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Education Law Alert - March 2019

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EDUCATION LAW ALERT

March 2019

Another Federal Court Ruling Chips Away at NCAA Limits on Support for Athletes

A federal judge ruled that the National Collegiate Athletic Association (“NCAA”) and colleges had violated federal antitrust law by artificially capping the value of scholarships for educational purposes -- but stopped well short of creating the kind of free market for athletes' compensation that the players and their lawyers had sought.

The federal judge in many ways split the difference. She supported the NCAA's argument for continuing to restrict compensation and benefits that are unrelated to education (i.e., payments for sports-related performance), but concluded that the NCAA's amateurism model (which she described as "circular") does not justify the limitations on the education-related benefits that the NCAA currently maintains.

Read more [here](#).

Massive Scandal Alleged in College Admissions

What many are calling the worst admissions scandal in higher education emerged on March 12, 2019, in what the FBI referred to as “Operation Varsity Blues.” The FBI announced 50 indictments that involved getting people into elite colleges through purported, but not necessarily real athletic talent. The charges were against coaches, parents (including celebrities), and some who administered exams. This scandal has also sparked a discussion regarding the advantages of wealthy applicants that don't violate any laws.

Read more [here](#).

Trump to Sign Broad Executive Order

President Trump delivered on his promise of an executive order that would hold colleges that receive federal research funding accountable for protecting free speech. The order also includes language on outcomes data and risk sharing. But it's unclear what force it will carry because the order essentially directs federal agencies to ensure colleges are following requirements already in place, and it doesn't spell out how enforcement of the order would work.

Read more [here](#).

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that They Must Observe in Every Other Civil or Criminal Proceeding

Eighteen State attorneys collectively submitted a 72 page comment opposing rules submitted by the Department of Education for Title IX. The eighteen State attorneys take the position that the preponderance of evidence standard should apply in Title IX proceedings, which would be a rollback of due process rights. However, federal courts are increasingly rejecting these rollbacks as students seek the help of attorneys and challenge universities and colleges in court.

Read more [here](#).

Federal Appeals Court Reworks Legal Test To Determine Faculty's Union Status

In the case of University of Southern California v. NLRB, a federal appeals court unanimously rejected the National Labor Relations Board's "subgroup majority status rule" for determining when college and university faculty members are to be deemed managers and therefore excluded from coverage under the National Labor Relations Act. By rejecting the Board's "subgroup majority status rule," yesterday's decision dispensed with the Board's reliance on "crude headcounts" and held that the proper test is for the Board to assess whether the faculty members at issue are "structurally included within a collegial faculty body to which the university has delegated managerial authority." Colleges and universities should familiarize themselves with this decision and its potential impact on faculty bargaining units.

Read more [here](#).

DOL Releases new FMLA and FLSA Guidance

In a recent release, the Department of Labor ("DOL") has clarified its position on the use of leave under the Family and Medical Leave Act ("FMLA"), and the applicability of state law to the Fair Labor and Standards Act ("FLSA"). Beginning with the FMLA, employers are now instructed that the 12 weeks of leave required under the FMLA are not subject to extension by using accrued paid or unpaid leave either before or after the FMLA qualifying leave starts. By way of example, an employee announces on January 1st that they need to take 12 weeks of leave beginning on January 15th, to undergo and recover from a medically necessary surgery, because this leave is for an FMLA qualifying purpose, it must be designated as FMLA leave. The employee's employer can no longer require that this individual use any accrued leave to reduce the amount of FMLA leave taken, and strangely, if the employee decides to use paid leave, the paid leave now counts towards the 12 weeks of FMLA leave, and the FMLA's protections expire at the end of the 12th week of leave for an FMLA qualifying purpose, regardless of whether an employer permits an employee to take additional leave for qualifying purpose. While employers can grant additional leave time in addition to the FMLA, any leave used for a purpose protected under the FMLA must now count towards the 12 weeks of guaranteed leave. Employers are encouraged to revise current policies requiring the use of paid leave before FMLA leave, as this position by the DOL would make such policies a violation of the FMLA. To read more, please refer [here](#).

Under the FLSA, the DOL has determined that adherence to state law no longer qualifies as a good faith defense to failing to pay unpaid overtime. Using the State of New York as an example, a janitor, who has no right to overtime under NY law, may nevertheless raise a claim that they were not paid sufficient overtime pay under the FLSA, and that their employer did so in bad faith, effectively expanding the applicable statute of limitations from two to three years if they prevail on their claims. To read more on

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From the Lighter Side: Momma Said There Would be Days Like This

Boynton Beach resident and mannequin enthusiast Mikkel Dankner was arrested for attacking his own mother. The motivation for the attack was his mother's refusal to dress his mannequin. According to Dankner's mother, the two, or three if you count the mannequin, were in the backyard when Danker requested his mother clothe the mannequin. She declined and Danker allegedly reacted in a completely reasonable manner by pushing her to the ground, hitting her over the head several times with a wooden stool, and stuffing dumplings in her mouth. Danker has been charged with aggravated battery on a victim over 65 years of age and domestic battery by strangulation.

Read more [here](#).

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Firm News

On February 13, 2019, **Jeff Slanker** spoke at Tallahassee Community College's TCC Sparks program, a program designed to assist veterans in starting new businesses. Jeff spoke on labor and employment issues affecting startups and growing businesses including compliance with wage and hour and employment discrimination laws.

Lisa Barclay Fountain has been elected to the Board of Directors for both the Tallahassee Bar Association and the Downtown Business Association of Tallahassee.

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Sniffen & Spellman, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

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