



The difference between pupil activity and supplemental contracts

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This factsheet is designed to address the most frequently asked questions about supplemental and pupil activity contracts. The information is of a general nature. Readers should seek the advice of legal counsel with specific legal problems or questions.

What is a supplemental contract? A pupil activity contract?

Supplemental contracts are limited contracts given to **teachers** to complete additional duties outside the scope of their teaching duties. "Pupil activity contracts" are very similar to supplemental contracts; however, they are given to **individuals who are not licensed to teach**. To illustrate, a teacher, receives a supplemental contract to be the head football coach. An individual who is not licensed to teach, receives a pupil activity contract to be the head football coach. The duties may be the same, but the type of contract and the employment relationship are different depending on the licensure status of the recipient.

For which types of activities are supplemental and pupil activity contracts issued?

The most common types of activities are for coaching athletics, supervising extracurricular activities and clubs, extended service and advisory positions. The positions will vary from district to district based on its extra- and co-curricular activities. The law requires districts to give written supplemental contracts to teachers who receive compensation for performing duties in addition to their regular teaching duties (Ohio Revised Code Section (RC) 3319.08). "Regular teaching duties" are defined by each board in its teacher contract (1969 Ohio Atty. Gen. No. 025). Other situations where courts have found a supplemental contract is required:

- where a collective bargaining agreement indicates an intent to compensate teachers for extra duty;
- when a teacher is required to act as a substitute during planning periods; or
- where a teacher acts as a guidance counselor in addition to teaching.

Can the board assign supplemental duties through board policy and regulations or through teaching contracts?

Boards retain the right to include extra duties such as coaching or advising in a teaching contract by means of a negotiated agreement (*Wolf v. Cuyahoga Falls City School Dist. Bd. of Educ.* (1990), 52 Ohio St.3d 222). However, this is not a desirable way to handle these duties from a management perspective. Before condensing teaching and supplemental duties into one contract, the board should consider that it is much more difficult to nonrenew a limited teaching contract than a supplemental contract. By consolidating duties into one contract, the board may deprive itself of options it otherwise would have to bring someone else into the supplemental position. The better approach is to hire individuals for extra duties under supplemental contracts that automatically nonrenew. This protects the district from unforeseen difficulties. A board considering assigning extracurricular duties to teachers without issuing supplemental contracts should consult legal counsel.

May an administrator be employed under a supplemental contract?

Certified administrators may be eligible for supplemental contracts. RC 3319.08 authorizes the issuance of supplemental contracts to "teachers." RC 3319.09(A) defines "teacher" as including any individual certified to teach who is currently

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employed in certain designated administrative positions. Thus, a qualified administrator may be entitled to the statutory preference afforded teachers for supplemental contracts. A district also may preclude administrators from specified supplemental positions by contract or policy. From a practical perspective, the administrative positions involve a significant time commitment and boards should consider the expectations of the administrator prior to authorizing additional duties.

Can a nonteaching employee receive a supplemental contract?

A nonteaching employee, who is hired to supervise or coach a pupil activity, does not receive a true “supplemental” contract, even though they are sometimes referred to as supplemental contracts. The nonteaching employee has no teaching duties to “supplement” with additional duties. Instead, they receive a type of contract that is very similar, often called a pupil activity contract. This contract often has the same terms as a teacher’s supplemental contract. The difference is the recipient, and the legal status of the contract under Ohio law, i.e., the creation and nonrenewal of such a contract.

Do individuals who are not teachers need to be licensed to coach or advise?

Yes. RC 3313.53(C) permits boards to employ a nonlicensed individual to direct, supervise or coach a pupil activity program as long as that individual holds a valid pupil activity program permit issued by the State Board of Education. The minimum requirements for the permit are established in RC 3319.303 and Ohio Administrative Code section (OAC) 3301-27-01 and include passing a criminal records check, providing evidence of competency, the ability to work with students, and knowledge of district rules and regulations and completion of approved CPR and first aid courses. The permit is valid for three years and is renewable. If the permit is suspended, revoked or limited by the State Board, the board of education may suspend or terminate the employment contract. One court found that a contract issued in violation of RC 3313.53(C) was invalid and unenforceable (*Holloway v. Ohio Dep’t. of Educ.* (2007), 2007 Ohio Misc. LEXIS 138, 2007-Ohio-1988).

Do we have to pay overtime for supplemental and pupil activity contracts?

