

Legal Issues: I

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Today's Roadmap

- Intellectual Property, Copyright and Tech Transfer
- Academic Integrity and Due Process
- Sexual Harassment and Due Process
- Accommodating Students under the Americans with Disabilities Act
- Fair Labor Standards Act

IP, ©, and Tech Transfer

- Intellectual Property
 - Patents, ©, TM, Trade Dress, Trade Secrets
 - IP is created by intellect, not naturally occurring
 - Property – inventors have limited monopoly over creations
 - Ownership vesting:
 - Patent = conception
 - © = when affixed in a tangible medium
 - TM = conception + when goods/services develop recognition with mark
 - Trade Secret = when developed
 - After vesting, ownership can be transferred automatically by employment or agreement
 - Duration varies by type

Trademarks

- USPTO and state offices
 - Lanham Act of 1946, Amended 1996 – 15 USC 1051, et seq.
- Word, phrase, symbol, design, or combination that distinguishes one source of goods from another. Can be state or federal registration.
- Service mark: services rather than goods
- Trade dress: protects distinctive features of a product that identify that product for the consumer
- Can be refused if similar to registered mark, generic, immoral, deceptive, or scandalous, disparaging or false connections, name of a person w/o consent, surname, or a flag or coat of arms.
- Marks are published for opposition before registered
- Institutional Policies on use and ownership

Trademarks

- Continuing issues with protecting against tarnishment and dilution
 - Student and employee using marks for goods and services not of the institution
 - T-shirts, social media, web addresses, etc.
- TM protection for IP developed and commercialized by employees and students for institution
- Check with your TTO, Marketing, or Business offices as well as institutional policies

Copyrights = ©

- U.S. Code Title 17
- An idea is not protected, but rather the tangible expression of the idea
- Requires: Originality, creative expression, and tangible form
- Life: Life of author plus 70 years, or as work for hire – 95 years from publication or 120 years from creation, whichever first. 17 USC §§301 - 305.
 - <http://copyright.gov/circs/circ15a.pdf>
- Ownership determined on employment or publishing agmt

Copyrights

- Scholarly Works
 - Academic tradition (aka “teacher exception”) of broadly disclaiming works that would be works for hire has not been incorporated into the revisions to the copyright law
 - Courts of different jurisdictions have differing holdings
 - Look at applicable facts, policies, and agreements
 - Policies
 - Institution as Owner (Work for Hire – Copyright Act of 1976, 17 U.S.C. Section 201(b).) – Often for online course materials
 - Creator as Owner with License back to Institution – Often for all course materials
 - Creator as Owner, unless specifically commissioned
- May also be burdened by Conflicts and Use of Institutional Name policies, and state laws

Copyright: Fair Use

- Infringement: show valid copyright, actual copying, and misappropriation (profit)
- Remedies: injunctions, loss of profit, damages, and impounding
- Fair Use is a Limited Defense (17 USC §107):
 - Purpose and Character of the Use, including if commercial nature or is for nonprofit educational purposes;
 - Nature of the copyrighted work;
 - Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - Effect of the use upon the potential market for or value of the copyrighted work.
- Cite sources
- Some institutions have adopted standards they defend, others not
- US Copyright Office 2013 Joint Strategic Plan on Intellectual Property Enforcement, U.S. Intellectual Property Enforcement Coordinator Report to the White House – Index of Fair Use Cases and educational material on Fair Use www.copyright.gov/fls/fl102.html

Patents

- US Code Title 35
- Monopoly is granted for exchange of full disclosure of new technology
- Patent rights exclude others from making, using, selling, importing
- Does NOT give owner the right to make, use, sell, or import
- Protected in country of issue

Patents and Tech Transfer

- Bayh-Dole – Passed in 1980 (35 USC §§200 – 212)
 - A small business, university, or non-profit may own inventions created from federal funds
 - Universities could protect and commercialize govt funded research
 - Employment contracts assign rights to inventions by researchers to the institution or its governing board
 - Technology transfer offices were created to protect and commercialize those inventions
- Stanford v Roche, 2011 WL 2175210 (U.S. 2011)
 - United States Supreme Court case where the Court held that title in a patented invention vests first in the inventor, even if the inventor is a researcher at a federally funded lab subject to the 1980 Bayh–Dole Act
 - Many institutions now have a future assignment document attached to beginning of employment

