

# Higher Education Check-In: Aside From COVID, Where Are We?

January 13, 2022

## Presented by:

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1

## FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT



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2

## The Family Educational Rights and Privacy Act (FERPA)

- FERPA provides two fundamental rights to postsecondary students:
  1. The right to review their education records, defined as those that contain information “directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution” 34 C.F.R. §99.3(a); and
  2. The irrevocable written consent before an institution of higher education will disclose personally identifiable information (“PII”) from their education record, unless FERPA authorizes disclosure without their consent.

20 U.S.C. §1232g; 34 C.F.R. Part 99



3

## The Family Educational Rights and Privacy Act

- Student’s Right to Review Records:
  - Institutions must honor a request of a student to review and inspect their education records within 45 days of receipt of that request. (34 C.F.R. § 99.10)
  - If the student requests an amendment to their education record they believe is inaccurate or misleading, the institution must consider the request and provide the student a hearing if it determines the record will not be changed. (34 C.F.R. §§ 99.20 & 99.21)
  - This is a separate process from a grade appeal.



4

## The Family Educational Rights and Privacy Act

- Student's Right to Provide Written Consent Before Disclosure:
  - A postsecondary institution must obtain a student's written consent before releasing personally identifiable information from the student's education record unless the disclosure is:
    1. to other school officials who the school has determined have legitimate educational interests. This includes persons or entities outside of the institution provided certain conditions are met. (34 C.F.R. § 99.31(a)(1));
    2. to officials of another school where the student seeks or intends to enroll, or where the student is already enrolled if the disclosure is for purposes related to the student's enrollment or transfer, subject to certain requirements. (34 C.F.R. § 99.31(a)(2));



5

## The Family Educational Rights and Privacy Act

3. to authorized representatives of the U.S. Comptroller General, the U.S. Attorney General, the U.S. Secretary of Education, or State and local educational authorities, such as a State postsecondary authority that is responsible for supervising the university's State-supported education programs. Disclosures under this provision may be made, subject to certain requirements, in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to these programs. These entities may make further disclosures of PII to outside entities that are designated by them as their authorized representatives to conduct any audit, evaluation, or enforcement or compliance activity on their behalf. (34 C.F.R. §§99.31(a)(3); 99.31(a)(5); and 99.35);



6

## The Family Educational Rights and Privacy Act

4. in connection with financial aid for which the student has applied or which the student has received, if the information is necessary to determine eligibility for the aid, determine the amount of aid, determine the conditions of the aid, or enforce the terms and conditions of the aid. (34 C.F.R. § 99.31(a)(4));
5. to organizations conducting studies for, or on behalf of, the school in order to (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction. (34 C.F.R. § 99.31(a)(6));



7

## The Family Educational Rights and Privacy Act

6. to accrediting organizations to carry out accrediting functions. (34 CFR § 99.31(a)(7));
7. to parents of an eligible student if the student is a dependent for IRS tax purposes. (34 CFR § 99.31(a)(8));
8. to comply with a judicial order or lawfully issued subpoena. (34 C.F.R. § 99.31(a)(9));
9. in connection with a health or safety emergency, subject to certain conditions. (34 C.F.R. § 99.31(a)(10));
10. disclose information that the institution has designated as “directory information.” (34 C.F.R. § 99.31(a)(11));



8

## The Family Educational Rights and Privacy Act

11. to a victim of an alleged perpetrator of a crime of violence of a non-forcible sex offense, subject to certain requirements. (34 C.F.R. § 99.31(a)(13)).
12. to the general public, the final results of a disciplinary proceeding, subject to certain requirements, if the school determines the student is an alleged perpetrator of a crime of violence or non-forcible sex offense and the student has committed a violation of the school's rules or policies with respect to the allegation made against them. 34 C.F.R. § 99.31(a)(14)).