The Fair Labor Standards Act (FLSA) (29 United States Code 207) is a federal law that requires all employers, including boards of education to pay a minimum wage and to compensate hourly employees at a time and a half rate for hours worked over 40 hours. Teachers are specifically exempt from this law. Nonteaching employees who are paid hourly must be

paid overtime for hours worked in excess of 40 hours. The rights under the FLSA may not be waived and cannot be bargained away. Supplemental or pupil activity contracts are usually for a set amount of money. The employee then works an indeterminate amount of time per week, the actual number of hours of which is out of the control of the employee and the district. This means that a bus driver, cook, custodian or other nonteaching employee who is hired under a pupil activity contract will need to keep time records and be paid overtime if their coaching duties lead them to work more than 40 hours per week. The U.S. Department of Labor (DOL) has issued an opinion letter stating that nonteaching employees may be paid a sum for volunteering to coach, which could not exceed 20% of what the district would pay to hire a coach in the same position. This may conflict with the district’s collective bargaining agreement. The agreement may require the board not to compensate anyone at a rate higher or lower than it would pay a teacher. The nominal sum is often lower, and paying overtime is often higher. The agreement may prohibit filling a paid position with a volunteer. The DOL’s letter also appears to conflict with RC 3313.53(F), which requires compensation paid to a nonlicensed individual to be the same amount as the position was or would be offered to the district’s licensed employees. The unfortunate result is that many districts have opted not to hire nonteaching staff for pupil activity coaching or advising. It may be possible to work out a solution, and boards are advised to consult counsel to develop a plan for a particular situation.

The boosters want to partially fund the football coach’s salary. Is this permissible?

The Ohio Ethics Commission has issued an opinion on this important topic. In opinion 2008-01, it held that a booster group or other entity may not compensate a coach or advisor to supplement the salary the district pays to the employee. The commission found that RC 2921.43 “prohibits a public servant from soliciting or accepting, and prohibits any person from promising or giving a public servant, except as allowed by law, any compensation: (a) to perform his or her official duties; (b) to perform any other act or service in his or her public capacity; (c) for the general performance of the duties of his or her public office or public employment; or (d) as a supplement to his or her public compensation.”

The commission left districts a way to address this issue. A booster group or support organization can donate funds to the district, and then the district can use those funds to pay the salary of a coaching or advising position.

What is the initial hiring procedure for a supplemental contract?

Under Ohio law, supplemental contracts are limited contracts (RC 3319.08). Only some of the traits of limited teaching contracts apply to supplemental contracts. A supplemental contract must be in writing, specifying additional duties the teacher must perform and the salary. The contract should have a clear statement of its duration, which may be for any period up to five years, especially the date of termination. The contract should state that the teacher agrees to perform the duties of the position as prescribed under Ohio law, board rules and regulations under any relevant job description adopted by the board.

The initial employment of a teacher under a supplemental contract requires the superintendent's nomination (RC 3319.07). Without the nomination, the board may not grant a supplemental contract to a teacher.

What is the initial hiring procedure for a pupil activity contract?

Pupil activity contracts are nonteaching employee contracts. Boards of education are permitted to employ nonlicensed individuals who have pupil activity permits to direct, supervise or coach a pupil activity program (RC 3313.53). However, the board may only do so if it passes a resolution that it has first offered the position to licensed individuals in the district and no one qualified has applied for and accepted the position and then it has offered the position to licensed individuals not employed by the district and no one qualified has accepted the position.

Pupil activity contracts must be in writing and must state the compensation to be paid to the employee. The compensation must be the same as that offered to the district's licensed employees and cannot be reduced except as part of a uniform plan affecting the entire district (RC 3313.53). Although a common practice, a superintendent's nomination is not required for the initial employment of a nonlicensed person under a pupil activity contract.

Despite statutory language providing that a teacher who meets minimum job qualifications must be given first preference for the position, some case law indicates that the board of education is not compelled to employ a certified staff member in this situation. The courts have concluded that a board decision as to who is "qualified" is subject to deference and will not be overturned absent an abuse of discretion.

In one case, the court held that RC 3313.53 does not impose any obligation to hire an applicant from the staff to fill a supplemental position, even if all the other preconditions other than the board's actual vote have been met (*Gardner v. Liberty Center Local Schools Board of Education* (June 1, 1982), Henry App. No. 7-81-14, unreported). Another court has reasoned

that a certified person is not automatically "qualified" for a supplemental position, and the determination of a person's qualifications is a matter entrusted to the board of education that cannot be overturned absent a showing that the board's decision was an abuse of discretion (*Harrah v. Harrison Hills City School District Board of Education* (Aug. 11, 1981), Mahoning App. No. 369, unreported). If a board of education decides to employ a noncertified person over a certified employee who is both qualified and has expressed an interest in the job, the board should have very specific reasons for its determination that the noncertified individual is the better qualified applicant for the position.