Tech Transfer

- Bayh-Dole
- Leahy-Smith America Invents Act signed into law September 16, 2011
 - Went into effect September 16, 2012 and on March 16, 2013
 - Went from first to invent to a first inventor to file system
 - Expanded definition of prior art
 - Intervention proceedings
- Most institutions have a division to assist in the protection and commercialization of IP created at the institution
 - These offices negotiate agreements for research collaboration and sharing of IP
 - They often help identify potential partners in industry and other institutions for researchers

Pathway to Commercialization

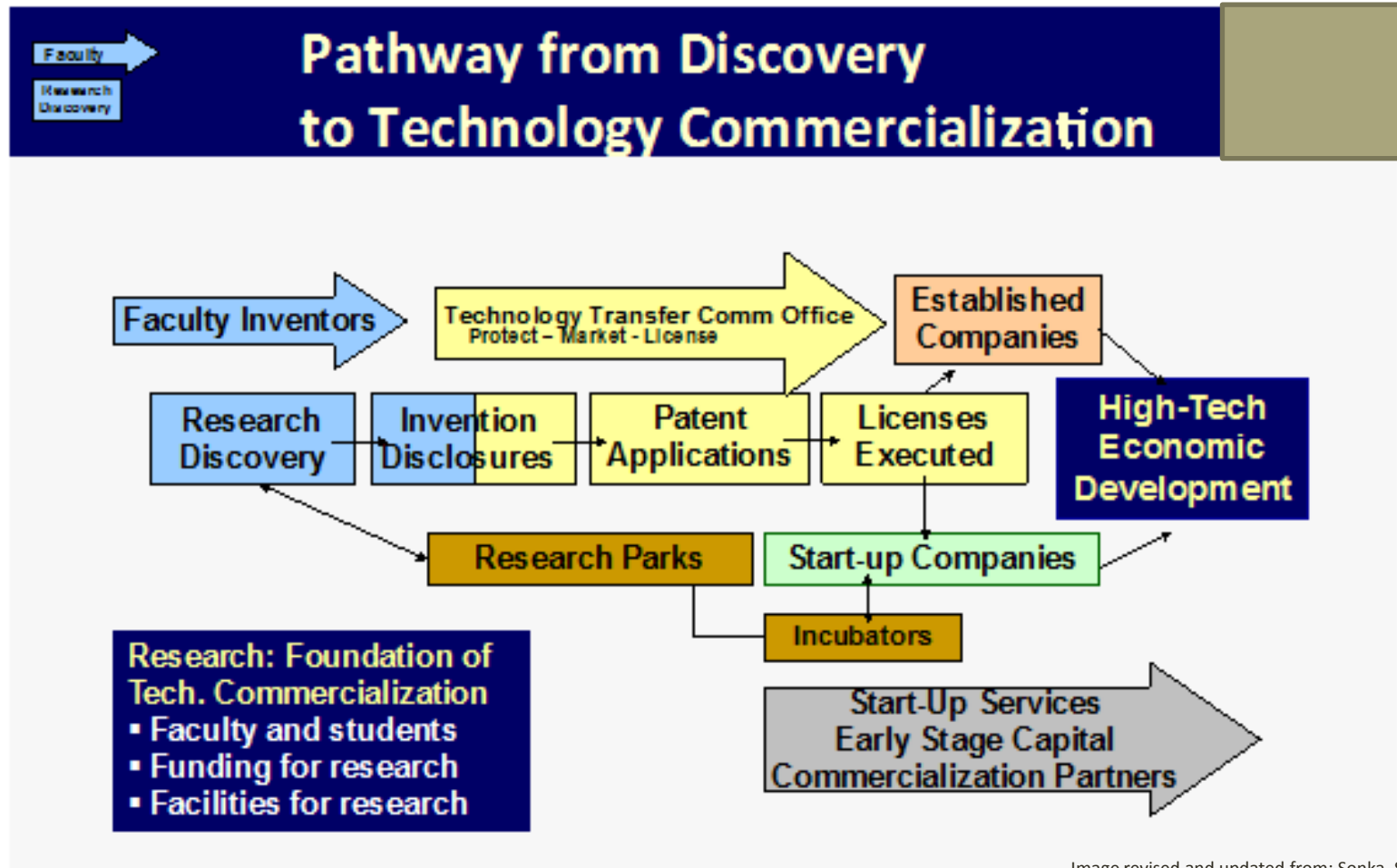


Image revised and updated from: Sonka, Steven T. and Chicoine, David L. 2004. "Value and University Innovation." American Journal of Agricultural Economics 86 (Number 5): 1337-1344.

