

2021 ANNUAL CONFERENCE



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Today's
discussion

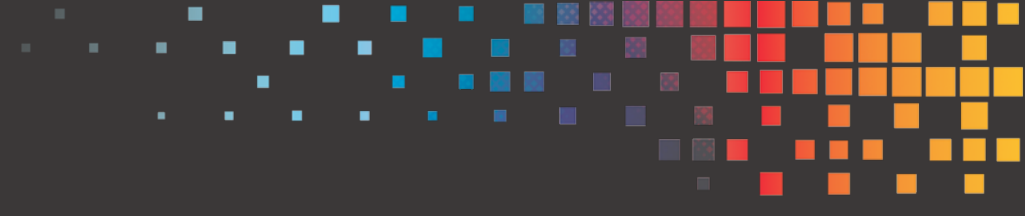
Legal Claims on the Horizon Is Your School at Risk?

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Some of the Subjects We Will Cover Today

Over the last year, the legal landscape has changed substantially. In addition to dealing with the usual employment and student issues, you now have to navigate additional pandemic-related matters.

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- 01 > ADA in the Post-Pandemic Workplace
 - 02 > Employee Leave Due to COVID-19
 - 03 > OSHA's New COVID-19 Emergency Temporary Standard
 - 04 > Vaccination Mandates
 - 05 > Transgender/Gender Identity
 - 06 > Wage/Hour

The Americans with Disabilities Act (ADA) Post Pandemic





CASE STUDY

Anna contacts her Division Head to advise that she will not be able to work on campus for at least the beginning of the 2021-2022 school year because she is taking immuno-suppressing drugs for a medical condition. She advises that her lawyer told her that because the school has shown its ability to accommodate employees with disabilities by working remotely, she intends to continue to teach remotely.

This is an issue that we have seen come up frequently. Before we delve into the answer, we feel an ADA refresher will be helpful.

Back to the Basics

Americans with Disabilities Act

- › The Americans with Disabilities Act (ADA) prohibits discrimination against qualified individuals with disabilities.
- › The law requires Schools to make **reasonable** accommodations for disabled individuals as long as there is **no undue hardship** to the School; **no direct threat of harm to the individual or others**; or (as it relates to students) **no fundamental alteration of the School's program**.
- › The goal is to create level playing field for “disabled” employees, students or applicants.
- › The emphasis is on what individuals **can** do, not on limitations.
- › The law requires Schools to consider the individual's ability to perform essential employee job or student functions.

Definition of “Disability”

- › Any individual with a **history** of an impairment
- › Any individual **regarded as having** a disability
- › Any individual with a **present** physical or mental impairment that substantially limits one or more major life activities
- › **Major Life Activities:**
 - › Walking
 - › Talking
 - › Breathing
 - › Heating
 - › Lifting
 - › Working
 - › Reproduction
 - › Bending
 - › Learning
 - › Thinking
 - › Concentrating
 - › Seeing

Obligations to Employees

- › ADA **Title I** pertains to the School's obligations to employees.
- › It requires that the School not discriminate against employees and applicants with disabilities.
- › It also requires that the School accommodate employees and applicants with disabilities.

Obligations to Students and Parents

- › ADA **Title III** covers the School's relationship with students and their parents, to both not discriminate and to accommodate.
- › Title III provides a **religious** exemption from the duty to accommodate students and their parents if the School is controlled by a religious organization and does not receive federal funding.
 - › This requires an analysis of the school's founding, mission, articles of incorporation, bylaws, funding, policies, etc. It is much more than simply being affiliated with a religious organization.
- › Many exempt schools still choose to accommodate students with disabilities because of the increased number of students with special needs.
- › Even if the school is exempt from Title III, it may still have disability accommodation obligations under state, county, or city law.

Interactive Process – When is it Triggered?

- › The School has duty to initiate the **interactive process** if the employee's or student's disability is **known** or **apparent**
 - › Employee/student/parent tells the school
 - › School otherwise becomes aware of the condition, such as through a third party or by its own observation
- › The interactive process is simply a process whereby the school and the employee/student/parent discuss the individual's need, talk about how it can be accommodated, and seek medical information to help the school better understand the individual's restrictions and potential accommodations.