9

## The Family Educational Rights and Privacy Act

13. to parents of a student regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the school, governing the use or possession of alcohol or a controlled substance if the school determines the student committed a disciplinary violation and the student is under the age of 21. (34 CFR § 99.31(a)(15)); or
14. in relation to sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines. (34 C.F.R. § 99.31 (a)(16)).



10

## The Family Educational Rights and Privacy Act

- Notable Consent Exceptions
  - For disclosures to school officials, such officials include contractors, consultants, volunteers or other parties to whom the institution has outsourced institutional services or functions if the institution determines they have a legitimate education interest; they conduct an institutional service or function for which the institution would otherwise use employees; they are under the direct control of the institution regarding the maintenance and use of the records; and they are subject to FERPA's use and redisclosure requirements. (34 C.F.R. § 99.31(a)(1)(i)).
  - Threat Assessment Teams – disclosures are to school officials.



11

## The Family Educational Rights and Privacy Act

- Notable Consent Exceptions
  - For disclosures relating to a judicial order or subpoena, the institution must make a reasonable effort to notify the student in advance of compliance with the order or subpoena unless the instrument prohibits disclosure. (34 C.F.R. § 99.31((a)(9)(ii)).
  - For disclosures related to health and safety emergencies, the institution may take the totality of the circumstances in determining if an emergency exists. If the institution determines that there is an articulable and significant threat to the health and safety of a student or other person, it may disclose an education record to any person whose knowledge of that information is necessary to protect health and safety. (34 C.F.R. § 99.36(c)).



12

## The Family Educational Rights and Privacy Act

- Notable Consent Exceptions
  - For disclosures relating to release of “directory information,” FERPA makes clear what type of information can be considered “directory:”
    - Name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g. undergraduate or graduate; full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended. (34 C.F.R. § 99.3).
    - Institutions may consider limiting this list further.
    - Annual Notification (34 C.F.R. § 99.7) and Opt-Out (34 C.F.R. § 99.37)



13

## The Family Educational Rights and Privacy Act

- Notable Consent Exceptions
  - FERPA also allows institutions to disclose “de-identified” records without prior written student consent. This is especially relevant in relation to the exception on audits and evaluations. For this exception to apply, the institution or entity receiving the information must remove all PII and make “a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple release, and taking into account other reasonably available information.” (34 C.F.R. § 99.31(b)(1)).



14

## Recordkeeping Requirements under FERPA

- Except for disclosures to school officials, disclosures related to some judicial orders or lawfully issued subpoena, and disclosures of directory information, the FERPA regulations require the institution to record the disclosure. (34 C.F.R § 99.32).
- Therefore, it is a good practice to train all departments that release FERPA protected information on logging disclosures that need to be recorded. The campus' Registrar's office is often the place where the disclosures are recorded; therefore, coordinating the training with the Registrar's office is best.



15

## Not Considered Education Records Under FERPA

- Law Enforcement Records: Records maintained by a law enforcement unit of an institution that were created by such unit for purposes of law enforcement. (34 C.F.R. §§ 99.3(b)(2) & 99.8).
- Treatment Records: Records which are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in their professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice. (34 C.F.R. §§ 99.3(4) & 99.10(f)).



16



## Not Considered Education Records under FERPA

- Employment Records, exception for student workers. (34 C.F.R. § 99.3(b)(3));
- Records created or received by an institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student. (34 C.F.R. § 99.3(b)(5));
- Grades on peer-graded papers before they are collected and recorded by the faculty member. (34 C.F.R. §99.3(b)(6)); and
- Records kept in the sole possession of the maker, are only used as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record. (34 C.F.R. § 99.3(b)(1)).