IP Ownership Policies

The UNC system policy directs campuses to adopt IP policies covering the following issues:

- Patents: ownership; income; sponsored research; publication; conflicts of interest; duty to disclose; campus patent committees; patent management
- Copyrights: copyright use; ownership of works by faculty, staff, and students; works subject to both copyright and patent protection; administration; dispute resolution
- Service Marks, Trademarks, and Trade Secrets: ownership; use

IP Ownership Policies

Scenarios typically covered in UNC system policies include –

- Works Created by Faculty and Staff
 - Traditional or Non-Directed Works
 - Traditional or Non-Directed Works Involving Exceptional Use of Institutional Resources
 - Directed Works
 - Sponsored or Externally Contracted Works
 - Works Made for Hire
 - Works Made by Independent Contractors
- Works Created by Students
 - “Default” rule
 - Works created during hourly employment
 - Classroom and laboratory notes (which may be used for educational purposes only and not for the student’s commercial gain)

IP Ownership Policies

- At one UNC campus, the “default” rule for “traditional” works created by faculty and certain staff is as follows:
 - The creator owns the copyright
 - The school has “a perpetual, non-exclusive, irrevocable, royalty-free license to reproduce, publicly perform, publicly display, or make derivative works” of any work created within the scope of employment
 - If the school provides financial resources to assist in the commercialization of the work and the work generates income, the creator must either reimburse the school or share income with the school
- “Traditional” works generally include pedagogical, scholarly, literary, and artistic works not created at the direction of the school or a school employee

IP Ownership Policies

- Pursuant to one UNC institution's policy, the "default" rule for works created by students is as follows:
 - A student owns his or her work unless there is a prior, written agreement to the contrary; and
 - The school has "a perpetual, non-exclusive license to exploit all of the Student's rights in the work under the law"
- Transfer of rights between the student and the school is permitted
- Agreement to these terms is a condition of enrollment

Students and Scholarly Writings

- Institutional policy will identify IP ownership
 - Policy will align with the institution's philosophies on IP ownership
 - Generally, students will own their creations except
 - When the IP is subject to the terms of a sponsored research or other agmt granting the institution rights,
 - IP development involved significant use of institution resources,
 - IP was developed as a direct result of duties, whether paid or unpaid, as an employee, work study student, intern, contractor, or volunteer,
 - IP copyrightable material a “work made for hire”
 - IP is a trademark or service mark relating to goods, services or programs of institution

Students and Scholarly Writings

- Ex: South Dakota Board of Regents Policy 4:34
 - For copyrighted scholarly materials, generally no claim made, unless federally funded research, and works for hire or pursuant to employment
 - Graduate students' work is usually considered faculty directed and inventions are considered owned by Board
 - Scholarly writings are licensed back to the institution for future use and publication

Academic Integrity and Due Process

- Employee or Student
 - Follow the institutional policies and procedures (bargaining agreement)
 - Case law
 - There may be cross over depending on the facts
 - Research Misconduct will have additional requirements
- Generally Speaking:
 - Academic Decisions receive more deference than conduct
 - Notice and Opportunity to be heard for academic decisions
 - Conduct, requires notice and a hearing

Academic Integrity and Due Process

- Certain due process standards are currently in flux in the legal environment
- Elements of due process
 - Procedural (adjudication processes are fair and impartial)
 - Substantive (protection of fundamental rights; limitations on what can be regulated)
- Attorney Representation
 - No U.S. constitutional right to attorney representation, yet, but state law may provide this
 - Institutions may provide for it in their policies
- Title IX
 - Regulations and guidance for hearing procedures address representation

Due Process

- No person shall be . . . deprived of life, liberty, or property, without due process of law.
- Student Cases:
 - Goss v. Lopez, 419 U.S. 565 (1975) – Disciplinary case
 - 10 students were suspended without a hearing and joined in this action challenging the process of such suspensions. All suspensions were disciplinary in nature.
 - Due process guarantees hearing prior to suspensions.
 - Court found both a property and a liberty interest implicated by suspension from school.
 - “Fundamental requisite of due process is the opportunity to be heard.” Id. at 579.
 - Court held students are entitled to “*some* kind of notice” and “*some* kind of hearing.” Id. (emphasis in original).

