



**PENNSYLVANIA
ASSOCIATION OF
SCHOOL BUSINESS
OFFICIALS**

**ACT 93
SECTION 11-1164
OF THE SCHOOL CODE**

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Who is To Be Included in an Act 93 Compensation Plan?

- School administrators as defined under Section 11-1164 of the School Code. A “school administrator” is defined to mean “... any employe of the school entity below the rank of District Superintendent, Executive Director, Director of Vocational-Technical School, Assistant District Superintendent, or Assistant Executive Director, but including the rank of first level supervisor, who by virtue of assigned duties is not in a bargaining unit of public employes ...”



What Positions Cannot be Included in an Act 93 Plan?

- Superintendent, commissioned Assistant Superintendent, IU Executive Director, IU Assistant Executive Director, Business Manager, Personnel Director.



Which School Employers are Covered by the Act 93 Requirements?

- All school districts
- All intermediate units
- All vocational-technical schools



What is to be Covered Under an Act 93 Plan?

- A description of the program as to how administrative salaries are determined
- Salary amounts or a salary schedule
- A listing of fringe benefits
- Needs to be in writing
- Must be in effect for at least one school year



Can There be Multiple Act 93 Plans?

- Yes. There is no requirement that there be one Act 93 plan for all administrators. Many districts break up the compensation plans. For example, a school can have a separate compensation plan for head custodians (if they are not in the Bargaining Unit) and a different compensation plan for principals, etc.



Who Must Sign an Administrative Compensation Plan?

- Technically, the plans need not be signed. Indeed, we recommend that the plans should not be signed, since they are in the nature of compensation policies that ultimately could be unilaterally approved by the governing board.



Are Administrative Compensation Plans Negotiated?

- No. The employer has an obligation to “meet and discuss in good faith” over the terms and provisions of the plan. Agreement need not be achieved with the administrative group.



Can an Act 93 Group Appoint a Subgroup or Appoint a Representative to Act on Their Behalf?

- There is nothing in the Act that explains this process. Frequently, administrators do select a subgroup to meet and discuss with the Board or a representative on the part of the Board. The only obligation is that there be a meet and discuss in good faith.



Can an Act 93 Group Appoint a Subgroup or Appoint a Representative to Act on Their Behalf?

- In some school entities, the Superintendent or Executive Director acts on behalf of the administrative group. The Superintendent or Executive Director, as well as the Board, needs to be comfortable with that situation because if it gets contentious, it could put the Superintendent or Executive Director in a difficult position.



Can a Superintendent, Assistant Superintendent, Executive Director, Assistant Executive Director, Personnel Director, or Business Manager Incorporate the Same Benefits as in an Act 93 Compensation Plan?



- Yes. As part of these job classifications, contracts or compensation policies can incorporate at least the benefit levels that are in an Act 93 compensation plan.



Assume that a school entity does provide a fringe benefit that pays administrators for unused but accrued sick and vacation days under an Act 93 plan.



The employer and the Act 93 group would like these days to be deposited into a 403(b) plan to shelter this benefit upon an administrator's retirement. How is that accomplished?



- In order to qualify for an appropriate 403(b) contribution, the contribution needs to be non-elective. In other words, an administrator cannot have a choice, and all administrators must agree to have these contributions placed in a 403(b) plan.



- The question becomes how and Act 93 group can make a non-elective contribution.
- The only way to do that is to have individual signoffs of each administrator to the Act 93 requirements regarding a 403(b) plan, and there must be a requirement that all new Act 93 administrators (even after the introduction of the plan) must agree to signoff appropriately for a 403(b) Plan.



Sample 403(b) language follows



Resignation and Retirement

Upon separation from service, other than for termination for cause, if the employment separation occurs before the end of a fiscal year, the administrator shall be credited with vacation earnings for one (1) year proportionate to the length of his/her service during that year.



The District shall further cause to be contributed to the administrator's 403(b) contracts and tax sheltered annuities, the current per diem rate based upon 261 work days for any vacation days the administrator was entitled to receive for the current year and for any unused vacation days accumulated from the previous years and one-half (0.5) of the administrator's per diem rate based upon 261 work days for unused sick days up to a maximum of five (5) days for each year of service beginning July 1, 1995.



The District shall further cause to be contributed to the administrator's 403(b) contracts and tax sheltered annuities, any sums due and payable pursuant to the Administrative Longevity Plan set forth in Exhibit "X" to this Administrators' Compensation Plan. The District shall cause to be contributed as an employer non-elective contribution to one or more annuity contracts described in Code Section 403(b), in the year of separation of service, an amount up to or equal to the limits established by law for such accounts.



Further, if the compensation exceeds the limits established for such contracts in the year of separation of service, the District shall cause to be contributed as an employer non-elective contribution to one or more annuity contracts described in Code Section 403(b) an amount up to and equal to the established limits for such contributions in each subsequent year for a period of not more than five (5) years or until the benefit amount is exhausted.



In order for such contributions to be made, all administrators agree to read, approve, and accept the following agreement:



"This shall acknowledge that I have agreed to the Addendum to my Employment Agreement for the purpose of allowing me to receive non-elective contributions to Section 403(b) annuity contracts, including payments for the Administrative Longevity Plan set forth in Exhibit "X" to the Administrators' Compensation Plan, which have been established on my behalf.