## Recent FERPA Resources

- The U.S. Department of Health and Human Services & the U.S. Department of Education issued an update in December 2019 on its *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records*, originally issued in November 2008.  
<https://studentprivacy.ed.gov/resources/joint-guidance-application-ferpa-and-hipaa-student-health-records>
- The Congressional Research Service released a report on May 24, 2021, entitled *The Family Educational Rights and Privacy Act (FERPA): Legal Issues*.  
<https://crsreports.congress.gov/product/pdf/R/R46799>
- The U.S. Department of Education's Student Privacy Policy Office issued FAQs in March 2020, entitled *FERPA & Coronavirus Disease 2019 (COVID-19)* ([https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/FERPA%20and%20Coronaviruss%20Frequently%20Asked%20Questions.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronaviruss%20Frequently%20Asked%20Questions.pdf)) and updated its guidance in September 2020 with a document entitled *May Schools Disclose Information about Cases of COVID-19*  
[https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/Blog%20post%209-24-20.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Blog%20post%209-24-20.pdf)

# STUDENT CONDUCT



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19

## Student Conduct Policies and Procedures

- Codes of conduct – many different choices depending on:
  - Size
  - Residential or primarily commuter
  - Location and connection to community
  - History and culture (honor codes, students serving on disciplinary panels, religious institution)
  - Composition of student body



20

## Periodic Review is Useful and Important

- Back to first principles – why are we doing things this way?
- Weigh and balance values:
  - Uniform sanctions versus discretion in determining sanction
  - What are effects on different groups (low-income or first-gen students, students of color, campus “celebrities”)
- Consider gaps or shortcomings, what worked well
- Avoid over- or under-legislating



21

## Recommended Practices: Clarifying and Managing Expectations

- Set out clear expectations, including rights and responsibilities and all possible sanctions
- Make rules and processes easy to find and clear
- Include grievance process with appeal process
  - Part of or separate from disability accommodation grievance process
  - Part of or separate from grade/academic appeal process
  - Advantages include safety valve, surface other problems early



22

## Covid Violations: Part of Student Conduct Code or Separate?

- Variety of approaches
  - Covid addendum to conduct code, explicitly supersedes anything contradictory in conduct code (SUNY Alfred)
  - Include within conduct code (West Virginia University)
  - Strong enforcement of safety rules (Fordham, student guest policy)
  - Address Covid violations via campus housing privileges(UConn)
  - Consider behavioral contracts (be prepared to respond to students who refuse to sign them)



23

## Student Speech: Social Media

- Be clear that social media behavior is subject to same conduct rules as in-person conduct, such as:
  - Filming individuals have sex with incapacitated person
  - Sending unwanted sexual texts or advances
  - Threatening retaliation for bringing complaints
- Consider including Social Media Policy and best practices in conduct code



24

## Off-Campus Activity: To Regulate or Not?

- Institutions can generally choose (private IHEs have more leeway)
- If so, clearly state in policy, limit to activity that has a nexus to campus and enforce it consistently
- Off-campus disrespectful or disruptive conduct not enough to discipline in high-school context (SCOTUS Mahanoy cheerleader case – “F\*\*\* Cheer”), certainly not in higher education context



25

## Social Media Off Campus in Clinical Settings

- Courts have allowed students in clinical programs to successfully challenge discipline for posting photos and text on personal social media mocking/expressing disgust for patients/cadavers.
- No guarantee that IHEs can successfully address, but best practices include:
  - Program Policies: clear and specific behavioral rules; link specific rules to detailed professional standards, potential sanctions, harm to subjects and families
  - Specifically include personal social media
  - Consider behavioral contract for program



26

## Student “Hate Speech”

- Public IHEs – 1st Amendment protections
- Private IHEs – not subject to 1st Amend., but can voluntarily agree to free speech provisions (also subject to State requests)
- “Hate Speech Codes” strongly disfavored by Courts
- Alternatives to avoid punishing “hate speech”
  - Conduct code is clear that behavior is addressed, not intent
  - Use non-discrimination policies
  - Respond to communicative behavior that causes harm (spitting, hitting, destroying property, blocking entranceways)
  - Enforce consistently regardless of content (Viewpoint Neutrality)



