AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

555 New Jersey Ave., NW, Suite 600, Washington, DC 20001
PHONE: 202.737.5900 • **www.aaup.org**

FACULTY HANDBOOKS AS ENFORCEABLE CONTRACTS: A STATE GUIDE

This new section of *Faculty Handbooks as Enforceable Contracts: A State Guide*[1] provides members with a comprehensive analysis of what a faculty handbook is and how it can be contractually enforced, with links to certain landmark cases and other resources. The update is presented in an easy-to-follow format with discussions of topics including background information, faculty employment, fundamental contract law principles in relation to academic freedom and tenure, tenured and non-tenured faculty, public versus private institutions, and collective bargaining agreements (and their applicability to faculty handbooks). This update also explains contract defenses commonly raised in faculty handbook cases, including handbook disclaimers, financial exigency, and sovereign immunity.

This update is intended to provide general information, not binding legal guidance. If you have a legal inquiry, you should consult an attorney in your state who can advise you on your specific situation.

Section 1. Background—Contracts and Employee Handbooks

Contract law stems from a rationale that analyzes the tenets of fairness, justice, reliance, commitment, certainty, efficiency, and promise-keeping between parties to a contract. These tenets are balanced by the freedom to contract and the fairness of the exchange. The employer-employee relationship is a unique contractual relationship that outlines the terms and conditions of employment. Under the common law of contracts, most employment relationships are "employment at will." At-will employment means that an employee can be terminated at any time or for any purpose, unless there is a statutory, public policy, or contractual limitation on the employment termination right. [2] At-will employees who are terminated cannot sue their employers for breach of contract or wrongful termination, and public at-will employees may not have the advantage of due-process protection under the Fourteenth Amendment, discussed below.[3]

---

[1] *Faculty Handbooks as Enforceable Contracts: A State-by-State Guide* continues to be a resource for those who are seeking a quick overview of states' decisions on whether provisions of faculty handbooks are enforceable as contracts.

[2] See *Restatement (Second) of Contracts § 2* (2014), 2 Education Law §6D.01 (Contracts, Duties and Responsibilities).

[3] At-will employees are protected from certain discriminatory practices by federal law. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.S. §2000e*, et. seq.,* prohibits termination because of an employee's race, color, religion, sex, or natural origin. The National Labor Relations Act, as amended, outlaws retaliatory discharge of an employee for exercising rights under the Act. 29 U.S.C. §158 (1974).

Employment relationships can also be limited by employment handbooks. In the 1980s and 1990s, most state courts took the position that without consideration independent of an employee's job performance or mutual bargaining, employee handbooks were considered unilateral employer statements and unenforceable. Over time, state courts began to find that some (but not all) handbooks could be legally enforceable as contracts. This was welcome relief for employees; however, these decisions were often inconsistent. Most states now recognize that specific promises embodied in employee handbooks may be binding on employers. One exception to this general rule is the use of disclaimers in handbooks, discussed below.

Section 2. Faculty Employment

Two types of legal employment relationships tend to exist between faculty and their institutions—continuous tenure and term contracts.

A. Tenured Faculty

Tenured appointments are ongoing, extending beyond the period indicated in the annual salary letter. Tenure is a presumption of competence and continuing service that can be overcome by an employer only if specified conditions are met.

The 1940 *Statement of Principles on Academic Freedom and Tenure* ("1940 *Statement*") and other AAUP policy documents, notably the *Recommended Institutional Regulations,* speak to the termination of tenured appointments. "Probably because it was formulated by both administrators and professors, all of the secondary authorities seem to agree [the 1940 *Statement*] is the most widely-accepted academic definition of tenure" (*Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978)). According to the 1940 *Statement*, "After the expiration of a probationary period, teachers . . . should have permanent or continuous tenure, and their service should be terminated only for adequate cause . . . or under extraordinary circumstances because of financial exigencies" (15).

B. Faculty with Term Contracts

Many faculty members have "term contracts," which are for one semester or one year. Faculty members who have term contracts can include contingent faculty, part-time faculty, and individuals on probation for tenure. Such nontenured faculty ordinarily have a protected property right to continued employment during the life of their contract, and, if a public employee, a concurrent right to due-process protections if they are subject to dismissal during the period of their employment contract. These types of employment relationships are typically governed by letters of appointment, university, and department policies, and, potentially, the faculty handbook.

Section 3. What Is a Faculty Handbook[4]?

Faculty members are governed by a complex system of rules and standards. In general, a faculty handbook 1) informs faculty about university[5] administrative procedures, legal compliance with federal regulations (including policies on harassment and nondiscrimination, and employment-related matters (that is, policies and procedures on job security and dismissal). Faculty handbooks may also reference applicable collective bargaining agreements.