Due Process

- Student cases continued
 - Board of Curators of the University of Missouri v. Horowitz – Defining the Procedural Due Process Standard for academic decisions.
 - Does NOT require a formal hearing, instead merely requires:
 - Notice of dissatisfaction
 - Notice of consequences
 - Decision must be “careful and deliberate.”
 - Academic, rather than disciplinary cases, “call for far less stringent procedural need for procedure requirements.”

Due Process

Student cases continued:

- Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985)- Defining the Substantive Due Process Standard for academic decisions.
- Substantive Due Process standard for academic decisions:
 - Only a “narrow avenue” of judicial review of the substance of academic decisions is appropriate.
 - “When judges are asked to review the substance of a genuinely academic decision they should *show great respect for the faculty’s professional judgment*. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible *did not actually exercise professional judgment.*” Id. at 225.

Due Process

- Employee cases
 - Board of Regents v. Roth, 408 U.S. 564 (1972).
 - Roth was hired for a one year fixed term; possible extension by consent
 - University rule allowed president to decide not to renew, and provided opportunity for review if dismissed prior to the end of the contract term
 - Roth alleged 1st Amendment and 14th Amendment (due process) violations
 - Under the 14th Amendment, there is no requirement for a hearing prior to nonrenewal of contract unless the nonrenewal deprived the employee of a “liberty” or “property” interest in continued employment
 - No liberty or property interest implicated

Academic Integrity and Due Process

- Ex: South Dakota Board of Regents Policies
 - Plagiarism is considered a conduct issue with notice and hearing before action
 - Academic decisions may be made by instructor of record
 - Faculty and employee academic misconduct is handled through research office (compliance) investigations
- UNC system policy on substantive and procedural due process
 - Requires institutions to establish student codes of conduct, with sanctions
 - Distinguishes between minor violations (less than suspension/expulsions) and major violations (possible suspension/expulsion)
 - Longer and more detailed notice and hearing requirements for hearing major violations
 - Constituent institutions address academic dishonesty in varying ways

Lawyers in Disciplinary Proceedings

- Background on student disciplinary proceedings
 - Disciplinary or Conduct Procedures are designed to address violations of Disciplinary or Conduct Rules in a manner that prioritizes student development and education.
 - Primary objectives of these procedures are to uphold standards of integrity and personal responsibility; to encourage responsible choices concerning issues such as alcohol use, the treatment of others, and sexual behavior; and to promote student learning, safety, health, and well-being.
- Emphasis upon student education and growth – different from criminal/civil legal processes.
- Disciplinary procedures do not result in an adjudication of whether a crime has occurred..
- Institutions attempt to keep proceedings non-adversarial
- Seek to reflect community values, university policies, and standards.

Lawyers in Student Disciplinary Proceedings

- North Carolina law
- **§ 116-40.11. Disciplinary proceedings; right to counsel for students and organizations.**
 - *Any student* enrolled at a UNC institution who is *accused of a violation of the disciplinary or conduct rules of the constituent institution* shall have the *right to be represented*, at the student's expense, by a *licensed attorney or nonattorney advocate* who may *fully participate* during any disciplinary procedure or other procedure adopted and used by the constituent institution regarding the alleged violation.
 - No right to be represented by a licensed attorney or nonattorney advocate in either of the following circumstances:
 - If the constituent institution has implemented a "Student Honor Court" which is fully staffed by students to address such violations.
 - For any allegation of "academic dishonesty" as defined by the constituent institution.
 - Also applies to student organizations officially recognized by a constituent institution.

