



AMERICANBARASSOCIATION

Legal Education and
Admissions to the Bar

Memorandum

To: Interested Parties and Entities

From: David A. Brennen, Council Chair
Jennifer Rosato Perea, Managing Director of Accreditation and Legal Education

Date: August 28, 2024

Re: Matters for Notice and Comment: Definition (9) and Standard 405 – **Deadline: October 14, 2024**

At its meeting on August 15-16, 2024, the Council of the Section of Legal Education and Admissions to the Bar (the “Council”) approved for Notice and Comment proposed revisions as follows:

- Standard 405: Tenure and Security of Position (previously titled “Professional Environment”) and Definition (9): Full-Time Faculty Member

All proposed revisions and accompanying explanations are published on the Section’s website at https://www.americanbar.org/groups/legal_education/resources/notice_and_comment/.

We solicit and encourage written comments on all the proposals listed above. ***Please note the changes to the submission instructions as follows:*** All written comments should be addressed to David A. Brennen, Council Chair, and sent electronically as a .pdf attachment to NoticeandComment@americanbar.org by **October 14, 2024**. Early submission of written comments is strongly encouraged. Written comments received after October 14, 2024, will not be able to be included in the materials considered by the Council at its November 2024 meeting. All written comments received will be posted publicly on the Section’s website at https://www.americanbar.org/groups/legal_education/resources/notice_and_comment/.

Standard 405: Tenure and Security of Position (previously titled “Professional Environment”) and Definition (9): Full-Time Faculty Member

Background: Since this revised version of Standard 405 is significantly different than version that went out for Notice and Comment, and it expands job security to more full-time faculty members, an extended explanation of the reasoning behind these changes is necessary. The Council understands that these revisions to Standard 405, if codified, may require extra time for law schools to implement. As such, this Standard will take effect no earlier than the beginning of the 2027-2028 academic year. With respect to changes in status for persons in positions described in the revisions, law schools with 2026-2027 Site Visits will report a plan for compliance in the 2026-2027 Site Evaluation Questionnaire (SEQ).

Tenure or another form of job security that provides security of position reasonably similar to tenure is crucial for law professors to maintain academic freedom because it provides protection against external pressures and unjust dismissal. Security of position allows law professors to explore, teach, advocate for social justice, participate in faculty governance, and publish controversial ideas without fear of losing their livelihood. Security of position supports faculty participation in academic governance by providing a form of academic independence that enables all full-time faculty members to speak openly and truthfully about institutional matters. Moreover, the academic independence that security of position provides protects the integrity of shared governance between the faculty and the administration by ensuring that voting or speaking on controversial matters will not result in adverse employment action.

When faculty members lack security of position, it undermines the quality of legal education and harms law students. Non-tenure track faculty members in the areas of academic support/success and bar readiness report being afraid to help students who have substantive questions about doctrinal areas of law because they fear that a tenured faculty member will complain to the dean that the academic support faculty member is trying to teach Torts, Contracts, or some other substantive doctrinal area of law. This fear has led many faculty members without security of position to limit their assistance of students to the “skills” aspect of teaching which frustrates the efforts of students who seek out academic support to ensure their own academic success through full understanding of the substance of legal doctrine as well as the skill of applying legal doctrine. Legal writing faculty members without security of position also report concerns about “staying in their place” and not helping students understand the substantive doctrinal law. These are serious examples of the harm to legal education that results from the lack of security of position for all full-time faculty members who rely on their faculty position for their livelihood. These reports have come from presentations at conferences and comments submitted; Council members have observed this perspective in some of its accreditation work as well. The Standards Committee also reviewed the research and materials available through the American Association of University Professors (AAUP) in drafting the Academic Freedom Standard 208 and Standard 405. See <https://www.aaup.org/our-work/protecting-academic-freedom>.