Section 4. Faculty Employment Relationship

A faculty handbook, together with other university-created materials such as letters of appointment and university and department policies may establish the existence of faculty employment contracts. A professor's contractual rights may be articulated in faculty handbooks because the basic terms and conditions of employment are not necessarily spelled out in the letter of appointment.

Faculty and their university employers sometimes operate in a state of uncertainty as to which employment promises are contractually binding and which are merely illusory (not binding). In typical employment disputes, faculty members assert that they were contractually promised some form of benefit (that is, job security). Universities usually respond either by denying that the promise was made, asserting that the promise if made was not contractual, or, if it was contractual, that the promise was retracted.

Resolution of these disputes may be settled internally or determined by filing a breach-of-contract claim.[6] To prevail in a breach-of-contract claim, faculty will need to demonstrate: (1) the existence of a valid contract; (2) performance of the contract; (3) breach of the contract; and (4) resulting damages. The question for a court is whether the terms contained in the faculty handbook become part of an employment contract.

Section 5. Contract Principles[7]

A. Existence of a Valid Contract

A contract must exist for there to be a breach of contract. In general, a contract is a "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty" (*Restatement (Second) of Contracts § 1*, 2014). A promise is further defined as "a manifestation of intention to act or refrain from acting in a

[4] For the purposes of this outline, the term "Faculty Handbook" may also be referred to as "handbook" or "manual."
[5] For the purposes of this outline, the terms "university," "college," and "institution" are used interchangeably.
[6] Faculty may assert other legal causes of action related to employment claims, but the scope of this section is primarily limited to state breach-of-contract claims.
[7] This discussion is derived primarily from *Restatement (Second) of Contract Laws* (2014) and *Education Law*, § 6D. State law(s) generally do not deviate from fundamental contract principles; however, some state rules include nuanced legal phrasing to define fundamental contract principles.

specified way, so made as to justify a party to a contract in understanding that a commitment has been made" (*Id.* § 2). A valid contract generally requires a bargain in which there is an exchange of promises contemplating acceptance by performance, or some other statement or conduct manifesting a promise and an assent (offer and acceptance), and consideration (a legal term referring to something of value given in exchange for a promise). A faculty employment contract may sometimes be subject to formal approval by the university's board. A contract may be formed, however, even if the "offer" itself is not approved by the board. For instance, in *Salaita v. Kennedy,* 118 F. Supp. 3d 1068 (N.D. Ill. 2015), an Illinois court found the offer letter issued by the university and signed (accepted) by Professor Steven Salaita resulted in a valid contract even though the university, upon review by the board, rescinded its offer.

Faculty handbooks can establish a valid contract only if the faculty handbook is specific enough to show an intent by the university to make an offer. If the handbook contains a disclaimer, discussed below, then the university has not made an offer. A binding offer contract must be communicated *and* accepted. In the faculty handbook context, this means that before a professor can obtain redress in contract, he or she must show that the handbook was not solely an internal document for management, but that it was published for general distribution to faculty (thus serving as communication of the offer) *and* that the professor was generally aware of the policies and continued to work for the university – (that is, acceptance of the terms of employment). Faculty must keep apprised of the university's policies and procedures, particularly as it relates to termination procedures.

B. Performance and Breach

A breach also requires that one party, often the plaintiff filing the lawsuit, "performed" his or her part of the agreement. This can mean they have completed or partially completed their role in the contract. While performance means that one party has fulfilled their obligations of the contract, nonperformance means the other party to the contract, often the defendant, has not. In the university setting nonperformance usually means that a university has not followed its own published procedures.

C. Damages

Last, the plaintiff must show that the defendant's nonperformance resulted in tangible economic losses for the plaintiff. A plaintiff must be able to prove how the specific breach of contract led to various damages. Damages cover any lost money, lost service time, or any other expense incurred due to the breach of contract. The general measure of contract damages is the loss of the bargain, which means what the plaintiff lost due to the other party or parties' breach of the contract. The first step to determining damages in a breach of contract case is to look closely at the terms of the contract. There are often penalties or remedies for breach written into the contract; however, if no specific terms are included, a court *may* consider the following:

- Specific performance of the contract, although this is rare in a private university. In contrast, If a tenured professor at a public university is wrongfully dismissed, state law may require that he or she be reinstated.
- Compensation for time lost due to the breach of contract.
- Reimbursement for expenses.
- Payment for future time, money, and expenses that will be lost due to the breach.
- Any other monetary damages the court finds appropriate according to the terms of the contract (for example, attorneys' fees). If the contract is silent on what "other damages" may be recovered, courts generally have some discretion to award costs and attorney's fees.

Section 6. Contract Enforcement Considerations

It is not possible in this document to address all contract issues, legal decisions, and nuanced legal approaches to the enforceability of faculty handbooks as contracts. Rather, this document examines common legal issues that courts consider when they analyze faculty handbooks as enforceable contracts, including the impact of AAUP's standards and principles.

