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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:10PM)

- Intros / Agenda
- NYS Budget – What's Changed
- The End of the PHE (Generally)

Roger Bearden – (12:10PM-12:20PM)

- Telehealth and Connected Aspects of the PHE Wind-Down

Barbara Lee – (12:20PM-12:30PM)

- Remote Work as a Reasonable Accommodation

Seth Gilbertson – (12:30PM-12:35PM)

- Artificial Intelligence in Higher Education

Alison Roach – (12:35PM-12:45PM)

- Lion Elastomers LLC and the National Labor Relations Board

G. Oberfield – (12:45PM)

- Questions / Wrap Up

New York State Budget...Where Things Landed

Sources: NYTimes.com, PoliticoPro, City and State, Greater NY Hospital Association

- Medicaid rates: final positions include increases to
 - Hospitals → 7.5%
 - Outpatient providers and assisted living → 6.5%
 - Nursing homes → 6.5% ... with a possible 7.5% conditioned on Federal approval
 - *Reality – labor contract costs for many providers*
- Changes to the 340b program
- Healthcare transformation funds –
 - Statewide healthcare transformation
 - ‘Vital Access Provider’ programming
 - Changes to eligibility in Vital Access Provider Assurance Program to include certain hospitals and ‘Performing Provider Systems’
- Minimum wage increases → \$17 in NYC and downstate by 2026; NYS by 2027



New York State Capital – Office of General Services

New York State Budget...Where Things Landed

Sources: *NYTimes.com, PoliticoPro, City and State, Greater NY Hospital Association*

- Adding community health worker services as Medicaid-reimbursable
 - Facilitating efforts to address social determinants of health (CMS-pending)
- Expanded *reporting* of healthcare transactions– regulations to be promulgated
- Significant behavioral health investments
- Staffing agency reforms to control costs
- Movement of certain healthcare professionals' oversight out of NYSED → not adopted



New York State Capital – Office of General Services

Between Now and June...

Sources: PoliticoPro and City and State

- For the ongoing legislative session:
 - Sealing of records concerning felony justice involvement?
 - Context – budget language concerning judges’ discretion in setting bail
 - Supportive housing
 - Is it realistic to see movement before June concludes?
- Changes to alcohol laws?
- More on health
 - Interstate licensure compacts?
 - Scope of practice flexibilities?
 - General emergency / pandemic preparedness?



New York State Capital – Office of General Services

PHE's End – And New York State Implications

Sources: City and State, Albany Times Union

- Federal PHE permitted to expire on May 11, 2023
 - Relating context → the World Health Organization ended the *international* PHE on May 5, 2023
- Insurance coverage for COVID-19 tests phasing out...
 - local implications to be felt...
- Vaccination requirements –
 - Federal signaling that healthcare worker vaccination will end, but NYS yet to act...
 - relationship to staffing
- Telehealth – a significant and evolving arena ...
 - more to come, later in the program



End of the PHE



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Workplace Investigations Best Practices



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Fundamentals

- Employers with 15 or more employees must provide reasonable accommodations for employees who meet the definition of an individual with a disability
- An employee with a disability must be qualified in that the employee
 - Can perform the essential functions of the position, with or without reasonable accommodation
 - Does not pose a “direct threat” by requesting an accommodation that exposes the employee, co-workers, or others to danger
 - Does not pose an undue hardship to the employer (financial or functional)

Fundamentals

What is an essential function?

- The fundamental job duties of the employee. Fundamental duties are those that
 - The job was created for
 - Other employees are unable or unavailable to perform these functions
 - Require special expertise that other employees do not have
 - Require the majority of the employee's time to perform (aggregated)
- What is evidence of an essential function?
 - Job description (maybe), the amount of time spent performing the function, consequences of not performing the function, the work experience of past employees in the job

The Interactive Process

- Unless it is obvious that the request for remote work is impossible to fulfill (truck driver, factory worker, delivery employee, mechanic, lab assistant), the employer must initiate the “interactive process” to analyze whether the employee’s request for remote work can be accommodated.
- Obtain medical documentation of the condition and the limitations it places on the employee’s
 - Ability to perform the essential functions of the position
 - Ability to travel to your workplace

Medical Documentation

- Medical documentation should include
 - A description of the employee's functional limitations (physical and psychological)
 - Proposed reasonable accommodations
 - How long the functional limitation is expected to last
 - And if the employee is requesting full-time remote work, the reason that the employee cannot travel to work (from the health care provider's point of view)