Interactive Process

- **Step 1:** Determine the “essential functions” of the position or activity.
- **Step 2:** Meet with the employee/student/parent regarding whether the individual can perform the essential functions and how the individual may be limited due to an impairment. Ask what they are seeking regarding accommodation.
- **Step 3:** Obtain medical documentation to support that the individual has a disability, the restrictions, and the physician’s recommended accommodations.
- **Step 4:** Identify the potential reasonable accommodations that are necessary and will be effective.
- **Step 5:** Select and implement the accommodation that is most appropriate that will be effective.
- **Remember:** no accommodation is required if the request is unreasonable; if it will create an undue burden; or if the situation poses a direct threat to the individual or others. In addition, for students, the accommodation is not reasonable if it will fundamentally alter the school’s program.

Example of a Direct Threat

- › Due to the high level of transmission of the delta variant of COVID in the school's community, the school requires that all students and employees wear masks. An employee that works in the early childhood program is unvaccinated. She works with children who are too young to be vaccinated against COVID. She must touch and be in very close contact with children all day long. She brings in a doctor's note indicating that she cannot wear a mask to school due to her severe allergies and asthma.
- › Given the very high risk of the transmission of COVID both to the teacher and to the students, the School determines that an unvaccinated teacher not wearing a mask around very young children poses a direct threat of harm to both the teacher and the children.



CASE STUDY

Back to our Case Study:

Anna contacts her Division Head to advise that she will not be able to work on campus for at least the beginning of the 2021-2022 school year because she is taking immuno-suppressing drugs for a medical condition. She advises that her lawyer told her that because the school has shown its ability to accommodate employees with disabilities by working remotely, she intends to continue to teach remotely.

Is Anna right? Do you have to let her work remotely?

ADA in a Pandemic Environment

- › Schools, probably more than many other types of industries, perfected the remote work and remote learning process during the pandemic.
- › However, running dual programs and having teachers teaching students remotely is both hard and is not an ideal learning environment.
- › Thus, most schools have required employees to be fully back at work for the 2021-2022 school year.
- › Whether a school will have to grant remote work will depend on the circumstances.

ADA in a Pandemic Environment

- › The School does not have to permit an employee to work remotely if there is no disability-related limitation that would require such accommodation.
- › Thus, follow standard procedures to obtain medical documentation that confirms the impairment, the restrictions, and the recommended accommodations.
- › You can send the employee's physician a medical inquiry if you feel that additional information is necessary (such as other alternatives rather than remote work).

ADA in a Pandemic Environment

- The EEOC has made clear that even though the School **temporarily** excused performance of one or more essential functions (i.e. physical presence for face-to-face teaching) during the early part of the pandemic, it does not have to continue to do so.
- Thus, if the individual cannot work at school and perform the essential function of face-to-face teaching due to a medical condition, you assess other options (unpaid leave or a different job if you have one).



CASE STUDY

Although we are hopeful that vaccines will reduce the number of infections this year, we still anticipate that some of our teachers and their children will have a higher frequency of illness or necessary need to quarantine this year. We think it would efficient for the school to allow teachers to continue to work remotely in those cases rather than having to use substitutes.

Do you see any concerns with this approach?

ADA in a Pandemic Environment

- › Remember that if you continue to allow teachers (and others like guidance counselors, etc.) to work remotely, you may be setting a precedent that could lead to an argument that face-to-face presence is not an essential function of the job.
- › As long as you limit the remote work to a short quarantine period, you may be able to argue that face-to-face interactions are still essential for the job. It is when you give longer periods of remote work (for a full semester or year) that your argument will begin to falter.