I further acknowledge and agree that in the event I am deemed to have been in constructive receipt of any of the amounts contributed or intended to be contributed to the Section 403(b) annuity contracts, I shall reimburse the District for any withholding taxes, and any interest thereon which the District may be required to pay as a result of such constructive receipt.



Alternatively, at the request of the District, I shall pay such taxes directly to the IRS or the Pennsylvania Department of Revenue. I further authorize the District to satisfy my repayment obligation by applying any amounts, which the District was otherwise required to contribute to a Section 403(b) annuity contract on my behalf as described in the Addendum.



It is my intention that this letter of agreement serves to set forth my obligation to indemnify and hold harmless the District, its agents, employees, and board members from any claim, which the IRS or the Pennsylvania Department of Revenue could assert with respect to the Addendum and the transactions described therein.”



In case of the death of the 403(b) plan holder, all remaining entitled monies are due to the named beneficiary designated on the plan. Additionally, if the District were to enter into bankruptcy and/or receivership by the Commonwealth of Pennsylvania, all unpaid monies will be paid to the 403(b) plan holder.



Assume that a school entity offers administrators a fringe benefit that permits the administrator to either:



1. Elect to receive a lump sum payment for each unused sick day; or
2. Apply a certain amount of sick days toward the payment of healthcare insurance.

Is there a tax implication?



- Yes. See the attached decisions.
 - **Private Letter Rulings Private Letter Ruling 200724008, 06/15/2007, IRC Sec(s). 61**
 - **Private Letter Rulings Private Letter Ruling 9046014, 8/17/1990, IRC Sec(s). 106**
- Construction receipt doctrine.



Are There Any Other Tax-Related Issues that Need to be Addressed in an Act 93 Compensation Plan?

- As with all compensation plans, there may be tax implications. If there are unusual payment or benefit arrangements, be sure to have them reviewed by a tax attorney representing the interests of the district.



Are There Any Other Tax-Related Issues that Need to be Addressed in an Act 93 Compensation Plan?

- Many Act 93 plans contain provisions that may not survive a tax review, such as medical expense reimbursement plans (that must survive the discrimination rules) and many other situations that pose constructive receipt issues that must be addressed in the employer's Section 125 plan.



Are There Any Other Tax-Related Issues that Need to be Addressed in an Act 93 Compensation Plan?

- For example, if the district has an opt-out waiver for healthcare, it must be affirmatively addressed in the Section 15 plan, or there will be a constructive receipt problem under the compensation plan.



What Other Issues Should an Employer be Concerned About?

- Because of the recently passed regulations on the need for 403(b) plans and 409A salary deferral issues, these issues should be addressed in the Act 93 compensation plan. See Client Alert.



What is the Legal Consequence of Being Covered by Act 93 Plan?

- The Act 93 plan does have contractual force once it is approved. See Curley v. Board of School Directors of the Greater Johnstown School District, 163 Pa. Cmwlth. 648, 641 A.2d 719 (1994).



If an Administrative Compensation Plan has Contractual Force, How Can it Be Amended?

- It may not be a bad idea to have an amendatory provision, which may be required from time to time, to deal with tax-related issues or other issues that were not contemplated when the ACP was approved.



If an Administrative Compensation Plan has Contractual Force, How Can it Be Amended?

- In the absence of that, there should be a meet and discuss prior to the Board having the right to unilaterally implement the amended ACP.



What Happens if a Board Refuses to Meet and Discuss Over an ACP?

- The employees can file what is known as a mandamus action compelling the Board to address an ACP.



What Happens if the Governing Board Unilaterally Implements an ACP After a Good Faith Meet and Discuss and the Administrators are Dissatisfied with its Implementation?



- They are free to quit.
- They can exercise their right to have a fact finding panel appointed under the Public Employe Anti-Strike Law.



What Would be the Implication of Going to Fact Finding?

- The fact finding report will ultimately become public. This is a rarely used option because there is generally not a great deal of community empathy for administrator compensation in Pennsylvania. For all intents and purposes, this might be viewed as an illusory remedy.



Are There Any Wage and Hour Issues that Need to be Addressed as Part of an ACP?

- Yes. Depending upon the classification of the employee and the functional duties of the employee, a determination needs to be made whether they are exempt from an executive, administrative, or professional basis under the terms of both the federal law and Pennsylvania state law (which do not match).



Should Legal Counsel Review the ACP?

- Though this may appear self-serving, this has to be a definite yes. Since compensation and fringe benefits are involved and since the plan itself has contractual force, this should be reviewed as a matter of course with legal counsel.



Should Legal Counsel Review the ACP?

- In addition, your legal counsel or law firm should have capabilities to review tax-related issues that may be addressed as part of the compensation and fringe benefits addressed in the program.



Because Everyone in an ACP is an Administrator, Are They Exempt from Overtime Under the Federal and State Fair Labor Standards Act?



- No. The fact that they are an administrator covered by the administrative compensation plan does not make them exempt necessarily under the Fair Labor Standards Act. A functional duty analysis and a determination needs to be made whether someone is indeed exempt. Head custodian example.