What is the renewal/nonrenewal procedure for a supplemental contract?

Supplemental contracts for certificated employees are exempt from the evaluation, notice and hearing provisions applicable to all other limited contracts (RC 3319.11(I)). Supplemental contracts should include a termination date, thus eliminating the need for later board action. Due to conflicting case law, the contract should clearly state that all supplemental duties automatically terminate when the contractual activity ends for the school year or on a certain date. One example is a contractual provision to coach "through the regular season and all applicable tournament rounds." Another is to "advise the yearbook for the 20__ school year." By specifying contract length, districts may be able to avoid claims for multiyear supplemental contracts. Failure to provide a clear expiration date may result in unexpected scenarios.

Re-employment of a teacher on a supplemental contract where the superintendent has failed to recommend the employee requires a three-fourths vote (*Mason v. Conneaut Board of Education* (Aug. 19, 1994), Ashtabula App. No. 93-A-1842, unreported). Where the superintendent recommends a teacher's supplemental contract be renewed, the contract is nonrenewed when the contract fails to obtain three affirmative votes (RC 3313.18).

What is the renewal/nonrenewal procedure for a pupil activity contract?

Pupil activity contracts are nonteaching employee contracts. Employees employed under these contracts will be automatically re-employed if the board fails to provide written notice of nonrenewal on or before June 1 (RC 3319.083, (*Pistone v. Canfield Local Bd. of Educ.* (June 23, 1987)), Mahoning App. No. 87, unreported). Because of this court of appeals case, it is recommended that boards of education take formal action to nonrenew all pupil activity contracts and provide notice of such nonrenewal by June 1. If an individual's pupil activity permit is suspended, revoked or limited by the State Board, the board of education

may suspend or terminate the employment contract.

Where the superintendent does not recommend the re-employment of a pupil activity supervisor, the board may re-employ an individual in a pupil activity position by a majority vote of the entire board (RC 3313.18). Note that this is different than for teachers on supplemental contracts, where a three-fourths vote is required to override the superintendent's refusal to nominate.

After a person has been granted a pupil activity contract, RC 3313.53(D)(2) allows the board to renew the contract without first offering the contract to any qualified certificated person and without adopting the resolution required for the initial award of such a contract. RC 3313.53(D)(2) seems to permit a school district to renew such a contract for one or more years. However, RC 3313.53(F) limits these supplemental contracts to one year. Therefore, whether multiple-year contracts are permissible is not clear from the statute. Renewing the pupil activity contract for a term not to exceed one year avoids this potential uncertainty.

Can a teacher achieve continuing contract status for supplemental duties?

The Ohio Supreme Court has held that continuing contract status cannot be obtained with respect to supplemental teaching duties, even though a teacher has attained tenure under a regular teaching contract (*Tate v. Westerville City Bd. of Educ., supra*). A court of appeals has held that where a teacher's continuing contract provides for supplemental duties such as "extended service," the board will be presumed to have granted the teacher a supplemental contract for

the maximum period allowed for limited contracts, which is five years (*Swaykus v. Board of Education of the East Holmes Local School District, supra*). Again, the best way to avoid this issue is to set forth the terms of the supplemental contract in a separate document with a specified term and termination date.

Bargaining implications

When negotiating collective bargaining provisions relating to supplemental contracts, the board must consider the implications of RC Chapter 4117. Since provisions relating to supplemental contracts directly involve terms and conditions of employment, they constitute mandatory subjects of bargaining.

Since supplemental contracts are by law limited contracts, negotiated provisions relating to limited contracts might be construed to apply to supplemental contracts as well. The Ohio Supreme Court has noted that supplemental contracts for teachers do not automatically renew pursuant to RC 3319.11. But a board should be familiar with the conditions of dismissal and nonrenewal that the bargained agreement imposes. The failure to comply with any negotiated requirement might result in the invalidation of board action to nonrenew or terminate a supplemental contract. Many negotiated agreements specify that all supplemental contracts automatically nonrenew at the end of the school year.

The information in this factsheet is intended as general information. It should not be relied upon as legal advice. If legal advice is required, the services of an attorney should be obtained.