A. Definite and Complete Terms

The primary concern for courts interpreting contract law is to analyze the intent of the parties in forming the contract. To be *enforceable*, the terms of a contract must be reasonably certain, definite, and complete to enable the parties and the courts to give a contract exact meaning. Certainty means that each term is expressed in an exact manner. When a contract is complete on its face and is plain and unambiguous in its terms, a court is generally not free to search for its meaning beyond the contract itself. This is rare. Faculty employment relationships are constantly in flux (for example, there may be changing work responsibilities, policy changes, economic realities, and shifting power dynamics). Often faculty handbooks are not updated in a timely manner to reflect these changes, thereby making the handbook ambiguous and difficult to enforce.

B. Implied Terms-Generally

In some cases, parties to an otherwise enforceable employment agreement refer to stated policies or established practices to supply implied terms in an agreement.

Illustration:[8]

P receives a letter from C, a local college, offering P a position as assistant professor of geometry on a year-to-year contract. Before P begins work for C, P and C had no communication about whether or when P might be eligible for tenure. C's handbook for professors' states that "assistant professors are eligible for tenure after 5 years of instruction." C's practice is to

[8] Education Law, §6D.01.

conduct a tenure review of assistant professors in their fifth year of teaching. C conducted no such review of P. Shortly before the end of P's fifth year, C notifies P that his contract will not be renewed.

C is in breach of contract. P's eligibility for a tenure review in his fifth year of instruction was an implied term of the employment agreement under C's established practices.

C. Implied Terms—Professional Norms and Academic Custom

In the academic setting, contract law also allows for the recognition of professional norms and academic custom in interpreting the rights and duties of professors and their universities. One of the most important cases involving contractual enforcement of faculty handbooks is *Greene v. Howard Univ., 412 F.2d 1128, 1132, 134 U.S. App. D.C. 81 (D.C. Cir. 1969)*, which addressed claims under District of Columbia law made by several nontenured professors who alleged that the university violated the terms of their employment by failing to provide adequate notice of its decision not to renew their contracts per the terms of the faculty handbook. The professors asserted that their breach of contract claims was based "not only on personal assurances from university officials and on their recognition of the common practice of the University, but also on the written statements of university policy contained in the Faculty Handbook under whose terms they were employed" (*Id.* 1133).

The DC Circuit Court found that not only did the university breach the terms of the faculty handbook, but it was also bound by the professional norms and expectations inherent in an academic setting, namely to provide advance notice of termination to nontenured faculty, and that "[t]his usual practice, of course, can be raised to the level of a contractual obligation" (*Id.* 1133 & n.4*)*. Finding that the professors' contracts "comprehend as essential parts of themselves the hiring policies and practices of the university as embodied in its employment regulations and customs," the court held that "the contractual relationships existing here, when viewed against the regulations prescribed for, and the practices customarily followed in, their administration, required the University . . . to afford the teachers an opportunity to be heard" before terminating their employment (*Id.* 1131, 1135). **The court further analyzed that**, "**Contracts are written, and to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the marketplace are not invariably apt in this non-commercial context"** (*Greene* 1135, emphasis added).

The highlighted language is often cited in cases describing professional norms and academic custom. *Greene* is an important decision because: 1) even though there was a disclaimer in the faculty handbook, the court acknowledged the professional norms and academic customs in a university setting, 2) the university was found to be in breach

because it did not follow its own procedures, and 3) the court took judicial notice of the fact that the faculty handbook under review purported to accept AAUP's policy on tenure (*Greene* 1134 n.7).

The analysis promulgated in *Greene* is often cited in decisions recognizing that professional norms and academic custom are enforceable. In *Howard Univ. v. Best, 484 A.2d 958, 966-67* (D.C. 1984) (Best I), the court found that "[t]he objective view of contract interpretation . . . requires, in the context of University employment contracts, that the custom and practice of the University be taken into account in determining what were the reasonable expectations of persons in the position of the contracting parties" (citation omitted). In that regard, university contracts "are to be read [] by reference to the norms of conduct and expectations founded upon them in a particular manner, unlike, to some degree, contracts made in the ordinary course of doing business" (*Id.*).

D. Incorporation by Reference

Often letters of appointment include language that references, incorporates, or integrates other university promulgated documents (that is, faculty handbooks and university and department policies). Understanding the meaning of this language is important in assessing whether faculty and universities are legally bound by the incorporated documents.

The referencing language must be clear and unequivocal. The terms of the incorporated document must be known or easily available to the other party. Below are a few examples of such language typically found in faculty letters of appointment:

- Example 1: "As a member of the faculty, you are subject to and shall abide by the provisions of X's Faculty Handbook and any approved revisions thereof, department, school and University policies and the By-Laws of the Board of Trustees."
- Example 2: "This Notice of Appointment is subject to and incorporates the provisions of X's Policy Manual, Polices Y and Z, Conditions of Service for Academic and Service Professionals, and Chapter 4 of the University Handbook for Appointed Personnel."
- Example 3: "The University's criteria for retention and promotion shall include teaching, including case supervision, practice of law, community service, and scholarship as defined under the School of Law's Standards and Procedures for Retention and Tenure."