Lawyers in Student Disciplinary Proceedings

- UNC system approach –
- Academic Dishonesty – Any act that constitutes cheating, plagiarizing, or knowingly misrepresenting the source of information contained in work submitted by a student; or knowingly assisting another in cheating, plagiarizing, or a knowing misrepresentation.
- Accused of a Violation – A student or Student Organization is Accused of a Violation when, following an appropriate inquiry or investigation into an alleged violation of Disciplinary or Conduct Rules, a designated university official brings a formal charge against a student or Student Organization to initiate a Disciplinary or Conduct Procedure.

Lawyers in Student Disciplinary Proceedings

Arkansas - A.C.A. § 6-60-109 (enacted April, 2015)

- Who: Any disciplinary action against the student that results in a suspension of 10 days or more
 - Academic dishonesty is exempt from statute
 - Doesn't apply to student organizations
 - Protection: Student may request appeal process and be represented by attorney at student's expense.
- North Dakota - N.D. Cent. Code, § 15-10-56 (enacted April, 2015)
 - Who: Any student, or student organization, who is accused of a violation of the institution's rules or policies and the violation could result in a suspension or expulsion
 - Academic misconduct exempt
 - Also provides students with right to appeal to institutional administrator or body that did not make the initial decision AND extends right to counsel for said appeal
 - Protection: Right for counsel to "fully participate during any disciplinary proceeding" and appeal.

Proposed Legislation

- South Carolina – HB 3453
 - Standard language regarding right to counsel by students, but also provides right to appeal suspensions of 10 days or more to state court.
- Massachusetts – Bill H.3942
 - Prior to any disciplinary hearing (that could result in a suspension or expulsion) the student has the right to call his/her parents while in the custody of campus police or a law enforcement component of a school, AND to have an attorney present at any subsequent institutional disciplinary hearing.
- Virginia
 - 1st version of bill did not pass in 2014. Would have provided right to counsel to both students and student orgs facing 10 days of suspension or expulsion. The bill also provided a right to appeal to state court after exhausting all college-level appeals.
 - New version is being considered by higher education sub-committee. This version ONLY grants the right to appeal to state court, and exempts the Virginia Military Institute.

Student Disciplinary Proceedings

- Issues
 - When does the right attach?
 - Educational process v. adversarial process
 - The role of counsel
 - Even absent a statute granting the right, should universities permit counsel?
 - Evolving right?

Title IX and Sexual Harassment

- Title IX was signed into law in 1972
 - No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . 20 U.S.C. 1681(a)
- The White House, OCR, DOJ, Courts and Congress have provided additional context over the years
 - Many people thought Title IX was just about athletics – in recent years, the broader implications have been highlighted
 - As of late, Sexual Assault has been highlighted as a form of discrimination and harassment subject also to Title IX
- Sexual Assault has been a prohibited form of discrimination and harassment for a long time:
 - Quid Pro Quo
 - Hostile Environment

Title IX and Sexual Harassment

- Generally, Dear Colleague Letter(s) guidance from the OCR has directed institutions of higher education:
 - Title IX Coordinator(s)
 - Grievance Procedures
 - Notice of Nondiscrimination and Contact info for Title IX Coordinator
 - Training
- Implications on Due Process – Attorneys in conduct proceedings
- Clery Act: When campus security authorities and law enforcement agencies receive reports of Clery crimes within Clery geography, they must be referred for Title IX investigation and included in statistics

Title IX & Student Disciplinary Proceedings

- Issue: What are the rights of accuser in regards to counsel?
- Violence Against Women Act – New provisions effective as of July 2015
 - Institutions must provide “the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice”
 - Institutions are not allowed to limit the choice or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding
 - You may establish restrictions on the extent of participation so long as it applies to both the accused and the accuser

Fair Labor Standards Act

Fair Labor Standards Act

- Legislation originally enacted in 1938 that establishes:
 - Specifies minimum wage: Now \$7.25 per hour
 - Maximum hours: Pay equal to 1.5 employee's regular rate pay for any hours worked over 40 in a workweek
 - Recordkeeping
 - Child labor standards
- Administered and enforced by the Wage and Hour Division of the U.S. Department of Labor

Coverage under the FLSA

- Employers
 - Enterprise Coverage (ADV of \$500k; other institutions)
 - Individual Coverage (Employers whose employees are engaged in commerce or production of goods for commerce)
- Higher education institutions