ADA in a Pandemic Environment

- › Note, however, if the School is faced with a situation in which the request is **not** for a **face-to-face position**, then telework may still be a feasible accommodation as long as it does not pose an undue hardship.
- › Thus, an advancement employee or business office worker who enters information into the database all day may not need to be physically at work.
- › Remember, if you insist that no telework is permitted, it will be the school's burden to show why it is not a reasonable accommodation or why it is an undue hardship.
- › Undue hardship may be shown by the fact that other employees have had to absorb the remote employee's work and now they are worn out due to overtime, are making errors, and things are slipping through the cracks. Question: why can't the school hire a temporary employee to help out those in the office?

Leave Requests in a Post-Pandemic Workplace



Reminder Re FFCRA Voluntary Extension

- The American Rescue Plan Act of 2021 extended the tax credits that employers could receive for voluntarily providing paid leave through **September 30, 2021**.
 - There will be no further federal paid leave options as Congress did not extend the FFCRA.
 - Some states/local jurisdictions have separate COVID-19 related leave laws. Check your jurisdiction to ensure you are in compliance.

Leave Request due to COVID-19

- › Under the FFCRA, severe COVID-related illness or illness due to vaccinations were covered conditions that qualified an employee for leave.
- › **Now:**
- › Consider long term leaves for COVID-related illness and severe illness from a vaccination as leaves **without pay** (or using PTO or other paid benefits such as STD) under FMLA for the first 12 workweeks (if applicable).
- › If additional time is needed, the employer must remember the ADA accommodation and go through the interactive process that we discussed earlier.

OSHA's New Healthcare Emergency Temporary Standard



OSHA'S Emergency Temporary Standard

- The Occupational Safety and Health Administration (OSHA) issued a new Emergency Temporary Standard (ETS) on June 10, 2021.
- The ETS applies to all settings where any employee licensed to provide healthcare services provides healthcare or healthcare support services.
- On its face, the ETS applies to **schools with an embedded clinic, healthcare facility, nurse's office, or other area where healthcare services are provided.**

OSHA's ETS Exemptions

- › The ETS does not apply to the entire school campus, rather, the ETS takes a “**settings-based approach**” and focuses on specific areas.
 - › A school healthcare setting embedded within a facility is treated separately from the rest of the school.
 - › At most schools, this will be the nurse's office or clinic.
- › The ETS also exempts the school from having to create a substantial plan to address potential COVID hazards if:
 - › All *non-employees* (e.g., students, parents, visitors) are screened for COVID prior to entry into the clinic; and
 - › Where people (employees, students, etc.) with suspected or confirmed COVID-19 are not permitted to enter the nurse's station or office.
 - › Thus, the clinic cannot have an isolation room as a part of the clinic; it must be in a separate area away from the clinic.

School's Legal Obligations

- › The School has an obligation to provide a safe workplace under OSHA. OSHA recommends that persons who are not vaccinated wear a mask indoors.
- › If someone complains to OSHA that they feel unsafe, OSHA can investigate the circumstances.
- › If the person who complains later feels that they have been retaliated against for complaining, they can assert an OSHA retaliation claim and/or a whistleblower claim and seek damages.
- › If other employees, parents, or students are treating employees negatively because they are wearing masks, this could lead to discrimination or harassment concerns.
- › Employees should be told to report any concerns to Human Resources.

COVID-19 Vaccinations



Attendee Participation



**Is your School planning to
require employees to be
vaccinated?**

**Has this recently
changed with the
imminent federal
mandate?**

EEOC Guidance on COVID-19 Vaccines

- › EEOC has indicated that employers can require employees to be vaccinated as long as the employer complies with the reasonable accommodation provisions of the ADA (medical exemptions) and Title VII (religious exemptions).
- › There have been a handful of challenges to the mandatory vaccination requirement. On June 15, 2021, in the first case to decide the issue, a Texas federal court dismissed a challenge to the mandatory vaccination requirement by employees of Houston Methodist Hospital.
- › Department of Justice has also said that the Emergency Use Authorization status of the vaccines does not prevent employers from mandating them.

EEOC Guidance on COVID-19 Vaccines

- › Most independent schools have not required employees to be vaccinated but more have started to do so and more are considering it.
- › Some states (California, Washington) have already implemented mandatory vaccination requirements for K-12 teachers, including those in private/independent schools.
- › They do allow for an exemption request (medical, religious).