- Example 4: "The Standard Terms and Conditions appended to the offer letter state that the faculty appointment will be renewed on a continuing annual basis, subject to satisfactory annual performance and programmatic needs. The Terms and Conditions also provide that as a full time University employee, you will be subject to all applicable University policies, as they may exist from time to time, including, conflicts of interest, patents, and tangible research property; the Faculty Handbook; and the School of Medicine polices." Renewal letters state, "You may wish to review Appendix C of the Faculty Handbook which includes the University's policy on Academic Freedom and Academic Tenure and the University's obligations in the event of notice of termination .

. . Please remember that all appointments are annual appointments with modifying descriptors and all secondary appointments are annual appointments . . . "

In example 1, a Georgia court held that only the faculty (and not the university) were contractually obligated to comply with the entirety of the faculty handbook. (*Wilson v. Clark Atlanta Univ. Inc.*, 339 GA App. 814, 825, 794 S.E. 2d 422, 431 (Ga. Apps. 2016)). In example 2, a federal district court interpreting Arizona state law held that the "subject to and incorporates" language evidenced a clear intent to make the referenced documents part of the notice of appointment (*Nicolini v. Az. Bd. of Regents*, 2021 U.S. Dist. LEXIS 78914 (Az. Dist. Ct., 2021)(dis'dby stip.)). In example 3, the District of Columbia federal district court interpreting DC law held that "to the extent that the Appointment Letter expressly incorporates the Standards and Procedures at all, it was only for the limited purpose of importing its definitions of the University's specific standards for retention and promotion, and not for providing plaintiff with an express contractual right to all of the procedures it also contains" (*Mawakana v. Bd. of Trs*.,113 F. Supp 3d 340, 348 (D.C.D.C. 2015)). In example 4, a North Carolina court held that the terms of the faculty handbook were not expressly incorporated into a separately existing employment contract and thus were unenforceable (*Shaughnessy v. Duke Univ.*, No. 1:18-CV-461, 2020 U.S. Dist. LEXIS 129808 (M.D.N.C. July 23, 2020)). Further, the court did not characterize the faculty handbook's academic freedom provisions as obligations or promises; instead, the professor's renewal letters characterize these provisions as a "policy" (*Id.*).

Words matter when scrutinizing the language in a writing that references, incorporates, or integrates other documents. The usage or understanding of a word or words may need to be proven to arrive at the meaning intended by the parties.

Section 7. Tenure and Academic Freedom

A. Tenure

One of the most contentious issues in higher education involves an institution's efforts to terminate the tenured appointments of faculty members and term appointments of faculty members before their expiration. When disputing such efforts, faculty at public institutions must commence their suits utilizing state administrative law. Faculty at private institutions must commence their suits as private citizens subject to state contract law.

(i) Public Institutions

Courts have held that tenure at a public institution is a property interest protected by the Fourteenth Amendment of the US Constitution. In the seminal case *Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570* (1972), the US Supreme Court recognized that, even where there was no statute and no contract provision conferring a property interest, one might exist. There, the court addressed whether a public junior college professor had a property right

in continued employment (*Id.* 599). The professor argued that a de facto tenure policy existed based on rules and understandings officially promulgated and fostered by the college and that such a de facto tenure policy could be sufficient to state a property interest (*Id.* 599–600). While emphasizing that "mere subjective 'expectancy'" is not protected by due process, the court nonetheless held in *Perry* that the professor "must be given an opportunity to prove the legitimacy of his claim of entitlement in light of the policies and practices of the institution" (*Id.* 603).

The claim of entitlement, however, must be determined by reference to state law, which varies. For instance, under Louisiana law, a public employee could have a property interest in a job if the employer contracted with the employee to fire him only for cause (*Hall v. Bd. of Supervisors of Cmty. & Tech. Colleges*, 2015 U.S. Dist. LEXIS 65374, 2015 WL 2383744). In Texas, personnel policies or employee handbooks do not create contracts and are no more than general guidelines (*Trudeau v. Univ. of N. Tex.*, 861 Fed. Appx. 604, 609, July 9, 2021). Tenured faculty at Texas public institutions do have protected property interests in their continued employment, however, "the *due process clause* does not protect . . . specific job duties or responsibilities absent a statute, rule, or express agreement reflecting an understanding that [professors] had a unique property interest in those duties or responsibilities" (*Id.*). Moreover, under Texas law "[t]he university's failure to follow its own internal rules does not always establish a due process violation" (*Wigginton v. Jones*, 964 F.3d 329, 338 (5th Cir. 2020)).