Employees

- Most jobs covered by the FLSA
- Exemptions from minimum wage and overtime rules
 - Executive, administrative, and professional employees
 - Employees in certain computer occupations
- Exempt v. Nonexempt
- Salary basis test
 - Teachers, lawyers, and doctors

Salary Test

- Salary test is a bright line test that must be met in order to be considered exempt
- Requirements:
 - Position must be paid on salary basis
 - Minimum salary threshold
 - Employee must make \$455 per week (\$23,660 annually) in order to be considered exempt

Duties Test – Executive Exemption

- Primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- Must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; AND
- Must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to employment decisions must be given "particular weight."

Duties Test – Administrative Exemption

- Primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; AND
- Primary duty must include the exercise of discretion and independent judgment with respect to “matters of significance.”

Duties Test – Professional Exemption

- Primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- Advanced knowledge must be in a field of science or learning; AND
- Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

Duties Test – Others

- Computer Employee Exemption
- Outside Sales Exemption
- Highly Compensated Employees
 - Total annual compensation of \$100,000 or more and performs at least one of the duties of an exempt executive, administrative, or professional employee
- First Responders

Overtime Changes Proposed

- March 2014: President Obama signs Executive Order to “Update & Modernize” FLSA
 - Doesn’t have to go through Congress because this is a rule change
- Proposed new overtime rule published on July 6, 2015
- Comment period ended on September 4, 2015
- Experts project publication of the final rule between January, 2016 and April, 2016 with an effective date 90-120 days later

The Proposed Changes

- Increase in the minimum salary threshold from \$23,660/year to \$50,440/year
- Possible requirement that any exempt position spend a minimum percentage of time on exempt duties
- Possible upper limit on the amount of time any exempt position may spend on nonexempt duties
- Prohibition on concurrent performance of exempt and nonexempt duties

New Salary Threshold

Current

- \$455/week or \$23,660/year
- Below the current poverty level for a family of four
- Currently at 12th percentile of F/T salaried workers
- Highly Compensated Employee Threshold of \$100,000

Proposed

- \$970/week or \$50,440/year
- Projected 40th percentile of F/T salaried workers
- Annual and automatic updating of salary threshold
- Highly Compensated Employee Threshold increases to \$122,148

Impact

- Employers face three options
 - Raise the employee's salary to be above the minimum threshold
 - Keep the employee's salary the same and pay them overtime (track hours)
 - Restrict the employee from working over 40 hours in the week
- Estimated Impact
 - The University of Florida system estimates the change to be a total cost of \$62 million annually
 - A large private research university estimated the costs at \$14.8 million

Complaint Process

- One (or more) of your employees thinks you have violated the FLSA in one or more ways:
 - You are not paying minimum wage for hours work;
 - You have misclassified his/her position as exempt rather than non-exempt (meaning no payment for overtime over the past 2-3 years); and/or
 - Lots of other people could be affected, too.
- How can it be addressed?
 - Internal complaint/grievance;
 - Complaint to the DOL;
 - AND/OR
 - Lawsuit in federal court.

Unlike the civil rights laws, there is NO requirement that the employee address the concern administratively first before filing a lawsuit.

Investigate Complaints Early

- Employees may receive attorneys' fees under the FLSA. See 29 U.S.C. 216(b).
- An employee is entitled to attorneys' fees if she prevails on "any significant issue" in litigation (even if resolved through a settlement).
- Attorneys' fees and costs can add up (especially if more than one plaintiff involved).
 - Gregory v. Belfor USA Group, 2014 WL 468923 (E.D. Va. Feb. 4, 2014): \$115,000 in attorneys' fees and \$12,368.63 in court costs awarded.
 - Driscoll v. George Washington Univ., 55 F. Supp. 3d 106 (D.D.C. 2014): \$387,710.48 in attorneys' fees and \$13,510.42 in court costs awarded.