EEOC Guidance on COVID-19 Vaccines. Requiring Proof

- › There may be times when the School may need to ask an employee whether he/she is vaccinated.
- › Asking or requiring an employee to show proof of a COVID-19 vaccination for a business purpose is permitted because it is **NOT** a disability-related inquiry.
 - › Simply requesting proof of vaccination is not likely to elicit information about a disability.
- › The School should not ask **why an individual did not receive a vaccination.** Doing so may elicit information about a disability.
- › All such questions should be asked only through Human Resources and the information should be maintained as confidential.
- › It is not an invasion of privacy for Human Resources to request such information as long as the information is kept confidential.

COVID-19 Vaccines. Biden Mandate

- › Biden's plan involves OSHA issuing a vaccine/testing rule that will apply to all private employers with more than 100 employees.
- › Estimated to impact 80 million workers, or 2/3 of the country's workforce.
- › Rule will take the form of an Emergency Temporary Standard (ETS), which allows OSHA to enact regulations it can enforce immediately if a "grave danger" to worker safety is present.
- › Covered employers who ignore the standard could face OSHA citations and penalties of up to \$14,000.00 per violation.
- › This will apply to schools with over 100 employees. Even if you have not regularly interacted with OSHA.

COVID-19 Vaccines. Biden Mandate

- OSHA officials have indicated that the ETS will be released in a “matter of weeks.”
- OSHA officials have also urged businesses to voluntarily begin the process of adopting vaccination mandates, without waiting for the agency to release the ETS.
- Once issued, the ETS will have immediate effect in the 29 states where federal OSHA has jurisdiction.
- The ETS can remain in place for six months before it must be replaced by a permanent OSHA standard.

COVID-19 Vaccines. Biden Mandate

- In states where the federal government does not have jurisdiction over workplaces safety, the state agencies will have to adopt the ETS or “just-as-effective measures” within 15 to 30 days.
- Governors of some state-plan states have already come out against the ETS, which could set up a battle between state-plan agencies and federal OSHA.

COVID-19 Vaccines. Biden Mandate

Will remote employees be covered?

- According to comments from OSHA on September 10th
 - The ETS will not apply to employees who “never” come to work.
 - But, if the employee ever comes to work, or works outside of the office with others, they will be covered.

COVID-19 Vaccines. Biden Mandate

How will the 100-employee threshold be counted?

- › While not clear in President Biden's announcement, on Friday, OSHA officials suggested the threshold will likely be *total* number of employees, rather than employees at each worksite.
- › Consider if you have multiple campuses.

COVID-19 Vaccines. Biden Mandate

Will employers be required to collect proof of vaccination from employees under the mandate?

- › Unclear at this time.
- › Consider record retention requirements: OSHA requires record retention for length of employment + 30 years.
- › Could have huge recordkeeping implications if required.

COVID-19 Vaccines. Biden Mandate

What type of testing will be required?

- › Unclear at this time.
- › While the PCR test is more accurate, it takes longer to receive the results and is more expensive.

COVID-19 Vaccines. Biden Mandate

Who pays for testing?

- › Unclear at this time.
- › Insurance may cover the cost of tests, and several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing.

COVID-19 Vaccines. Biden Mandate

Must Employers pay employees for time spent getting tested?

- › No clear answer for all employees – safest to pay for the time.
- › OSHA commented Friday that employer will be required to provide paid time off or use of existing PTO.
- › Generally, time spent by employees receiving employer-required tests should be treated as compensable
 - › If the testing is required during the workday or
 - › If necessary to perform the job safely and effectively.

COVID-19 Vaccines. Biden Mandate

Will the ETS face legal challenges?

- › Most likely.
- › Governors of many states have already indicated they intend to challenge the ETS.
- › Courts may block enforcement of the emergency rule, or parts of the rule, until legal challenges are resolved.
- › OSHA will have to prove that there is a “grave danger” to workers.
- › But employers should not count on being relieved of all obligations and should prepare now.

