



Campus Compliance: Employment Law Higher Education



November 6, 2025

- This information is good as of now. In an hour, it might not be. Stay tuned for new Executive Orders (EOs) and judicial or legislative responses (or agreements with Department of Ed or other settlements).
- The political aspects of this are undeniable, but our first priority is reducing risk to institutions.
- Remember not to lose the forest for the trees. What is the big picture? That will help guide your next steps with your institution's mission or ethic of care.

Disclaimers

We can't help ourselves. We're Lawyers.

- We are not giving you legal advice.
- Consult with legal counsel regarding specific situations.
- You will receive slides for today's presentation after we've concluded.
- No, we aren't recording this – because we expect things to shift quickly.
- Mixed group!

- Unlike other employers...
 - And Title VI
 - And Title IX
 - And academic freedom and shared governance
 - And government resolution agreements
 - And H-1B Visa employees
- Accommodations
 - Refresher on why we accommodate and that not all accommodations have the same legal reasoning behind them and it matters
- Miscellaneous
 - Federal government shut down – what happens to EEOC and Dept. Ed Investigations?
 - DOL changes to FLSA wage hours that were eviscerated

Unlike other employers...and Title VI – increased focus in 2023

- Title VI – Civil Rights Act of 1964 prohibiting discrimination on race, color, or national origin in any program that receives federal financial assistance – but the prior two administrations (Biden and Trump) have increased the focus on institutions of higher education and its enforcement by the Dept. of Ed.
 - In 2023, the Biden Administration issued guidance underscoring national origin to include “shared ancestry” or “ethnic characteristics” under Title VI and clarifying that it protects students from antisemitic, Islamophobic, and related forms of discrimination, which can be based on shared ancestry or ethnic characteristics.
 - The Dept. of Ed. investigated colleges and universities – many of you may have just wrapped up those investigations this spring – into the “disparate impact” of protests and institutional action/inaction

Unlike other employers...and Title VI – evolution under the current administration

- Title VI – under the current administration, since January 20, 2025
 - The administration and Dept. of Ed. AND Dept. of Justice have a specific view of what constitutes antisemitism and, in light of anti-DEI policies, have also included increased focus on non-merit-based decisions/decisions based on protected class status of race under Title VI
 - Removal of “disparate impact” and focus on intentional discrimination
 - This has been communicated through media, Executive Orders, and agreements to settle lawsuits after removal of federal funding
 - From information on Dept. of Ed website on Title VI and from language in agreements with the federal government, this administration appears to view Title VI as applicable to employment decisions and employees of Colleges and Universities to the extent it is connected to the discrimination or harassment against students on the basis of race, color, or national origin.

Unlike other employers...and Title IX

- Title IX of the Education Amendments of 1972 – prohibits discrimination on the basis of sex in educational institutions – massive evolution of Title IX as it applies to sexual misconduct since the first Bush administration
- AND...as of August 14, 2020, effective regulations apply to employees of Colleges and Universities
- AND...on January 20, 2025, the current administration made clear in EO 14168 that it viewed “sex” to mean two sexes only with impact on transgender individuals
- AND...many states have banned use of restrooms by transgender individuals except for use of sex assigned at birth
- AND...we are all still beholden to *Bostock* for Title VII and some of us state laws contrary to EO 14168

Unlike other employers...academic freedom and shared governance

AAUP: “The freedom of a teacher or researcher in higher education to investigate and discuss the issues in his or her academic field, and to teach and publish findings without interference from administrators, boards of trustees, political figures, donors, or other entities. Academic freedom also protects the right of a faculty member to speak freely when participating in institutional governance, as well as to speak freely as a citizen.

AAUP: “Shared governance refers to the joint responsibility of faculty, administrations, and governing boards to govern colleges and universities. Differences in the weight of each group’s voice on a particular issue should be determined by the extent of its responsibility for and expertise on that issue.”

Unlike other employers...government settlements

- Beginning shortly after January 20, 2025, the federal government began freezing federal funds to Colleges and Universities it accused violated Title VI and Title IX
- These resulted in some agreements between the federal government and Colleges and Universities including employment provisions:
 - Columbia University Resolution Agreement
 - Brown University Resolution Agreement
 - University of Virginia Resolution Agreement

Unlike other employers...government settlements – Columbia University

- Columbia University Resolution Agreement (from an employment lens)
 - Not binding on any other institution, but insightful for future government action
 - Paragraph 12 – Conduct a review of its Middle East Studies Departments including:
 - Review course offering for balance
 - Review all aspects of leadership and curriculum
 - Paragraph 15 – compliance with Title VII and no “unlawful DEI”
 - Paragraph 17 – “Columbia shall provide that all hiring and promotion practices for faculty and administrative roles are grounded solely in individual qualifications and academic professional merit, and shall not use of [sic] race, color, sex, or national origin as a factor – implicit or explicit – in hiring decisions across all schools, departments, and programs.” And goes on to address “indirect methods” as a substitute for race conscious hiring or promotion practices
 - Paragraph 30 – “Columbus shall ensure that its trainings for employees covers Columbia’s relevant obligations under this Agreement.”

