



# The difference between pupil activity and supplemental contracts

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*This fact sheet 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? What is 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 coach volleyball. An individual who is not licensed to teach would receive a pupil-activity contract to coach volleyball. The duties may be the same but the type of contract and employment relationship differ 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, and extended service and advisory positions. The jobs vary in districts depending on their extracurricular and cocurricular 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.Ops. No. 1969-025). Courts also have found a supplemental contract is required when:

- a collective bargaining agreement indicates an intent to compensate teachers for extra duty;
- a teacher is required to act as a substitute during planning periods;
- 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 Edn.*, 52 Ohio St.3d 222, 556 N.E.2d 511 (1990)). 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 the teaching contract, the board may deprive itself of the option 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."

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RC 3319.09(A) defines “teacher” as including any individual certified to teach who is currently 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, most administrative positions involve a significant time commitment and boards should consider the administrator’s job duties prior to authorizing additional duties.

### **May a nonteaching employee receive a supplemental contract?**

A nonteaching employee hired to supervise or coach a pupil activity does not receive a true supplemental contract, because the nonteaching employee has no teaching duties to “supplement” with additional duties. Instead, a nonteaching employee receives 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, for example, the creation and nonrenewal of such a contract.

### **When is a pupil-activity permit required?**

Nonlicensed employees must have a valid pupil-activity permit issued by the State Board of Education prior to directing, supervising or coaching a pupil-activity program (RC 3313.53(C)).

Licensed employees are required to have a pupil-activity permit only if they direct, supervise or coach a pupil-activity program that involves athletics, routine or regular physical activity or health and safety considerations (Ohio Administrative Code (OAC) 3301-27-01(E)).

### **What are the minimum requirements for directing, supervising or coaching a pupil-activity program?**

Prior to hiring any individual to direct, supervise or coach a pupil-activity program, the district must ensure that the individual has a criminal records check that discloses no disqualifying offenses and is competent to direct, supervise or coach a pupil-activity program as defined by OAC 3301-27-01(C)(1) (a) through (e).

Any nonlicensed or licensed individual hired to direct, supervise or coach a pupil-activity program that involves athletics, routine or regular physical activity or health and safety conditions also is required to obtain a pupil-activity permit, which requires a demonstration of good moral character and completion of approved CPR and first aid courses.

Pursuant to RC 3319.303, individuals hired to

coach interscholastic athletics, whether licensed or nonlicensed, also are required to complete specific training courses related to head injuries. Individuals applying for a first-time pupil-activity permit must successfully complete an approved training program that focuses on brain trauma and brain injury management. An individual applying for a pupil-activity renewal permit must have successfully completed, within the previous three years, an approved training program that recognizes the symptoms of concussions and head injuries or an approved training program that is authorized and required by an organization that regulates interscholastic athletic competition and events.

### **How long are pupil-activity permits valid?**

Most permits are valid for three years, and all permits are renewable. An individual holding a four-year educator license or four-year alternative resident educator license is only eligible to apply for and be issued a four-year pupil-activity permit. An individual holding a five-year professional educator license, senior professional educator license or lead professional educator license is only eligible to apply for and be issued a five-year pupil-activity permit (OAC 3301-27-01(B)).

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 Dept. of Edn.*, Ct. of Cl. No. 2006-06442-AD, 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 compensate hourly employees at a time-and-a-half rate for hours worked over 40 hours a week. Teachers are exempt from this law. Nonteaching employees paid hourly must be paid overtime for hours worked in excess of 40 hours. Rights under FLSA may not be waived by the employee 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. 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 (FLSA 2005-51). 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 often is lower, and paying overtime often is higher. The agreement may prohibit filling a paid position with a volunteer.

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 particular situations.

### **The booster group wants to partially fund the football coach's salary. Is this permissible?**

No. Ohio Ethics Commission (OEC) Opinion 2008-01 held that a booster group or other entity may not compensate a coach to supplement the salary the district pays to the employee. OEC 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:

- to perform his or her official duties;
- to perform any other act or service in his or her public capacity;
- for the general performance of the duties of his or her public office or public employment; or
- as a supplement to his or her public compensation."

However, OEC left districts a way to address this issue. A booster group or support organization may donate funds to the district, and then the district may use those funds to pay the salary of a coaching or advising position if it so chooses. The same restriction also applies to any other district employee.

### **What is the initial hiring procedure for a supplemental contract?**

Under Ohio law, supplemental contracts are limited contracts (RC 3319.08), but not all limited teaching contract requirements apply to supplemental contracts. A supplemental contract must be in writing and specify 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, and should include a termination date. 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).

### **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 do so only 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;
- then offered the position to licensed individuals not employed by the district and no one qualified has applied for and accepted the position (RC 3313.53(D) (1).

Pupil-activity contracts must be in writing and must state the compensation to be paid, duration of the contract (term not to exceed one year) and other terms of employment. The compensation must be the same as that offered to the district's licensed employees and may not be reduced except as part of a uniform plan affecting the entire district (RC 3313.53(F)). 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 the qualifications for the job 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 Ctr. Local Schools Bd. of Edn.*, 3d Dist. Henry No. 7-81-14, 1982 Ohio App. LEXIS 15291 (June 1, 1982)).

Another court 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 Dist.*

*Bd. of Edn.*, 7th Dist. Harrison No. 369, 1981 Ohio App. LEXIS 12735 (Aug. 11, 1981)).

If a board of education decides to employ a noncertified person instead of a certified employee who is qualified and has expressed an interest in the job, the board should have specific reasons for its determination that the noncertified individual is the better qualified applicant for the position. It is wise to consult with legal counsel when making this determination.

### **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 when the superintendent has failed to recommend the employee requires a three-fourths vote (*Mason v. Conneaut Area City School Dist. Bd. of Edn.*, 11th Dist. Ashtabula No. 93-A-1842, 1994 Ohio App. LEXIS 3640 (Aug. 19, 1994)). When the superintendent recommends a teacher's supplemental contract be renewed, the contract is nonrenewed if it 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 automatically will be 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 Edn.*, 7th Dist. Mahoning No. 87 C.A. 13, 1987 Ohio App. LEXIS 7655 (June 23, 1987)). 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.

Re-employment of an individual on a pupil-activity contract when the superintendent has failed to recommend the individual requires 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 pupil-activity contracts to one year. Therefore, the statute is not clear on whether multiple-year contracts are permissible. Renewing the pupil-activity contract for a one-year term 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 Edn.*, 4 Ohio St.3d 206, 448 N.E.2d 144 (1983)). An Ohio appellate court has held that when 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. Bd. of Edn.*, 5th Dist. Holmes No. CA-338, 1983 Ohio App. LEXIS 13641 (Feb. 7, 1983)). Again, the best way to avoid this issue is to set forth supplemental contract terms in a separate document that includes a 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.

Because supplemental contracts are, by law, limited contracts, negotiated provisions relating to limited contracts might be construed to apply to supplemental contracts as well. The RC 3319.11 automatic renewal provisions do not apply to supplemental contracts (RC 3319.11(I); *Gillenwater v. Reynoldsburg City School Dist. Bd. of Edn.*, 10th Dist. Franklin No. 98AP-1623, 1999 Ohio App. LEXIS 4827 (Oct. 14, 1999)). However, each board should be familiar with any dismissal and nonrenewal conditions imposed by the collectively bargained agreement.



The failure to comply with any negotiated requirement might result in 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. Boards of education should review collectively bargained language, any past practices and the law prior to making determinations or changing existing practices.

*The information in this fact sheet 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.*