(ii) Private Institutions

In private institutions, a tenured professor has no right of legal recovery for violations of constitutional due process. Tenure is based on a bargained for exchange between an institution and a faculty member to create a continuing employment relationship. Thus, the question of whether a professor is entitled to continued employment and was given due process is answered by the terms of the employment contract (including the faculty handbook) or whether the university properly followed its own procedures.

In a seminal case, *Otero-Burgos v. Inter Am. Univ.*, 558 F.3d 1 (5th Cir. 2009), a federal appeals court examined Puerto Rico contract statutes and found that the university breached its contract with a tenured professor because the faculty handbook constituted a binding contract between the university and faculty. The court concluded that the professor was not hired for a "fixed term" as that conclusion would render the concept of tenure meaningless. Relying on the 1940 *Statement of Principles on Academic Freedom and Tenure*, the Fifth Circuit confirmed that the university itself accepts the concept of tenure as outlined in its faculty handbook.

Courts have often held that a university must follow its own termination policies and procedures. For example, in *Branham v. Thomas M. Cooley L. Sch.,* 689 F.3d 558, 565 (6th Cir. 2012), the Sixth Circuit Court of Appeals (interpreting North Carolina law) affirmed the district court's finding that the defendant university breached the employment contract it had with the

plaintiff (a tenured professor) because the contract "provided for a process governing the method by which she could be terminated" and the university "did not comply with that process" (*Id*.). Similarly, in *Dye v. Thomas More Univ., Inc.,* 2021 U.S. Dist. LEXIS 166894, 2021 WL 4006123 (E.D. Kentucky 2021), the Kentucky court found the university's termination procedures were outlined in its faculty policy manual, a bilateral contract obligation that both parties were required to followed. The faculty manual stated that "[s]ubject to due process as outlined by AAUP, the College reserves the right to terminate a contract of a tenured faculty member or a non-tenured faculty member during the term of his/her contract if such faculty member . . . is in violation of his/her contractual responsibilities . . ." (*Id*. 54). The university argued that it complied with these termination procedures, but the court disagreed and found that the university failed to follow its own termination rules.

Under New York law, an employee can bring a breach of contract action where the employee can show that the employer made its employee aware of an express written policy limiting the employer's ability to take adverse employment actions, and the employee detrimentally relied on that policy in accepting employment. Accordingly, "workplace policies, including university policies that relate to a university's relationship with its faculty, can create binding and actionable contracts. Such policies can form part of the essential employment understandings between a member of the faculty and the university and can have the force of contract" ***(****see*, for example, *O'Neill v. New York Univ., 97 A.D.3d 199, 944 N.Y.S.2d 503, 512-13,* App. Div. 2012; *Matter of Monaco v. New York Univ.*, 145 A.D.3d 567, 43 N.Y.S.3d 328, 2016 N.Y. App. Div. LEXIS 8323, 2016). In *Monaco*, the university appealed. The appellate court's analysis directly conflicts with the language of the 1940 *Statement*. The court found that the faculty and *amici curiae* improperly gave meaning to the following phrase in a faculty handbook: "a sufficient degree of economic security to make the profession of teaching attractive to men and women of ability" (from the 1940 *Statement).* This phrase, according to the court, is prefatory, rather than defined. It is part of the faculty handbook section, "Case for Academic Tenure," which explains why tenure is desirable, yet the faculty handbook does not explain how one can obtain tenure. Rather, "the tenure process is detailed elsewhere, and, critically, there is no meaningful discussion of compensation at all, except that set forth in the Faculty Handbook's salary grievance section. Thus, contrary to the Professors' contention, 'economic security,' standing alone, simply does not confer any contractual rights or obligations" (*Monaco v. New York Univ*., 2022 N.Y. App. Div. LEXIS 1118, 12-13, 2022 NY Slip Op 01125, 5-6, 2022 WL 516793, 2022).

B. <u>Academic Freedom</u>

The 1940 *Statement* has been incorporated into many faculty handbooks in American universities and is now the general norm of academic practice in the United States. By including this provision in the faculty handbook, these standards may become enforceable contract provisions in the faculty member's employment relationship with the university. However, contract relief is limited by the language of university documents dealing with academic

freedom and by the ability under state law to make those documents part of an employment contract.

The Wisconsin Supreme Court recently held that Marquette University breached its contract with Professor John McAdams by suspending him for exercising his contractually protected right of academic freedom, *McAdams v. Marquette University*, 2018 WI 88, 914 N.W.2d 708 (2018). McAdams criticized a graduate teaching instructor by name in a blog on her refusal to allow a student to debate gay rights because "everybody agrees on this." The blog was publicized in the national press, and the instructor received numerous harassing communications from third parties. Marquette suspended McAdams and demanded an apology as a condition of reinstatement. When McAdams sued, the district court ruled in favor of the university. But on appeal to the state supreme court, the court found for McAdams.