COVID-19 Vaccines. Biden Mandate

Adopt Procedures for Determining Employees' Vaccination Status

- › Maintain confidential records of employee vaccination status.
- › EEOC has indicated it is lawful to ask employees about COVID-19 vaccination status, but this should end your inquiry.
- › ETS may require that you collect proof of vaccination.
- › Otherwise, create a confidential list of vaccinated workers.
- › Review state laws regarding confidentiality and privacy of medical records.

COVID-19 Vaccines. Biden Mandate

Determine if you will mandate the vaccine or allow unvaccinated employees to be tested weekly.

- › For some schools, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy.
- › OSHA officials stated that employers may require vaccinations without providing the alternative for weekly testing (subject to accommodations)
- › If planning for weekly testing, think through the logistics:
 - › Onsite or through designated vendors?
 - › Payment for testing
 - › Payment of time for testing

COVID-19 Vaccines. Biden Mandate

Develop a plan for handling accommodation requests.

- › Employees may request accommodations for disabilities or for religious reasons under federal or state laws.
- › Develop a robust and clear reasonable accommodation policy to address religious and disability issues.
- › Communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request.
- › Be prepared for employees to request an accommodation from the weekly testing requirement.

Frequently Asked Questions


Can we require that employees who do not show proof of vaccination have a COVID test weekly at their own cost?

- A. No. You should be very careful in structuring negative incentives for employees to become vaccinated because the negative action could result in a claim of discrimination or retaliation. There are many reasons why someone may not be vaccinated, including their own underlying health reason or their religious beliefs.

Frequently Asked Questions



Can we require that employees who do not show proof of vaccination have a COVID test weekly if the School pays for it?



- A. Yes. If you are requiring the test, you have to pay for it. If you are not doing the test on campus (i.e. employees have to go somewhere), you also have to pay non-exempt employees for the time that it takes for them to go get the test.

Frequently Asked Questions

If an employee gets COVID and claims she got it at school, is this covered by workers' compensation?

- A. It is not clear if workers' compensation will cover a COVID illness. Some companies have said that they view getting COVID at work the same as getting the flu at work – it is an illness not covered by workers' compensation. We recommend that you still file the claim and let workers' compensation make their determination.

Frequently Asked Questions

Can we disclose which employees have or have not been vaccinated?

- A.** Not without the employee's consent (in writing). That would be an invasion of privacy and disclosure of protected medical information. Some schools are disclosing that X% of employees have been vaccinated. Be careful not to make the group you are disclosing about too small such that others may be able to tell who has not been vaccinated (i.e. if there are 3 people who work in a particular office, do not say 2 of them have been vaccinated).

Frequently Asked Questions

A parent has asked us to assign her children to only fully vaccinated teachers. Are we allowed to do that?

- A.** No. If you take opportunities away from employees based on their vaccination status, you may be treating them differently based on a disability or their religion. You should advise the parent that you will ensure that all employees are following all safety guidelines. If you are only requiring unvaccinated individuals to wear masks, you may also want to advise parents that many employees choose to continue to wear masks even though they may be vaccinated.

Frequently Asked Questions

How do we handle situations where parents ask teachers directly if they are vaccinated?

- A.** Obviously, when parents do this, it puts the teacher in an awkward position, especially if they are not vaccinated. We recommend that the school send parents an email communication advising that we will not advise which employees are vaccinated and that employees have been advised not to respond to parent questions about their vaccination status. Remind parents that many people will wear masks even if they are vaccinated and that all employees of the school (whether vaccinated or not) will follow safety protocols.

Frequently Asked Questions

Many of our employees are refusing to get vaccinated. Can I tell employees that if they are vaccinated and are exposed to someone with COVID, they do not need to quarantine, and thus will get paid, while those not vaccinated will have to quarantine and use PTO?

- A.** Yes. The CDC's April 27, 2021 recommendations make clear that fully vaccinated employees no longer need to be restricted from work following an exposure as long as they are asymptomatic. You should privately tell those exposed who must quarantine and who does not need to. You also need to be **consistent** in the application of this policy. It does not matter why the individual has not been vaccinated (i.e. medical, religious, or other) as this policy would apply to all of the non-vaccinated employees.