Types of Reasonable Accommodations

- Providing technology or software to enable the employee to perform the essential functions without worsening the disability
- Reassignment to a vacant position or reallocation of job responsibilities, but reallocation of essential functions is NOT required
- Part-time work
- Additional training or other forms of support
- Flexible work schedule

What the ADA does not require

- Allowing remote work because the employee's family member has a serious health condition that could be compromised if the employee is exposed to a disease at the workplace
- Providing transportation for the employee to the workplace (unless the employer does so for other employees)
- “Bumping” a co-worker from a position that the employee with a disability can perform as a reasonable accommodation (unless a collective bargaining provision or company policy allows that)

Before the issue arises

- Ensure that job descriptions are up-to-date and accurate. Ideally, they should note the essential functions of the position
- Ensure that supervisors understand the requirement for the interactive process and monitor their participation
- Ensure that the HR department maintains a file separate from the employee's personnel file with information about the disability, the accommodation request, and detailed information about the interactive process.

Takeaways

- Neither the federal or state human rights agencies nor the courts assume that in-person work is an essential function of every job
- Simply because a job *can* be performed remotely does not mean that the employer must allow full-time remote work for an employee
- Following the interactive process is key. Even if the answer seems obvious, the agencies and the courts will review the process closely to ensure that the employee received every consideration.
- Mental health considerations are becoming increasingly important and need to be addressed thoughtfully

AI Impacts on Higher Education



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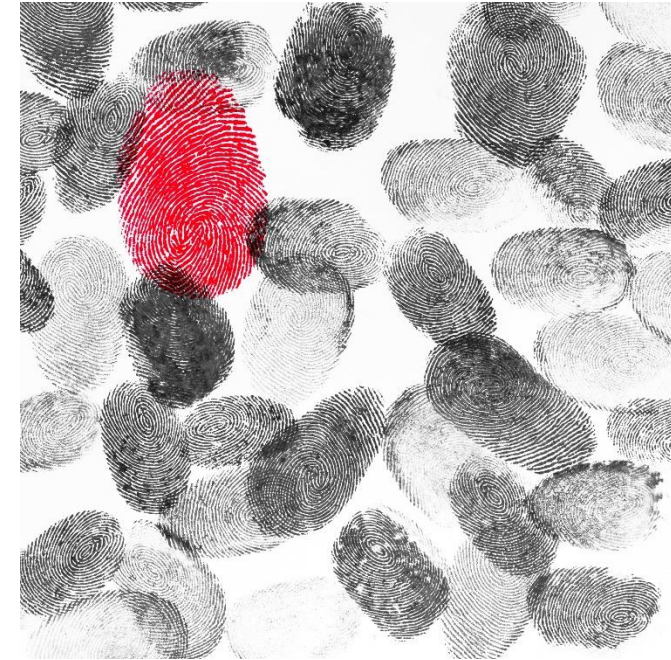
Buffalo, NY

Introduction

As we stand at the forefront of the digital revolution, AI's rapid advancements have ushered in a new era that demands careful consideration and proactive measures. The hurdles posed by AI range from the need for curriculum adaptation and faculty reskilling to ethical concerns. By understanding and addressing these challenges head-on, we can ensure the sustainable integration of AI in higher education, harnessing its potential while safeguarding the core principles and values that define our educational institutions.

Immediate Considerations

- Defining improper use of AI
 - Students
 - Faculty
 - Staff?
- Detecting and “proving” improper use of AI
 - detection tools
 - Turnitin
 - GPTZero
 - Post-submission questioning
 - Comparison to past work



