATTORNEY. EMPLOYEE AFFIRMS THAT SHE IS FULLY COMPETENT TO EXECUTE THIS AGREEMENT AND RELEASE OF CLAIMS AND THAT SHE DOES SO VOLUNTARILY AND WITHOUT ANY COERCION, UNDUE INFLUENCE, THREAT, OR INTIMIDATION OF ANY KIND OR TYPE.

IN WITNESS WHEREOF, the parties have signed this Agreement as of the dates set forth below opposite their names.

_____________________________________ __________________________________
Jane Doe                  Date

School District

_____________________________________ __________________________________
Chief Human Resources Officer  Date