Unlike other employers...government settlements – Brown University

- Brown University (from an employment lens)
 - Same limited parameters to Brown, but...
 - Paragraph 11c: “Will offer women the option of female-only restrooms” after adopting definitions of “male” and “female” consistent with EO 14168
 - Paragraph 12: Will not perform gender reassignment surgery or proscribe puberty blockers (they have a medical center) for the purpose of aligning the child’s appearance with an identity that differs from sex

Unlike other employers...government settlements – University of Virginia

- University of Virginia(from an employment lens)
 - Same limited parameters to Brown, but...
 - Paragraph II 6- affirms important of academic freedom and US will not aim to dictate content of academic speech or curricula – win for UVA
 - Will comply with Civil Rights Laws “according to the to the Department of Justice’s ‘Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination’ of July 29, 2025, so long as that Guidance remains in force and to the extent consistent with relevant judicial decisions.”

Unlike other employers – what does this mean for compliance?

- We are currently responding first to fast action and changes by an aggressive federal executive branch, as opposed to legislation and, belatedly, to judicial resolution – what does this mean for compliance?
- Not to sound like a punt – but if caught in the focus of the federal government and/or related media, it will be really fact-specific, require your stakeholders to weigh a lot of factors including institutional and community ethic of care and mission statements
 - Public institutions – does your state government align?
 - Which fight(s) are you will to have?
 - What is your funding/solvency like – can you survive financially?

Unlike other employers...H-1B visas

- Colleges and Universities rely heavily on H-1B visa holders in areas of technical expertise to attract the best talent globally (at least theoretically) and foreign employees rely heavily on H-1B visas with Colleges and Universities to build futures in the United States
- The Department of Homeland Security has introduced a \$100,000 fee for H-1B visas originating from overseas (as opposed to transitions from F-1 visas)
- Debate continues over whether there will be an exemption to the fee for colleges and universities – so this could really impact teaching and research roles
- So stayed tuned

Always beware the no-cause/universal policies that apply to everyone – accommodations are for carve outs from just these types of policies

We will be reviewing the following through an employment lens (student accommodations sometimes differ)

- Religious accommodations – stem from First Amendment
- Pregnancy accommodations and Pregnant Workers Fairness Act (“PWFA”)— stem from Title VII (previously from Pregnancy Discrimination Act which was a piece of Americans with Disabilities Act (“ADA”) legislation)
- Disability accommodations – ADA (and 2008 Amendments)
- PUMP Act

- Generally – a modification to work or schedule that allows an employee to practice their “sincerely held religious belief” without creating an “undue hardship” for the employer
- In case law, we have seen the undue hardship decrease in importance and increase in deference to employees in religious accommodations
- The U.S. Dept of Labor and EEOC have helpful fact sheets
- Generally, do not put yourself in the position of questioning a “sincerely held religious belief”

Relevant provisions:

- ADA Title II (public entities)
- ADA Title III (public accommodations)
- Section 504 (programs rec'ing federal financial assistance and contracts)

Definitions are important

- “Qualified individual” (ADA)
- “Essential to the instruction” (Section 504)
- “Fundamentally alter” (ADA)
- “Undue hardship” (ADA)

- Long story short – almost everyone qualifies as a “qualified individual with a disability” under the ADA after 2008 Amendments
- Undue hardship considerations
 - i. the nature and cost of the accommodation needed under this chapter;
 - ii. the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
 - iii. the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
 - iv. the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Accommodations – ADA/504 Takeaways

- Declining to provide modifications if they would fundamentally alter the nature of the public service provided or essential duties of the job ≠ discrimination
- Reasonable accommodations/adjustments may be requested
- Institution **must engage in an interactive process** to determine what accommodations are reasonable
- Medical documentation to support accommodations may be requested
- A healthy pregnancy is generally not considered a disability...but, still needs accommodation and an unhealthy pregnancy can be considered a disability
- Intermittent or short-term leave can be an accommodation under the ADA/and don't forget FMLA (spend it down first where applicable)

Accommodations – Pregnancy Workers Fairness Act (“PWFA”)

- Requires employers to provide reasonable accommodations to employees and applicants for known limitations related to pregnancy, childbirth and related medical conditions, unless the accommodation would cause an undue hardship for the employer.
- Was modeled after the ADA, so accommodation process will largely mirror the interactive process under the ADA.
- Unlike the ADA, however, accommodations under the PWFA are likely to be temporary, so they will arguably be easier to implement and potentially make it harder for employers to claim undue hardship.
- Prohibits employers from requiring employees to take leave, whether paid or unpaid, if another reasonable accommodation can be provided.

Accommodations – PUMP Act

- Providing Urgent Maternal Protections for Nursing Mothers Act
- Requires employers to provide reasonable breaks for an employee to express breast milk for one year after the child's birth and to provide a location other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public.
- Not so much a fact-specific interactive analysis, but requires planning and sometimes portable pods
- The PUMP Act does not require that reasonable breaks be paid, unless otherwise required by federal, state or municipal law or if the employee is not relieved from duty during the entirety of such break.
- Nonexempt employees will still be paid if they are using otherwise paid break time. (Exempt employees' pay should not be modified, regardless of whether they take a lactation break.)

Misc. – Federal Government Shutdown

- Questions – what will happen to open federal investigations?
- The last time – under the first Trump administration – everything was tolled, so it is largely anticipated that this will be the case here
- From an employer's perspective – EEOC and other investigations – delay may be welcome; from an employee's standpoint, likely a frustration
- Expect frustrated employees with currently pending investigations and be prepared to offer additional supportive measures while their investigations are paused

Misc. – Dept. Labor and FLSA wage threshold

- So...you complied with the law and increased your wages to meet the minimum threshold in 2024, and then the thresholds under the Biden administration went away...
- Rewards those who did not comply with the law
- Can you walk back your pay increases in 2024?
 - Legally, yes
 - From a morale standpoint, may need further consideration – but it's been done

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