What this means for Deans

- Identifying potentially affected employees
 - Post-Docs
 - Graduate Assistants
 - Other employees
- Trainees v. employees
- Wage & Hour Division guidance
- Questions

WHD Field Operations Handbook

- ***10b18 Graduate students — research assistants. In some cases graduate students in colleges and universities are engaged in research in the course of obtaining advanced degrees and the research is performed under the supervision of a member of the faculty in a research environment provided by the institution under a grant or contract. Normally, the graduate students involved in these programs are simultaneously performing research under the grants or contracts and fulfilling the requirements of an advanced degree. Under such circumstances, WH will not assert an employee-employer relationship between the students and the school, or between the student and the grantor or contracting agency, even though the student receives a stipend for their services under the grant or contract.***

Tracking Time Worked

- Capturing “time worked” for people who have previously been exempt
 - Potential hit to employee moral to now have to log hours

Compensable Work

- The Supreme Court has clarified that the appropriate test to use in determining whether time is compensable is not whether an employer required the action in question, but whether **the action was integral and indispensable to a principal activity the employee is employed to perform.**
 - Integrity Staffing Solutions, Inc. v. Busk, 135 S.Ct. 513 (2014)
- On the other hand:
 - Remote access work is not compensable when it is incidental to the work performed.
 - De minimus activities also are not compensable, but this is not a quick and easy standard for employers.

Affordable Care Act

College & University Employers

- ACA builds on employment-based model – large employers
- Colleges and Universities = large employers
- Traditionally offers comprehensive health coverage
- Competitive market for human capital
- Expectations of current/potential employees

Employer Mandate

- Coverage Requirements
 - Meet actuarial threshold of 60% of health care expenses paid by the employer plan
 - 95% of eligible employees, when fully enacted
 - Full-time employees (FTE) who work 30 or more hours/ week for 3 months
- Affordability Requirements
 - Premiums for individual coverage can't exceed 9.5% of household income

The Issue

- Must determine which employees should be offered coverage because they are “full time”
 - Penalty assessment of up to \$2,000 annually per full-time employee for employers that do not provide coverage if at least one full-time employee receives a premium tax credit or cost sharing reduction.

Who is a Full-Time Employee?

- A full-time employee is a common law employee who is employed:
 - on average at least 30 hours of service per week; or
 - 130 hours of service in a month.
- Relevant Exclusions
 - Bona fide volunteers
 - Student employees

Adjunct Faculty

- Employers should use a method of crediting hours of service that is “reasonable in the circumstances and consistent with the employer responsibility provisions.”
- Final regulations expressly allow crediting an adjunct faculty member with 2-1/4 hours of service per week for each hour of teaching or classroom time as a reasonable method for this purpose.

Adjunct Faculty – Alternatives?

- Three (or some other number) hours of service per course credit
- 75% or more FTE
- Track hours credited by state retirement systems

Temporary Employees

- No definition in the Final Regulations
 - Job of limited duration = not reasonably expected to work at least 30 hours per week over measurement period
 - Seasonal employees
 - Short-term employees
 - High turnover employees
- Break in service -- special rules for educational institutions
- Be careful about using temporary staffing agency

Others

- Graduate Assistants
- Teaching Assistants
- Postdocs

ADA Accommodations – Mental Health

- Approximately 61.5 Americans, 1 in 4 adults, experience mental health impairment in a year (National Institute of Mental Health, 2013)
- A few common impairments: Bipolar Disorder, Major Depression, Obsessive Compulsive Disorder, Post Traumatic Stress Disorder, Schizophrenia, Seasonal Affective Disorder
- ADA does not contain a list of conditions that constitute disabilities
- “Danger to Others”

ADA Student Accommodations

- Employee or Student
 - Title II, Title III, Section 504
 - Qualified individual with a disability
 - Students:
 - No longer in the IEP environment – need to work with your disability services
 - Generally, an institution may not discriminate on the basis of disability. It must insure the programs offered, including extracurricular activities, are accessible to students with disabilities. Such as by providing architectural access, aids and services necessary for effective communication, and by reasonably modifying policies, practices and procedures.
 - Not required to provide requested accommodation that fundamentally alters the program or course
 - Employees:
 - An employer may not discriminate on the basis of a disability in the terms and conditions of employment.
 - Provide reasonable accommodation through an interactive process -- perform the essential functions of their position
- Crossover challenges

