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Office of General Counsel

Legal Update: Cannabis, Affirmative Action, and More

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MINNESOTA STATE

Next Month's Presentation November 9, 2023

Clinical Agreements

Presented by Assistant General Counsel
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For a complete listing of the Fall Second Thursday topics, please

visit the Office of General Counsel's website at

<https://minnstate.edu/system/ogc/index.html>

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Outline of Today's Presentation

- Discuss recent legislation and regulatory guidance of interest to ASA and HR professionals.
- Review cases and legal developments of interest.
- Questions/Discussion

Cannabis Legalization

WEED be lying if we told you this wasn't a big deal for the State



Pot Luck

- Cannabis use and possession now lawful for those 21 and older
- Can use in private residence (not multi-unit housing) and outdoor public spaces (if not prohibited by local ordinance)
- Decriminalization/expungement

But HIGHly Important to Remember: Campuses subject to federal laws

- Drug-Free Schools and Communities Act and Drug-Free Workplace Act continue to apply
- Campuses receive and rely on federal money that require compliance with these programs

Let me be BLUNT

- Minnesota State follows MMB Policy 1418
- That policy defines drugs in accordance with those identified under federal law
- This includes all cannabinoids even if authorized under Minnesota law
- Employees can't use or possess or be under the influence while at the workplace

Peace and Harmony, Man

- At same time, can't refuse to hire or discriminate against applicants/employees who use cannabis off-premises during non-working hours
- Testing limited to safety-sensitive positions or after workplace accident or injury

We're Not Blowing Smoke: Little Change on Campuses

- Board Policy 5.18 requires campuses to comply with federal law regarding the use of controlled substances
- Smoke-free/tobacco-free campuses
- Cannabis use akin to alcohol and tobacco use on campus

Questions?



United States Supreme Court

Students for Fair Admissions v. Harvard College. *Students for Fair Admissions v. University of North Carolina.*

- Opinions issued on June 29, 2023 (holding that the Harvard and UNC admissions programs that considered race as a “plus” factor in a holistic process violated the Equal Protection Clause (UNC) and Title VI (Harvard)).
- Department of Education issued a FAQ document on August 14, 2023. [SFFA Resource FAQ DOJ Seal ED Seal.](#)

United States Supreme Court (2)

Biden v. Nebraska.

- Opinion issued on June 30, 2023 (striking down the Department of Education's student-debt relief plan).
- The pause on student loan payments is ending now.

United States Supreme Court (3)

Mahanoy Area School Dist. v. B.L., 141 S.Ct. 2038 (2021).

- High school student failed to make school's varsity cheerleading squad and subsequently posted 2 images on Snapchat expressing frustration with the school cheerleading squad, one containing vulgar language and gestures.
- School suspended student from the junior varsity cheerleading squad for one year for violating team and school rules.
- Student sued.
- **Holding:** School violated B.L.'s First Amendment rights.

United States Supreme Court (4)

Mahanoy, continued

- Schools may regulate off-campus speech BUT interest is *diminished*.
- In this case, B.L.'s speech was protected criticism and school did not prevent evidence of substantial disruption.
- **DICTA:** Court recognized school's interest in regulating:
 - Bullying or harassment targeting particular individuals.
 - Threats aimed at teachers or other students.
 - Failure to follow academic rules.
 - Breaches of school security devices.
 - Other rationales?

United States Supreme Court (5)

Religious Accommodations: *Groff v. DeJoy*, 600 U.S. 447 (2023)

- Title VII case
- Unanimous USSC opinion
- “Clarified” earlier *TWA v. Hardison* decision

Result: Undue Hardship is more than a *de minimis* burden

- Campuses probably never treated accommodation requests that way anyway
- But remember: undue hardship is an affirmative defense

Context-specific standard

- “whether hardship would be substantial in the context of an employer’s business in the commonsense manner that [a court] would use in applying any such test”
- “an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business”

Uncertainty

- Lower courts have to figure this out
- EEOC reviewing guidance
- Large employer—likely greater ability to accommodate
- Having to pay OT probably not enough
- Health and safety: maybe
- Labor agreements?

Post-*Groff* decisions

- Lots of refusal to vaccinate cases
- D. Minn cases: *Kiel v. Mayo Clinical Health System* (JRT) & *Lee v. Seasons Hospice* (PJS)
- *Hebrew v. Texas Dept. of Criminal Justice* (5th Cir.)

Individual assessment

- Interactive process
- Don't easily abandon trying to find accommodation

Students?

- Remember makeup at USSC
- *Groff* was unanimous
- MDHR often looks to federal precedent in interpreting the MDHRA.

United States Supreme Court: Upcoming Term

Two Social Media Cases

- Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social media account, when the official uses the account to feature their job and communicate about job related matters.
- Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.

Proposed New Title IX Regulations: Background

March 8, 2021 Executive Order:

- Directed Secretary of Education to perform 100-day review.
- All Title IX regulations, orders, guidance documents, policies.

April 6, 2021 Department of Education Announcement:

- Public Hearing June 7 – June 11 – aiming towards revised regulations.
- All Title IX regulations, orders, guidance documents, policies.

June 23, 2022:

- Biden administration releases proposed new regulations.
- Comment period closed on September 12, 2022 (approximately 240,000 comments).
- Final regulations first expected in May 2023; then October 2023; delayed again? (impact of government shutdown on OCR?)
- Also monitoring possible Minnesota legislation amending Minn. Stat. 135A.15.
- Continue using current 1B.3.1 procedure while monitoring events.

Earned Sick and Safe Time

- Takes effect January 1, 2024
- Paid leave
- Applies to student workers who work at least 80 hours in a year for employers in Minnesota
- Applies to others in the system who work at least 80 hours in Minnesota and who are not otherwise provided paid leave
- Earnings statement to employees must disclose earned and sick hours accrued and available for use and total number of hours used during pay period

How much can accumulate?

- Minimum one hour for every 30 hours worked to maximum of 48 hours in a year
- Can carry over to following year for a maximum of 80 hours

When can use?

- Variety of reasons including own health conditions or medical diagnosis; those of family members; issues related to domestic abuse, sexual assault or stalking; closure of employer's business due to weather or emergency; inability to work due to communicable disease

Election Law Change

- To facilitate voting, legislature requires list of student addresses for students enrolled in student housing or city or cities where campus is situated
- List to be disclosed to county auditor *If disclosure consistent with FERPA*

Is Such Disclosure Consistent With FERPA?

- Depends how campus defines directory information/limited directory information

(Re)Define Limited Directory Information?

- If campuses want to permit this disclosure to facilitate voting, may have to define limited directory information to include current addresses for the limited disclosure to auditors or election officials for the purpose of election day registration
- Allow students to review this new definition and opt-out of such disclosure

Please Take Our Survey

A link to our survey is provided in the chat. We appreciate your feedback and are always looking for ideas for future webinars and ways to improve.



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