27

## Hate Speech: Bias Intervention/Campus Response Teams

- Continuing campaign of legal challenges by Speech First
- Recent Circuit Court cases found such teams unlawful
- Campuses using teams should proceed carefully:
  - Consistent sanctions for behavior, not viewpoint
  - Formal and clear procedures; careful use of language
  - Clarify and separate roles of team members from conduct personnel
  - Regular review of conduct code and policies (every 1 or 2 years)
  - Note NY 129-A requirement to provide programs/info to incoming students on procedures in effect at college for dealing with bias related crime (NYS Education Law §6436)

Please see NACUANOTE “Campus Bias Teams: Lessons from Litigation and Practical Guidance,” by Ishan Bhabha and Erica Turret, dated July 16, 2021, acknowledged here.



28

# STUDY ABROAD CONSIDERATIONS



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29

## Study Abroad Considerations

- Partnership Agreements with Foreign Institutions
  - These agreements often contain language protecting the foreign institutions' policies and obligations under their governing law. Be sure to include language protecting your own institution's policies and governing laws.
  - There should be provisions governing student privacy under various laws, such as FERPA, and Gramm-Leach-Bliley (GLB). If the foreign institution is located in the European Union, there will undoubtedly be requirements under the EU's General Data Protection Regulation (GDPR).
    - Ensure that your institution's rights under GDPR are protected in the agreement.



30

## Study Abroad Considerations

- Partnership Agreements with Foreign Institutions
  - Costs of each institution and the student should be made clear.
  - Teach-out provisions should be included in the event the program must be cancelled during the semester or other academic term.
- Third-party Provider Agreements
  - Ensure third party provider agreements model the institution's policies, particularly with respect to non-discrimination policies;
  - Review all materials the student will be required to sign and that any release does not negate the release the student must sign for the institution.



31

## Study Abroad Considerations

- Health Insurance
  - Repatriation
- Negligence
  - Standard Release by Students
    - Assumption of risk
    - Provide for release of host institution, home institution and third-party providers
- Non-Discrimination Statutes' Applicability
  - Regardless of applicability in foreign jurisdiction, U.S. institutions have obligations to not discriminate in offering study abroad programs



32



## Study Abroad Considerations

- Clery Act
  - Foreign campuses owned or controlled by a U.S. institutions are required to report Clery crimes if they have an organized program of study and administrative personnel on-site.
  - An institution that has a study abroad program at a location or facility that the institution does not control, will not be responsible for reporting crimes at those facilities. However, if an institution rents or leases academic or program space for students in a hotel or student housing facility, it is considered in control of that space for the time period covered by the rental agreement or lease.
  - Host family situations do not normally trigger crime reporting responsibilities unless the written agreement with the family gives the institution some significant control space in that family's home.



33

## SEXUAL MISCONDUCT



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34

## What To Do Now About Sexual Misconduct

- Now that classes are in session face to face (or will be soon), the ugly issue of sexual misconduct is again with us and new problems have come to campus.
- OCR says they will start rulemaking in April 2022. Once that process is finished, we will all likely be revising our policies. There is one area where policies should be updated, which I'll discuss in a few moments.
- You might want to use this opportunity to consider helpful efforts, such as in-person training to address new legal developments, additional "climate surveys" for special populations, fostering peer mentors or other positive student activities.



35

## Misconduct by Employees or Students

- What we know now about Title IX:
  - The definition of "sex" in Title IX has been expanded to include sexual orientation and gender identity (U.S. Dept. of Justice) as a result of the Supreme Court's *Bostock* decision.
  - The Title IX regulations promulgated by the Trump administration are still in effect, **with the exception of this language**: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility...."
  - This means that information gathered during the investigation may be used at a hearing even if the source of the information is not cross examined.
  - The Office for Civil Rights has announced it will issue a notice of proposed rulemaking regarding the Title IX regulations in April of 2022.