In its analysis the court relied on Professor McAdams's letter of appointment, which was *subject to* the university's policies, including those found in the faculty handbook (*Id.* 712, emphasis added). Therefore, the university's faculty handbook, including the definition of academic freedom below, was made a part of McAdams's employment contract with Marquette:

> Academic freedom is prized as essential to Marquette University and to its living growth as a university. Professorial academic freedom is that proper to the scholar-teacher, whose profession is to increase knowledge in himself/herself and in others. As proper to the scholar-teacher, academic freedom is grounded on competence and integrity. When scholar-teachers carry on their academic lives in educational institutions, integrity requires both respect for the objectives of the institution in which they choose to carry on their academic lives and attention to the task of reevaluating these objectives as a necessary condition of living growth in human institutions. The University, because it prizes academic freedom, proposes the following safeguards [footnoting a reference to the AAUP's *Statement of Principles of Academic Freedom*] to that freedom:
>
> a. The teacher is entitled to full freedom in research and in the publication of results, subject to the adequate performance of his/her other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
>
> b. The teacher is entitled to freedom in the classroom in discussing his/her subject. This freedom must be integrated with the right of the students not to be victimized and the rights of the institution to have its accepted aims respected.

> c. The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he/she speaks or writes as a citizen, he/she should be free from institutional censorship or discipline, but his/her special position in the civil community imposes special obligations. As a man/woman of learning and an educational officer, he/she should remember that the public may judge his/her profession and institution by his/her utterances. Hence, he/she should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he/she is not an institutional spokesperson (*Id.* 729).

In its analysis of the merits of Professor McAdams's academic freedom breach-of-contract claim, the court specifically cited the AAUP's standards and principles, and concluded, "The University acknowledges this definition (of academic freedom) came from the American Association of University Professors' 1940 *Statement of Principles on Academic Freedom and Tenure.* During their arguments, both the University and Dr. McAdams had recourse to that document, as well as to subsequent AAUP-authored, explanatory documents such as the 1970 Interpretive Comments. Consequently, ***we will refer to those sources as necessary to understand the scope of the academic freedom doctrine***" (*Id.* 729–30, emphasis added). The court reversed and ordered Marquette to immediately reinstate McAdams with unimpaired rank, tenure, compensation, and benefits.

Accordingly, when working with your institutions on drafting academic freedom language for your handbooks and collective bargaining agreements,[9] it is important to expressly define academic freedom as a fundamental contract right. This will provide state courts with greater flexibility and predictability in how they may enforce the parties' contract rights. Professors may also argue academic freedom in contract when (1) there is an express written clause in the faculty handbook guaranteeing academic freedom; (2) a clause from another source like the *1940 Statement* is incorporated by reference*;* or (3) norms or custom of academic freedom at universities generally create an obligation.

Section 8. Collective Bargaining Agreements (Applicability to Faculty Handbooks)

At certain institutions, faculty and their universities are obligated to follow both a faculty handbook *and* a collective bargaining agreement. In these instances, collective bargaining agreements may take legal precedence over faculty handbooks (federal preemption). In other instances, faculty handbooks may take precedence over collective agreements. Last, there are instances where both the collective bargaining agreement and the faculty handbook must be

[9] See also the AAUP's *Guide on Academic Freedom Language in CBAs*, https://www.aaup.org/article/guide-academic-freedom-language-cbas.

followed. Where a statute provides protections, that will control. Below are a few examples outlining the varying approaches.

Healy v. Fairleigh Dickinson University, 287 N.J. Super. 407, 412, 671 A.2d 182, 184, (1996)

A former faculty member filed suit against the university for wrongful discharge, alleging that he had acquired de facto tenure under the provisions of his employment contract, which incorporated the terms of the professor's collective bargaining agreement with the American Association of University Professors' contract and the faculty handbook. The jury found that the professor had attained tenure status. However, the trial court ruled, as a matter of New Jersey law, that the professor's reliance on the AAUP contract and the handbook were misplaced, and that the professor had not attained de facto tenure. The appeals court affirmed noting that the issue of tenure involved an interpretation of the AAUP contract *and* the handbook provisions, which were not ambiguous and did not support the claim for tenure, and, thus, their interpretation was a question of law for the trial court. The court found that the trial court properly applied the rules of contract construction in arriving at the conclusion.

Bloch v. Temple University, 939 F. Supp 387 (E.D. Pa. 1996)

The professor and the university signed a letter of agreement deferring his tenure review. Thereafter, his tenure was denied. The professor claimed that the university failed to follow its tenure procedures outlined in the collective bargaining agreement between Temple University and AAUP Temple. In considering the professor's breach-of-contract claim, the court must first determine whether a letter of agreement existed independent of the collective bargaining agreement. If the letter of agreement did not independently exist, then the professor's claim must be dismissed because under Pennsylvania law he had no right to sue the university for breach of the collective bargaining agreement. The court dismissed the professor's state law claim holding, "The Court cannot possibly analyze whether this alleged contract was breached absent interpretation of the Temple/AAUP collective bargaining agreement. Proper resolution of plaintiff's claim was, therefore, left to the collective bargaining agreement's grievance procedures" (*Id.* 396).