What Are Schools Doing About Students?

- › Many schools are encouraging the vaccine for students 12+ and even holding on campus clinics.
- › The COVID vaccine has not yet been approved for use in young children. Pfizer's vaccine has been authorized for ages 12 and up. Moderna's vaccine is currently authorized for ages 18 and up. Both companies have begun clinical trials for younger children.

What Are Schools Doing About Students?

- › If there is no applicable state law, your school can continue to encourage vaccinations for children.
- › Given the increase in COVID in our communities due to the Delta variant, you should consider adding a clause in any return to school plan or the Student Handbook that the vaccine may be required for on campus instruction or activities if permitted by law.

Immunity Laws



Immunity Shield Laws

- › Some states have passed a form of COVID-19 related immunity laws.
- › Alabama, Florida, Indiana, Kentucky, Nevada, South Carolina and others have some form of law that provides protection from liability for businesses and employers against lawsuits.
- › These take various forms. Some only cover essential health care employers, while others cover all employers. Typically, these laws do not provide protection for intentional, willful, or reckless misconduct.
- › Example: Florida's immunity law provides protection for businesses against claims brought by individuals related to COVID-19 but it also requires that businesses make a good faith effort to comply with governmental health standards or guidance.
- › Check the applicable law in your jurisdiction as it may have certain requirements in order to take advantage of the protections.

Immunity Shield Laws

- › Despite some states passing legislation to increase protection for employers, lawsuits are still on the rise for COVID-19 related claims.
- › The most common claims include: retaliation, discrimination and Family and Medical Leave Act claims.
- › Employees commonly claim that employers did not provide a safe workplace or comply with protocols during the pandemic.
- › Others claim that employers fail to accommodate a disability or have discriminated based on a disability.
- › Employees have claimed that they were improperly denied leave, including under the Families First Coronavirus Response Act or FMLA.

The background of the slide features a warm, golden-hour photograph of a person's hands working on a desk. The person is wearing a blue long-sleeved shirt and a white wristband. Their hands are positioned over a desk with a pair of glasses and some papers. A large, semi-transparent clock face is overlaid on the image, with numbers 1 through 12 visible. The clock's hands are positioned to suggest a late afternoon or early evening time. The overall mood is professional and focused.

Wage Hour Issues



CASE STUDY

Your business manager tells you that you need to add \$40,000 to the budget to cover the overtime pay that the five misclassified employees are due for the last two years.

Is she right?

Wage Hour

This is still one of the largest growth area in litigation

- › Even small overtime liability can result in a large attorney fees award.
- › No prior warning is necessary – the employee who has been underpaid can sue immediately.
- › A court or the Department of Labor has to oversee settlements.
- › These issues are easy to resolve early with an audit and much less costly.

Wage Hour

If an employee is not “exempt” from the law

- › The employee must maintain a daily and weekly record of hours worked in every 7 day workweek period
- › The employee must be paid minimum wage (federal is \$7.25 per hour; check your state minimum wage)
- › The employee must receive overtime for all hours over 40 in a workweek

Wage Hour. Typical Exemptions

Executive Exemption

- › Heads, Division Heads, Operations Manager
- › Must hire, fire or recommendations are given “particular weight”
- › Must actively supervise and direct 2+ full time employees (80 hours others)
- › Must be paid on a salary basis of at least \$684 workweek (\$35,568/year)

Wage Hour

Academic Administrative Exemption

- › Admissions Directors; Division Heads; Curriculum Directors
- › Must make big decisions of importance to the organization
- › Must exercise independent direction and authority
- › Must be paid on a salary basis of at least \$684 each workweek (\$35,568/year)

Wage Hour

Professional Exemption

- › Teachers
- › Must engage in teaching responsibilities (or related) >50% of time
- › No pay requirement under DOL

Wage Hour

Problem areas

- › Many schools believe that means the employee is exempt if the employee is salaried.
- › Many schools have combination positions, making it harder to determine whether the employee is working >50% of the time in an exempt category.
- › Many schools give opportunities to non-exempt employees to earn extra pay (stipends) and fail to calculate overtime on the extra pay earned.
- › Most schools do not do a good job maintaining time records.
- › Many schools have supervisors of one and believe that means they are exempt.