36

## Misconduct by Employees or Students

- What we know now about Title VII:
  - The definition of “sex” in Title VII has been expanded to include sexual orientation and gender identity (*Bostock v. Clayton County*, 2020).
  - Employees or student employees may bring EEOC charges or lawsuits claiming discrimination under Title VII against the institution on these grounds as well as on the basis of biological sex.
  - *Bostock* may have an impact on state nondiscrimination laws in those states that do not include gender identity or sexual orientation within their definition of protected classes.



37

## Special Concerns When a Faculty Member is a Respondent in a Title IX Claim

- If the Title IX process finds them responsible; need to consult Faculty Handbook/policies for discipline process. Must follow discipline process even if Title IX process does the fact finding.
- Does your handbook allow for the hearing committee/grievance panel to accept the Title IX fact finding or must they consider the evidence de novo?
- What standard of proof does your faculty discipline process require? Typical Title IX processes use “preponderance of the evidence.” Faculty discipline policies may require “clear and convincing evidence” in order to find a violation of institutional policy.



38

## Special Concerns When a Student Brings a Title IX Claim

- Need to anticipate Title IX complaints involving gender identity or sexual orientation.
- Are Title IX staff trained and competent to deal with potentially different types of factual scenarios and complaints related to these new categories?
- Do chairs and deans understand the broader definition of “sex” and are they equipped to respond to student or faculty complaints related to these identities?
- Can cases brought under your student code of conduct be helpful as training examples?



39

## Special Issues Regarding Student Title IX Respondents Who Manage Autism Spectrum Disorder

- Consider issues involving student complainants or respondents who manage autism spectrum disorder. Their disability may make self-advocacy or testimony difficult for others to interpret or understand.
- According to experts, “The social challenges for a student on the autism spectrum include problems understanding others’ perspectives, sharing space and making eye contact. Many high functioning individuals with an autism spectrum disorder have extreme social anxiety and have difficulty negotiating with others, and interacting and working in pairs or groups. These students likely will not understand the ‘unwritten’ classroom etiquette and will often misinterpret facial expressions and other non-verbal cues.”

Marci Wheeler, “Academic Supports for College Students with an Autism Spectrum Disorder,”  
<https://www.iidc.indiana.edu/irca/articles/academic-supports-for-college-students-with-an-autism-spectrum-disorder.html>



40

## Steps to Address Conduct Issues for Students with Autism Spectrum Disorder

- Ensure that at least one staff member is trained to provide support for students with ASD, whether or not they are involved in Title IX or conduct code complaints.
- Provide supports to these students when they are accused of Title IX or conduct code violations to ensure that they understand the charges and can represent themselves or have others do so.
- Review NACUANote: “Accommodations for Disabilities in the Title IX Grievance Process” by Janet Elie Faulkner and Phil Catanzano, September 1, 2021, Vol. 20 No. 1.



41

## CYBERSECURITY



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42

## Cybersecurity Rules and Guidance

- The regular “alphabet soup” of cybersecurity rules still apply with on-going enforcement actions (e.g. Gramm-Leach-Bliley Act (GLBA), HIPAA, FERPA, GDPR, State laws).
- April 2021 - New ERISA Fiduciary Responsibilities - Employee Benefits Security Administration’s Cybersecurity Guidance. Applies to Employers and service providers such as record-keepers and plan fiduciaries. Expansion of ERISA fiduciary obligations.
- Per Biden May 2021 Executive Order on Improving the Nation’s Cybersecurity, anticipated new FAR and DFAR provisions with enhanced cybersecurity protection. NPRM expected in February.
- Industry standards and best practices (e.g. NIST Cybersecurity Framework – new guidelines on software supply chain security and cloud security).

Bottom line: this area is too dynamic and evolving to allow “dust to collect” on compliance.