Hott v. College of Sequoias Community College Dist., 3 Cal. App. 5th 84, 207 Cal. Rptr. 3d 398, 2016 Cal. App. LEXIS 745 (2016)

A former community college administrator alleged that the college put her on a different pay step when she became a faculty member. The California trial court ruled in favor of the administrator, finding that pursuant to the faculty handbook she was entitled to a year-to-year credit. The appeals court reversed and held that, as a matter of state law, the collective bargaining agreement between the district and faculty members governed the terms and conditions of the employment of faculty members (*Id.*).

Matter of Lipsky v New York Inst. of Tech., 69 A.D.3d 725, 893 N.Y.S.2d 193, 2010 N.Y. App. Div. LEXIS 250 (2008)

The university denied tenure to a tenure-track professor. Thereafter, the faculty appeals board issued a memorandum questioning the tenure decision. The professor's probationary employment was extended for an additional year, and he would be reconsidered for tenure pursuant to the terms of the collective bargaining agreement as modified by an agreement which provided that it was final, binding, and not subject to arbitration. Tenure was again denied. The professor sued in state court. The court found that under New York law, it is well settled that a party aggrieved by a denial of tenure may maintain an Article 78 proceeding to test whether a college's denial of tenure violated college rules and was arbitrary and capricious.

Roberts v. Howard Univ., 740 A.2d 16 (D.C. App. 1999)(nonfaculty case)

A nonfaculty employee's position was eliminated in accordance with a recently adopted university-wide "work force restructuring plan." Plaintiff filed suit against the university and others alleging, among other things, breach of contract. Plaintiff asserted that the university breached the contract by failing to follow the faculty handbook's procedures. The handbook, however, expressly states that its provisions do not apply to employees who are covered by the collective bargaining agreement unless those provisions are incorporated by reference in the faculty handbook, which they were not. Defendants filed a motion to dismiss the claims against them on the ground that they were preempted by federal law. The court agreed and ruled that the collective bargaining agreement superseded the handbook which terms did not apply.

Section 9. Contract Defenses

In breach of contract claims there are affirmative defenses that can be raised. Below are three common defenses that are repeatedly raised in breach of contract suits.

A. Disclaimers

A disclaimer is a denial or disavowal of a legal claim or a writing that embodies a legal disclaimer. Although courts have tried to articulate clear and reliable rationales in deciding whether a disclaimer is effective or not, the resulting case law differs from state to state and is sometimes even contradictory.

Generally, when interpreting the language of a disclaimer courts will consider the following factors:

- prominence of the disclaimer (in **bold** or in CAPITAL LETTERS or BOTH),
- location of the disclaimer (on the first page)
- exact wording of the disclaimer (promise of contract)
- number of the disclaimers contained in the handbook
- whether the employee had to sign an acknowledgement of the disclaimer

Courts have held disclaimers to be invalid when the wording is not clear, the disclaimer is not prominent enough, or the disclaimer is not adequately communicated to the employee.

Below are examples of disclaimers that rendered the faculty handbook unenforceable as a contract:

- "This handbook contains polices and guidelines applicable to the University's faculty, as the University may adopt from time to time." Alternatively, "This handbook will be updated or revised from time to time as deemed advisable by the University, and in its discretion, in consultation with the faculty." (This means it is not a contract because the university has discretion to unilaterally change the handbook.)

- "This Faculty Handbook is intended only to provide information for the guidance of X university faculty and officers of research . . . Anyone who needs to rely on any particular matter is advised to verify it independently. The information is subject to change from time to time, and the University reserves the right to depart without notice from any policy or procedure referred to in this Handbook. The Handbook is not intended to and should not be regarded as a contract between the University and any faculty member or other person" (*Joshi v. Trs. of Columbia Univ. in N.Y.,* 515 F. Supp 3d 200, S.D.N.Y., Jan. 25, 2021).

B. Financial Exigency

AAUP defines financial exigency as "a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that cannot be alleviated by less drastic means" than the termination of tenured faculty appointments (AAUP *Policy Documents and Reports*, eleventh edition, "Recommended Institutional Regulations on Academic Freedom and Tenure*,"* 2015, 81).

As the AAUP has previously reported, "restoring or maintaining financial health was the board and administration's rationale for abandoning institutional regulations, disregarding fundamental principles and practices of academic governance, discontinuing academic programs, and terminating tenured appointments—yet financial exigency was not declared." The reluctance to declare financial exigency is not new.[10] The AAUP's 2013 report *The Role of the Faculty in Conditions of Financial Exigency* pointed out that "most colleges and universities are not declaring financial exigency even as they plan for widespread program closings and terminations of faculty appointments."

