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Leased employees or "co-employees"? Check your contract provisions!

On May 18, 2018, the Arizona Court of Appeals confirmed that charter schools that have entered the Arizona State Retirement System (ASRS) may not subsequently avoid the obligation to make ASRS contributions by outsourcing staffing requirements to a third-party under a "co-employment"—rather than a leasing—agreement.

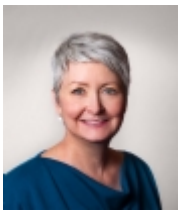
In *Griffin Foundation v. Arizona State Retirement System*, No. 1 CA-CV 17-0114 (Ariz. Ct. App. 2018), Griffin Foundation, which operates three Tucson charter schools, asserted that its employees were leased from a third party and that it therefore did not need to make contributions to ASRS on behalf of those employees. The Court rejected that argument, upholding ASRS's demand that Griffin Foundation pay over $800,000 in past-due contributions for its employees.

Griffin Foundation had originally participated in ASRS, but in 2010, it decided that it no longer wanted to do so, and therefore it contracted with a third-party to "lease" its employees instead of directly employing them. Griffin Foundation then stopped making contributions to ASRS, claiming that its employees were no longer ASRS-eligible members. After examining the contract with the third-party, ASRS determined that the employees were not "leased," but instead were "co-employees" of both Griffin Foundation and the third-party. Griffin Foundation then entered into another contract with a different third-party to provide it with employees. ASRS investigated the second agreement, and again determined that the contract was not a leasing agreement, but a co-employment agreement. The Court of Appeals upheld ASRS's determination: both agreements were "co-employment" agreements, not leasing agreements, and therefore, Griffin Foundation should have been making contributions to ASRS all along.

The *Griffin Foundation* decision is a warning shot to all charter schools that outsource their staffing functions and stopped making ASRS contributions. Notably, the Court rejected Griffin Foundation's assertion that its contracts for leased employees were similar to the ASRS-approved contract with Educational Services, Inc. (ESI), a third-party that also provides leased employees to schools. What was missing? "One sentence out of each contract that specifically tells the client whether or not those employees are the client's employees or belong to the contractor." Unlike the Griffin Foundation agreements, the ESI contract specifically notes that ESI is the

Education Law

For questions regarding the implications of the *Griffin Foundation* decision for your school, or education law matters generally, please contact:



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Whether it is drafting or reviewing your teacher or other employee contracts, providing advice about special education matters, handling an OCR complaint, working on regulatory matters with ASBCS, or providing other legal advice on the myriad issues that arise at schools, Osborn Maledon's Education Law team is here to help.

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sole employer of any employees, even though the schools to which the employees are leased have primary direction and control over the employees.

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If your school uses leased employees and previously participated in ASRS, now is the time to check your contracts to make certain that they satisfy all three statutory requirements for leased employees who are not subject to ASRS contributions:

1. The employees must be employees ONLY of the leasing company. The Court of Appeals' decision repeatedly noted that the ESI contract —approved by ASRS as an employee leasing agreement—stated that it was "the sole employer of any employees." If your contract includes any co-employer language, you need to revise it if you want to avoid any ASRS contribution requirements.
2. The employees must perform services for your school on a "substantially full-time basis" for at least one year. The court did not address this requirement, as it was not the focus of the decision.
3. The employees must perform services "under the primary direction or control" of your school. The Court rejected Griffin Foundation's assertion that this requirement necessitated that it and the third-parties with whom it contracted have a "co-employer" relationship with the employees.

The contracts used by Griffin Foundation and ESI were very similar in all other respects; it was merely the lack of clarity about who was the ultimate employer—and the sole employer—that doomed Griffin Foundation's position.

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