Immediate Considerations

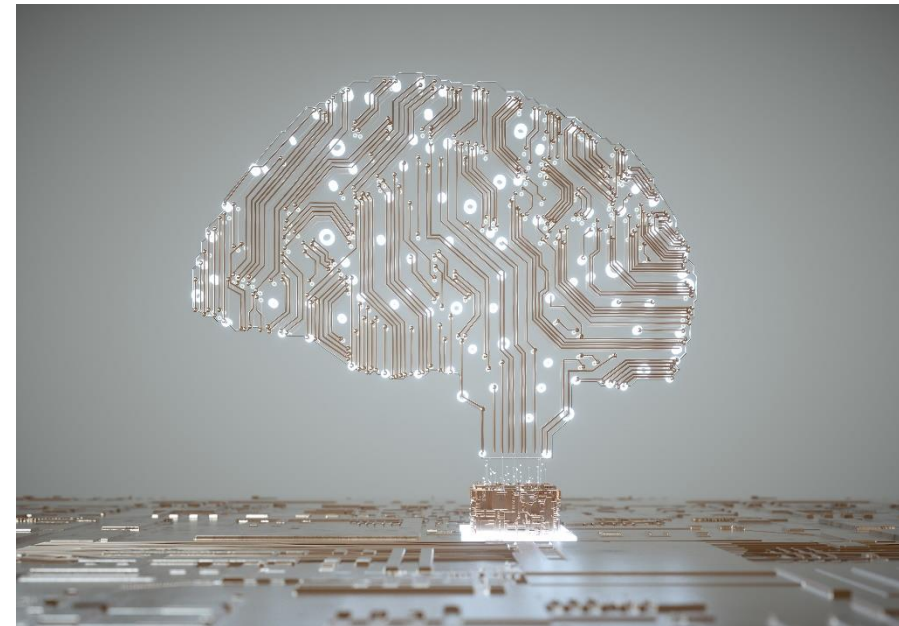
- Does it violate your published standards?
 - Not too late to provide guidance
- Can you meet the standard of proof required?
 - Preponderance of the evidence
 - Clear and convincing
- What is the appropriate penalty?
 - Employee vs. Student
 - Clear vs. Vague standard

Homework for this Summer

- Update Academic Dishonesty Policy
- Educate Faculty
- Update Guidance Provided to Employees/Applicants
- Consider Tools for Detection and Proof

Long Term Considerations

- Reconsidering Curriculum
- Updating Evaluation Methods
- Privacy Considerations
- Discriminatory Impacts
- Ethical and Moral Concerns
- Intellectual Property
 - Who owns something no human created?
- Job Displacement



NLRB Decision in Lion Elastomers LLC



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Roadmap

- Labor Disputes and Employee Outbursts
- New Labor Board Decision: *Lion Elastomers LLC II*
- Overview of the Board’s “Setting-Specific” Tests
- Implications of *Lion Elastomers LLC II*
- Tips for Employers

The NLRB, Employee Outbursts, and Protected Activity

- Labor disputes often lead to intense feelings in the workplace.
- Employees have a right to engage in “protected activities” under Section 7 of the National Labor Relations Act.
- The Board issued a new decision which affects how employers should respond to employee outbursts.
- The prior Board attempted to create a one-size-fits-all test and this Board has devised a trio of “setting-specific” tests.

Lion Elastomers LLC II

- Lion Elastomers discharged an employee after he was disruptive during a workplace safety meeting.
- The Board overruled its decision in *General Motors* and will apply “setting-specific” tests when evaluating discipline for employee outbursts.
- “To fully protect employee rights, conduct during protected activity must be evaluated in the context of that important activity – not as if it occurred in the ordinary workplace context.”
- This decision applies retroactively to all pending “abusive conduct” cases.

Three “Setting-Specific” Tests from *Lion Elastomers*

- Was the employee engaged in ordinary work or protected activity?
- If the employee was engaged in protected activity, the Board will apply the following tests to determine whether the abusive conduct is severe enough to lose protection of the Act:
 - 1. Outbursts to management in the workplace. Consider (1) the place of the discussion; (2) the subject matter of the employee’s statements; (3) the nature of the employee’s outburst; and (4) whether the outburst was caused by the employer’s unfair labor practice.
 - 2. Employee’s social media posts and “most conversations among employees in the workplace.” Consider the totality of the circumstances.
 - 3. Picket-line conduct. Consider all of the circumstances to determine whether “non-strikers reasonably would have been coerced or intimidated by the picket-line conduct.”

Implications of *Lion Elastomers LLC II*

- The three “setting-specific” tests may lead to arbitrary results and conflicting obligations.
- Employee conduct must be treated differently depending on whether the employee was engaged in protected activity.
- The decision may create potential conflicts between an employer’s obligations under the Act and laws against discrimination and harassment in the workplace.

Tips for Employers

- Think about defensibility and look critically at the context of any abusive conduct.
 - Did the employee's misconduct occur during ordinary work or was the misconduct related to protected activity (ex. employee wages, hours or working conditions)? What were the circumstances of the outburst?
- Review and update policies related to workplace speech and conduct, social media use, and picket-line behavior.
- Provide training and support to managers who may experience union activity or workplace activism.

Your Questions



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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

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Thank You

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