ADA Student Mental Health

- Student mental health considerations
 - Distress, suicide, etc.
 - Health practice considerations v. legal considerations
- “Direct Threat” under Title II
 - Pre-2011 – included both a threat to “other” and to “self”
 - March 2011 – Redefined by DOJ to include only those who pose a significant risk to the health or safety of others
- No formal guidance from OCR

ADA Student Mental Health

- Dealing with students at risk – harm to self
 - Facts and circumstances; flexible and adaptive
 - Conduct individualized risk assessment to justify removal, withdrawal, and conditions on readmission – use teams
 - Assess conduct that affects the health, safety and welfare of others
 - Enforce student code of conduct or other generally applicable policy
 - Provide due process – notice and an opportunity to respond; appeal
 - Reasonable conditions for readmission, based on the student

ADA Employee Mental Health

- Employer considerations
 - Direct threat; discrimination; liability to others
- Employee considerations
 - Disclosure of disability; discrimination
- Workplace conduct and the duty to accommodate
 - Mental illness often manifests as misconduct or inadequate performance
 - May require accommodation
 - Direct threat – self or others

Student John Smith was admitted to the Medical School with advanced standing that would normally require him to spend only two years in medical school, focused mostly on a variety of academic and clinical experiences. In the first year, several clinical faculty members found Smith's performance in clinics deficient. At the end of the year, Smith had confrontations with some of his colleagues and supervisors, and ultimately had to be removed from a clinic setting when he responded to some guidance from a clinic supervisor by launching into an uncontrolled tirade directed at the supervisor at a patient. Shortly thereafter, Smith was briefly hospitalized after he took an overdose of his medication in an apparent suicide attempt. He had indicated on his medical school application that he has bipolar disorder, which had been addressed with medication and other strategies.

In reviewing Smith's first year, the school's academic review panel recommended probation for Smith based on his academic and clinical performance, and based on his unprofessional behavior in clinics. Separately, the dean suspended Smith temporarily based on the clinic episode, relying on a policy that permitted summary suspensions in instances where the health or well being of students or faculty could be affected, or where physical safety is threatened. In making the decision, the dean relied on an assessment of Smith's medical condition, including reviews from a psychiatrist and a clinical psychologist, who concluded Smith was a danger to himself and others.

Smith sought to return for the second year of clinical rotations. Identifying Smith as "high risk" because he had been suspended for medical reasons, the dean required Smith to submit a release for his medical information, agree to comply with a personalized treatment plan, prepare a personal statement assessing his own behavior and performance in the first year and explaining what he would do differently in the second year, and agree to have his medical providers complete a questionnaire. As conditions for Smith's return, the dean required Smith to undergo a readmission evaluation by a psychiatrist identified by the school, follow all recommendations of Smith's treatment plan, including attending any required therapy and taking required medications, and agree to a series of behavioral objectives and consequences. Smith reluctantly agreed to the requirements, but complained that they were discriminatory based on his perceived disability (bipolar disorder).

Early in the second year, Smith's clinical supervisors again raised concerns about his ability to perform clinical functions and skills. He was rated as deficient in several areas. He did, however, comply with his treatment plan and avoided any behavioral problems, though he remained withdrawn from anything but the most essential interactions with peers, faculty and patients. The academic review panel fully evaluated Smith's progress at the mid-year point. The panel recommended that Smith not be considered for graduation at the end of the year based on his poor performance on clinical skills requirements. The panel also recommended his dismissal unless he showed substantial improvement by the end of the year.

In an effort to give Smith the ability to show improvement, the dean permitted Smith to participate in a set of oral and clinical examinations near the end of the year. Five practicing physicians evaluated Smith's performance. Two of the physicians recommended that he be permitted to graduate. Two recommended his immediate dismissal. One suggested that he repeat a year of clinical experiences.

The academic review panel evaluated the entirety of Smith's academic and clinical performance, including the reviews from the five physicians, and unanimously recommended his dismissal. A review committee appointed by the dean affirmed 6 to 1. Smith sought a formal hearing before the committee and asked for the opportunity to present evidence, cross-examine witnesses, and be represented by counsel. The dean denied those requests, based on school policy. The dean then decided to dismiss Smith from the program based on the panel's recommendation, a decision that was upheld by the provost and the chancellor.