[10] See *COVID-19 and Academic Governance*, https://www.aaup.org/report/covid-19-and-academic-governance.

A seminal case on financial exigency is in this area is *American Association of University Professors, Bloomfield College Chapter v. Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (Ch. Div. 1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (App. Div. 1975)). In *Bloomfield,* plaintiffs—tenured faculty who had been terminated for alleged financial exigency—sought clarification of their tenure status and reinstatement to their former positions. The court ruled that Bloomfield overstepped its authority, as defined by the college's own policies, when it terminated tenured professors under an invalid interpretation of its termination guidelines (*Id.* 268). The legal basis of the plaintiffs' claim of tenure is to be found in the faculty handbook of the college under the heading of "Bloomfield College Policies on Employment and Tenure" (hereinafter "Policies"). This document forms an essential part of the contractual terms governing the relationship between the college and the faculty.

Where an institution adopts "financial exigency" guidelines but fails to adhere to them, the court may not uphold a tenured faculty member's dismissal. Such was the case in *Linn v. Andover-Newton Theological School, 638 F. Supp. 1114 (D.C. Ma 1986)*. There, although a tenured faculty member was dismissed because of financial exigency, the court found the institution breached the tenure contract because it failed to follow its own internal procedures. In the contract, the parties stipulated that it was subject to AAUP guidelines, including the right to a hearing before a faculty group and a college governing board. The college's failure to provide the plaintiff with a hearing breached the contract and the court therefore overturned the dismissal.

In *Wilson v. Clark Atlanta Univ., Inc.,* 339 Ga. App. 814, 794 S.E.2d 422, 2016 Ga. App. LEXIS 665 (2016), *writ of cert denied Clark Atlanta Univ. v. Wilson*, 2017 Ga. LEXIS 668, the university declared an enrollment emergency, instead of financial exigency. The Georgia court found, however, that the university's financial exigency provision in the handbook created "an enforceable additional compensation plan" (*Id.* 822). The court explained that this language guaranteed faculty members a certain salary in the event of a layoff and, if the university declared a financial exigency, it still would be bound by these terms. The university could not avoid its obligations by choosing to declare an enrollment emergency rather than a financial exigency, rendering the additional compensation provision meaningless. The university also asserted that it was relieved of any contractual obligation under the faculty handbook because the handbook contained disclaimer language. The court disagreed and found that (1) each contract incorporated the handbook by reference through the language stating that the professors "are subject to and shall abide by the provisions of The Clark Atlanta University Faculty Handbook"; (2) the terms "tenured" and "tenure-track" are not defined in the contract, but can be defined through parole evidence found in the handbook; and (3) the tenure and tenure-track provisions in the handbook are additional compensation plans that form an enforceable part of their contract with the university (*Id.*) The court concluded that any other decision would render tenure and any additional compensation plans essentially meaningless.

C. Sovereign Immunity.

Under principles of US law, states generally enjoy sovereign immunity. This immunity, enshrined in the Eleventh Amendment of the US Constitution, bars private parties from bringing lawsuits against the states in federal courts established under Article III of the Constitution. Most federal courts have held that state colleges and universities, as well as the boards that govern them, are agencies or instrumentalities of the state, and thus immune from suit in federal court.

There are two forms of sovereign immunity: (1) sovereign immunity under the Eleventh Amendment, which bars federal lawsuits against states, and (2) sovereign immunity under the broader doctrine of state sovereign immunity, which shields a state from liability in both federal and state court, unless it has consented to be sued" (*Fed. Mar. Com'n v. S.C. State Ports Auth*., 535 U.S. 743, 753-54, 122 S. Ct. 1864, 152 L. Ed. 2d 962, 2002). "[T]he *Eleventh Amendment* does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity" (*Id.* 754).

Further, a state official sued in his or her official capacity for damages is not a "person" for the purposes of 42 U.S.C. § 1983 (Civil Action for Deprivation of Rights). See *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997), holding that state officials sued in their official capacities are not "persons" within the meaning of §1983. The US Supreme Court has also determined that official-capacity suits filed against state officials "generally only represent another way of pleading an action against an entity of which an officer is an agent" (*Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114, 1985). Thus, suits against state officials in their official capacity should be treated as suits against the state (*Hafer v. Melo*, 502 U.S. 21, 27, 112 S. Ct. 358, 116 L. Ed. 2d 301, 1991).

Sovereign immunity was intended to shield from liability public officials sued simply for discharging their duties in good faith. Unfortunately, college and universities have strayed from this intended purpose. Instead, institutions use this liability protection to prevent faculty and students from enforcing their constitutional rights. It has also served as a barrier to the development of new constitutional precedent in this area of the law.