43

## Main Components of Cybersecurity Compliance

- Foundational written policies and procedures – remote work adjustments?
  - How individuals should use information assets, including access controls and acceptable use (mobile devices, Wi-Fi protection)
  - Training
- Risk assessment activities
  - KNOW WHAT YOUR PII IS AND WHERE IT IS STORED – has this changed?
  - These should inform your cybersecurity program design and safeguards as well as your policies and procedures
- Cybersecurity Program Design and Safeguards
  - Investment in data security controls can be limitless (encryption, anti-virus software, firewalls, network segmentation, detection software)
  - The “special snowflake” problem



44

## Main Components of Cybersecurity Compliance

- Incident Response
  - Response team and response plan (can get stale if not reviewed and refreshed).  
Adjustment needed for remote work?
- Third Party Service Providers
  - Auditing third-party systems, contract terms (limits of liability), monitoring compliance



45

## Other Cybersecurity Considerations

- Insurance
  - Dynamic area with changing exclusions (e.g. cyber-extortion) and premiums
  - Pay attention to coverage for data breaches due to third-party vendor vulnerability
- Reminders and Training
  - Employees remain key area of vulnerability
- Remote work issues
  - Mobile device and VPN connections present cybersecurity vulnerabilities, as does wireless and unsecured networks
  - Enhanced cybersecurity risk comes from shortcuts
    - Examples:
      - Employee downloads PII onto unencrypted jump drive or mobile device
      - Employee sends email with PII attachment to personal email address
      - Employee physically takes sensitive information home



46

# REMOTE WORK



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47

## Remote Work – An Evolving Issue for Employers

- COVID accelerated solutions for many of the barriers that prevented remote work, particularly in the area of technology.
- Still, most organizations viewed the initial shift to remote work as *temporary*. Employers are still in the early stages of rethinking where work gets done and by whom in a “new normal.” And this early-stage thinking is being influenced by employee expectations.
- As we have come to expect with most new frontiers, the issues related to remote work are complicated. There are enhanced compliance issues to consider.



48



## Checklist of Legal/Compliance Considerations for Remote Work

- **Doing Business and Taxable Presence**
  - Is Institution “doing business” in the jurisdiction where the employee is working? Different rules apply depending on city, state, country.
  - Does Institution have to register or qualify to do business in the jurisdiction?
  - What is the threshold for creating a “taxable presence”?
  - What taxes need to be considered? Income tax, employment taxes, workers compensation, other local taxes.
- **Telecommuting Policies**
  - Ground rules (e.g. ELIGIBILITY) \*\*\*Most difficult area to address
  - Employees to sign contract and/or liability waiver?
  - Workplace set-up and accommodation requests
  - Travel/office supplies/mail
  - Allow work out of U.S.?



49

## Checklist of Legal/Compliance Considerations for Remote Work

- **Employee benefits**
  - Medical coverage and networks
  - Workers' compensation
  - Local paid leave laws
  - Remote workers in a state that has an individual health coverage mandate and reporting requirements (e.g. California)
- **Wage and Hour Requirements**
  - Tracking compensable time worked by remote employees, ensure work breaks
  - How to control work performed by remote employees
- **Immigration**
  - How to collect Form I-9
  - Compliance with various VISA requirements



50

## Checklist of Legal/Compliance Considerations for Remote Work

- Workplace Safety
  - Employee obligation to provide acceptable home-work environment. How to monitor to ensure workplace safety (e.g. fire and electric safety, etc.)?
  - Ensure remote employees are aware of obligation to report work-related injury or illness.
  - Ensure posting requirements are met for remote employees
  - Be aware of local laws/regulations
- Privacy and Security
  - How data, equipment, system and network use will be monitored
  - Special rules on remote access for PII
  - Need for physical files at home-office?
- Performance Management and Employee Engagement
  - How to monitor performance
  - How to keep employees engaged and properly trained