Explanation of Revisions: In terms of revisions, in Standard 405(b), the “adopt, publish, and adhere to” language used in other Standards was adopted here for consistency. In Standard 405(c), the revisions add more detail and clarification as to what law schools are required to provide to all full-time faculty members in terms of tenure or security of position reasonably similar to tenure, governance rights, and non-compensatory perquisites. A significant addition to Standard 405(c) is the requirement that the director or supervisor of the academic success, bar preparation, field placement, and legal writing programs have tenure or a form of security of position reasonably similar to tenure. This requirement does not necessitate transforming a staff position into a faculty position: the requirement can be satisfied by having a faculty member with tenure or security of position reasonably similar to tenure overseeing these programs. For example, if a law school’s academic success/support unit is comprised of staff members and these staff members are supervised and overseen by an associate dean – or other faculty member who has tenure or security of position reasonably similar to tenure – the law school can satisfy Standard 405(c). The goal of requiring the director or supervisor of these programs to have tenure or security of position reasonably similar to tenure was to ensure that decisions on content, curriculum, and/or pedagogy in these programs are made by a faculty member with security of position so that a staff member or faculty member on a short-term contract does not feel their choices on content, curriculum, and/or pedagogy are constrained by their employment status. Revised Standard 405(d) requires faculty member obligations and perquisites to be communicated in writing at or before the start of employment. Interpretation 405-5 states that law schools should develop criteria for retention, promotion, and security of position for all full-time faculty members. The current Interpretation 405-4 has been deleted since this topic is covered or subsumed by Standard 208’s Interpretation 208-3. A new Interpretation 405-4 has been added to create a “safe harbor” provision in which security of position “reasonably similar to tenure” is generally satisfied by a five-year presumptively renewable contract.

Finally, to accomplish the revisions noted above in Standard 405, the Standards Committee found that a revision was needed to the definition of full-time faculty member (Definition (9)). The change was the deletion of the phrase “who is designated by the law school as a full-time faculty member” to ensure that the definition was a functional one consistent with the duties of a full-time faculty member as described in Standard 404(a).

Redline Version: Definition (9): Full-Time Faculty Member

(9) “Full-time faculty member” means an individual whose primary professional employment is with the law school, ~~who is designated by the law school as a full-time faculty member,~~ who devotes substantially all working time during the academic year to responsibilities described in Standard 404(a), and whose outside professional activities, other than those described in Standard 404(a), if any, do not unduly interfere with his or her responsibilities as a full-time faculty member.

Redline Version: STANDARD 405. PROFESSIONAL ENVIRONMENT TENURE AND SECURITY OF POSITION

(a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty.

~~(b) A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory. A law school shall adopt, publish, and adhere to a policy or policies with respect to security of position and tenure.~~

~~(c) A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.~~

(c) To attract and retain a competent faculty, and to secure academic freedom as outlined in Standard 208, a law school shall:

(1) Afford all full-time faculty members, other than visiting faculty members or fellows on short-term contracts, tenure or a form of security of position reasonably similar to tenure.

(i) “A form of security of position reasonably similar to tenure” means such security of position as is sufficient to attract and retain a competent faculty and to ensure academic freedom. Providing such security of position requires that, following an appropriate probationary period, a full-time faculty member may be terminated or suffer an adverse material modification to their contract only for good cause. Such good cause determination shall be made only after the full-time faculty member has been afforded due process.

(ii) Full-time faculty members need not all be subject to the same rules regarding tenure and security of position.

(2) Afford all full-time faculty members, other than visiting faculty members or fellows on short-term contracts, reasonably similar participation in faculty meetings, voting, committees, and other aspects of law school governance. It is not a violation of this Standard for a law school

to limit voting rights in matters related to tenure-track hiring, granting tenure or security of position reasonably similar to tenure, or promotion.

- (3) Afford all full-time faculty members reasonably similar non-compensatory perquisites consistent with their specific faculty responsibilities. It is not a violation of this Standard for a law school to limit perquisites such as sabbaticals to those full-time faculty members with substantial scholarship responsibilities.
- (4) Afford the director or supervisor of the academic success, bar preparation, field placements, and legal writing programs tenure or a form of security of position reasonably similar to tenure.

~~(d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 303(a)(2), and (2) safeguard academic freedom.~~

(d) Each full-time faculty member's obligations and perquisites shall be communicated in writing at or before the time the employment commences.

Interpretation 405-1

A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.

Interpretation 405-2

A law faculty as professionals should not be required to be a part of the general university bargaining unit.

Interpretation 405-3

~~*A law school shall have a comprehensive system for evaluating candidates for promotion and tenure or other forms of security of position, including written criteria and procedures that are made available to the faculty.*~~

Interpretation 405-4 405-3

A law school not a part of a university in considering and deciding on appointment, termination, promotion, and tenure of faculty members should have procedures that contain the same principles of fairness and due process that should be employed by a law school that is part of a university. If the dean and faculty have made a recommendation that is unfavorable to a candidate, the candidate should be given an opportunity to appeal to the president, chairman, or governing board.