Gender Identity Issues





CASE STUDY

Judy told one of her close friends that she has always felt that she was a man in a woman's body. Judy wants to dress like a man and be called Joel. The colleague is concerned about the impact of Judy's potential behaviors on others in the school. The friend reports her concerns to the Head of School.

Can the school prohibit Judy from dressing like a man and changing her name?

Does it make a difference if Judy is an employee or a student?

Tread Carefully

- › These issues have become highly emotional over the last few years.
- › The U.S. Supreme Court ruled in the *Bostock* case in 2020 that Title VII prohibits discrimination against employees due to gender identity. Thus, you must not discriminate and you must accommodate (the courts did not address religious exemptions).
- › Your state law might prohibit prohibits discrimination against employees or students on the basis of gender identity; local ordinances may also have such a prohibition. Many of the city/county ordinances used to exempt religious organizations. Many of those exemptions have been eliminated.

For Employees

- › Schools must be prepared to provide accommodations to employees on the basis of gender identity.
- › Religious organizations may be able to argue that they are not required to accommodate where the employee's status violates the organization's religious principles.
- › This requires careful analysis to determine if the religious school is "religious enough."
- › It also requires an analysis of the employee's position to determine whether they are a "minister" under the U.S. Supreme Court's decision issued in July 2020 (*Our Lady of Guadalupe School*).

Accommodation Issues

- › Bathroom use – employees and students are entitled to use the restroom for the gender with which they identify.
- › Locker room use – same; suggest modifications for more privacy.
- › Hotel room assignments for field trips – work it out with student/parent and other student/parent for possible hotel room sharing.
- › Name to be called – okay to use nickname on non-legal documents; must use legal name and gender on transcripts.
- › Pronoun use – must use pronoun that matches gender identity. Discuss use of the preferred pronoun. A mistaken use of the incorrect pronoun does not constitute discrimination, but repeatedly referring to the wrong pronoun may give rise to a claim.

Competing Issues

- The accommodated employee/student may be subjected to bullying, hazing, and harassment. You have a duty to train, prevent, and address any unkind behavior.
- Some parents may not want the school to accommodate a transgender employee or student. Parents of younger children are especially sensitive and do not want their child exposed to sexuality at such a young age.
- There may be concerns about girls sports/boys sports and injury issues. For example, Florida law prohibiting transgender girls from playing in girls sports does not apply to private schools.

Confidentiality

- › When an employee/student advises you of the fact that they are or have transitioned or are struggling with gender identity issues, you need to communicate those issues only on a **need-to-know basis**, unless and until the individual is in agreement that the status can be more broadly communicated
- › Work with the employee/student/family to determine how, when, and what should be communicated

Recommendations

- ✓ Consider training by your legal counsel for all employees.
- ✓ Discuss the legal landscape with your managers and supervisors to ensure compliance.
- ✓ Address expectations of all to ensure non-discrimination, no harassment, and no bullying or hazing of employees
- ✓ Discuss definitions, pronouns, and working positively through the process even if an individual does not agree.
- ✓ Consider inviting an outside organization that specializes in LGBTQ issues to your company for training.

Recommendations

- ✓ Ensure that all employees know where to direct complaints.
- ✓ The appropriate person(s) should be involved to begin the discussion process.
- ✓ Assure the employee that the company will work carefully and thoughtfully with the employee.
- ✓ Assure no retaliation and advise the person how to report bullying, harassment, and retaliation.
- ✓ Ensure confidentiality of the employee's transition or disclosure unless and until that is not appropriate or possible.

Recommendations

- ✓ You don't want to be the test case
- ✓ All discussions should be documented thoroughly to show how you addressed it, open questions, and ultimate decision-making/agreement on proceeding.

Questions?



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