51

## Checklist of Legal/Compliance Considerations for Remote Work

- IP – special considerations if employees in foreign locations have access to EAR or ITAR controlled information
- Insurance – special insurance provisions for employees in remote locations. Property damage, cyberbreaches, etc.
- If hiring for remote job – consider how interview conducted/technology available to applicant, how to obtain signatures and paperwork. Cloud-based HR solutions raise cybersecurity issues
- Beware of disparate impact/unequal application of policies as basis for discrimination claims
- Telecommuting as a reasonable accommodation



52

# IMMIGRATION COMPLIANCE FOR REMOTE WORK



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53



53

## Main Areas for Compliance

- Form I-9 work authorization verification
- H-1B visa petitions and Labor Condition Applications (LCA)
- Address changes and Form AR-11



54

## Form I-9 Flexibility

- Since March 2020, employers have been able to remotely inspect original documents (e.g., over Zoom, fax, e-mail) with the caveat that in-person verification of original documents occurs when employee returns to on-site work
- Flexibility extended until April 30, 2022 for employees who are exclusively working in a remote setting and ends when employee returns to non-remote employment or when the flexibility is terminated by DHS
- End of flexibility – physical inspection of original documents within 3 business days & modify I-9 to indicate date that occurred (add'l info)



55

## Agent/Employer's Representative Option

- During and after pandemic, Form I-9 verification can be done by a designated agent – the agent does not have to be a notary public, just someone authorized by the employer to verify the identity and work authorization documents in person and complete Section 2 of Form I-9 on behalf of the employer
- Employer will be liable for whatever errors and mistakes are made by the agent, so, to the degree possible, the agent should be familiar with the Form I-9 process and how to complete the form
- The agent must review documents and complete Section 2 in the presence of the employee



56

## H-1B & LCA Compliance

- LCA – place of employment – location where work will be performed – restrictions on where H-1B employees can work
- Ongoing employer obligations
  - Notice requirement (in 2 places at new site for 10 days) if employee works in different location in the area of intended employment (employee's home?)
  - Need a new LCA and amended H-1B visa petition if employee now working in location outside the area of intended employment – sanctions and penalties for employers for failure to do so
  - Proactive compliance for upcoming semester – internal review of who is working in area of intended employment and who is not -- area seems ripe for audit by USDOL; update public access files



57

## Employee Change of Address

- File Form AR-11 with USCIS within 10 days of moving
- Failure to do so risks penalties for employee and may affect immigration process down the road



58

# CIVIL RIGHTS STATUTES



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59

## Civil Rights Statutes Triggered by Federal Aid

- There are four civil rights acts triggered by receipt of federal financial assistance:
  - Sec. 504 of the Rehabilitation Act of 1973 (ADA Counterpart)
  - Title VI of the Civil Rights Act, prohibits discrimination based upon race and national origin
  - Age Discrimination Act of 1975
  - Title IX of the Education Amendments of 1972
    - Waiver of Sovereign Immunity
    - Institutions that participate in Title IV programs specifically, must confirm compliance with these laws in the Program Participation Agreement they sign with USED.



60

## Sec. 504

- Enforced by the U.S. Department of Education's Office for Civil Rights (OCR);
- Requires institutions to provide equal access to disabled individuals and to engage in an interactive process for reasonable accommodation;
- Persons who suffer from mental health issues may have a disability that is protected by Sec. 504.
- Very similar to the ADA, which is enforced not only by OCR, but also by the U.S. Department of Justice



61

## Non-Discrimination Policies & Procedures

- Campuses should have policies and procedures in place to respond to all allegations of discrimination, regardless of the basis.
- There are specific regulations that must be used when responding to acts of sexual misconduct prohibited by Title IX. The USED is expected to issue new proposed Title IX regulations in April of this year.
- Title IX and FERPA
  - Where there is a conflict in responding to a Title IX complaint under the new regulations, Title IX due process supersedes FERPA. (See Congressional Research Service's Report: *The Family Educational Rights and Privacy Act (FERPA): Legal Issues, Dated May 24, 2021*)



62

## Questions?

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63

## Thank You

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64