Interpretation 405-4

Security of position "reasonably similar to tenure" is generally satisfied by five-year presumptively renewable contracts. A law school that provides less than five-year presumptively renewable contracts for full-time faculty members bears the burden of demonstrating that those contracts provide the security of position necessary to comply with this Standard.

Interpretation 405-5

If the dean and faculty have determined the question of responsibility for examination schedules and the schedule has been announced by the authority responsible for it, it is not a violation of academic freedom for a member of the law faculty to be required to adhere to the schedule.

Interpretation 405-5

A law school should develop criteria for retention, promotion, and security of position for all full-time faculty.

Interpretation 405-6

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts. Under a separate tenure track, a full-time clinical faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the entire clinical program. A program of renewable long-term contracts shall provide that, after a probationary period reasonably similar to that for other full-time faculty, during which the clinical faculty member may be employed on short-term contracts, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a long-term renewable contract. For the purposes of this Interpretation, "long-term contract" means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom. During the initial long-term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the entire clinical program.

Interpretation 405-7

In determining if the members of the full-time clinical faculty meet standards and obligations reasonably similar to those provided for other full-time faculty, competence in the areas of teaching and scholarly research and writing should be judged in terms of the responsibilities of clinical faculty. A law school should develop criteria for retention, promotion, and security of employment of full-time clinical faculty.

Interpretation 405-8

A law school shall afford to full-time clinical faculty members participation in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(e).

Interpretation 405-9

Subsection (d) of this Standard does not preclude the use of short-term contracts for legal writing teachers, nor does it preclude law schools from offering fellowship programs designed to produce candidates for full-time teaching by offering individuals supervised teaching experience.

Clean Version: STANDARD 405. TENURE AND SECURITY OF POSITION

- (a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty.
- (b) A law school shall adopt, publish, and adhere to a policy or policies with respect to security of position and tenure.

(c) To attract and retain a competent faculty, and to secure academic freedom as outlined in Standard 208, a law school shall:

- (1) Afford all full-time faculty members, other than visiting faculty members or fellows on short-term contracts, tenure or a form of security of position reasonably similar to tenure.
 - (i) “A form of security of position reasonably similar to tenure” means such security of position as is sufficient to attract and retain a competent faculty and to ensure academic freedom. Providing such security of position requires that, following an appropriate probationary period, a full-time faculty member may be terminated or suffer an adverse material modification to their contract only for good cause. Such good cause determination shall be made only after the full-time faculty member has been afforded due process.
 - (ii) Full-time faculty members need not all be subject to the same rules regarding tenure and security of position.
- (2) Afford all full-time faculty members, other than visiting faculty members or fellows on short-term contracts, reasonably similar participation in faculty meetings, voting, committees, and other aspects of law school governance. It is not a violation of this Standard for a law school to limit voting rights in matters related to tenure-track hiring, granting tenure or security of position reasonably similar to tenure, or promotion.
- (3) Afford all full-time faculty members reasonably similar non-compensatory perquisites consistent with their specific faculty responsibilities. It is not a violation of this Standard for a law school to limit perquisites such as sabbaticals to those full-time faculty members with substantial scholarship responsibilities.
- (4) Afford the director or supervisor of the academic success, bar preparation, field placements, and legal writing programs tenure or a form of security of position reasonably similar to tenure.

(d) Each full-time faculty member’s obligations and perquisites shall be communicated in writing at or before the time the employment commences.

Interpretation 405-1

A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.

Interpretation 405-2

A law faculty as professionals should not be required to be a part of the general university bargaining unit.

Interpretation 405-3

A law school not a part of a university in considering and deciding on appointment, termination, promotion, and tenure of faculty members should have procedures that contain the same principles of fairness and due process that should be employed by a law school that is part of a university. If the dean and faculty have made a recommendation that is unfavorable to a candidate, the candidate should be given an opportunity to appeal to the president, chairman, or governing board.

Interpretation 405-4

Security of position "reasonably similar to tenure" is generally satisfied by five-year presumptively renewable contracts. A law school that provides less than five-year presumptively renewable contracts for full-time faculty members bears the burden of demonstrating that those contracts provide the security of position necessary to comply with this standard.

Interpretation 405-5

A law school should develop criteria for retention, promotion, and security of employment for all full-time faculty.