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August 16, 2022

**What You Missed This Summer:
Higher Ed Edition**



Bricker & Eckler
ATTORNEYS AT LAW

Disclaimer



- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- We have a variety of stakeholders here, so keep that in mind!
- If you registered using your email, you will get a copy of the slides. Watch for “Thank You For Attending” email.

Today's Agenda



- Supreme Court Update (plus a bonus case)
- OFCCP – Federal Contractors and Pay Equity
- Department of Commerce – Academic Outreach Initiative
- Proposed Borrower Defense Regulations
- Proposed Title IX Regulations
- OCR Manual Updates
- Athletic Update
- Pandemic update

We will be live-tweeting links to the reference material at www.twitter.com/brickerhighered!



Case Law Update

With Erin Butcher

Dobbs v. Jackson Women's Health Organization (1 of 2)



- Supreme Court overturned *Roe v. Wade* and *Casey v. Planned Parenthood*; there is no longer a constitutional right to an abortion (within the restrictions that *Casey* had set in place)
- Raises potential concerns about:
 - Criminal enforcement – in other states
 - Consider your employees and what they might say/do
 - Clinical placements and accreditation
 - Employee benefits

Dobbs v. Jackson Women's Health Organization (2 of 2)



- ☐ Know your state's current law with regard to legality of abortion and other related procedures.
- ☐ Attend our webinar in September for a in-depth discussion into potential implications.
- ☐ Attend our other webinar on September 26th for a review of non-discrimination on the basis of pregnancy and parenting

Cummings v. Premier Rehab Keller



- Supreme Court ruled that plaintiffs cannot recover for emotional distress under the ADA and Section 504
- This case is already being argued to apply to other non-discrimination laws, including Title VI, Title VII, and Title IX
- This will affect:
 - How legal claims are pleaded
 - How parties resolve cases – and how much they pay
- ☐ **Review the case before settling civil rights cases.**

West Virginia v. EPA



- Supreme Court significantly restrained the EPA's regulatory powers
- This case will be used repeatedly to invalidate every possible regulation (including the proposed Title IX regulations)
 - Pro: Fewer regulations!
 - Con: The courts will decide on their own how to enforce the laws, which takes time.
- ☐ **Watch for challenges to finalized regulations, which may delay or prevent implementation.**

State of Tennessee v. ED



- Blocked implementation of non-regulatory application of *Bostock* to Title IX through executive orders and guidance
 - Applies in 20 states: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia
- ☐ **If you are in one of these states, confer with legal counsel before relying on Executive Orders and ED guidance relating to *Bostock*.**



Office of Federal Contract Compliance Programs

With Kylie Stryffeler

OFCCP – Pay Equity Directive (1 of 4)



- What happened?
 - On March 15, 2022, the OFCCP issued a new directive on this subject, Directive 2022-01, which provides additional guidance to **federal contractors** regarding pay equity audits and anti-discrimination obligations
- Desk Audits:
 - Federal regulations currently require that federal contracts perform “in-depth analyses of its total employment process to determine whether and where impediments to equal opportunity exist, [including, at a minimum] (3) Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities.” See 41 C.F.R. § 60-2.17(b)(3)

OFCCP – Pay Equity Directive (2 of 4)



- Desk Audits – continued:
 - The Pay Equity Directive begins by noting that OFCCP may conduct “desk audits” during a compliance evaluation in order to determine whether the contractor is meeting its affirmative action and anti-discrimination obligations
 - The federal contractor is required to provide OFCCP with data described in OFCCP’s Scheduling Letter and Itemized Listing document

OFCCP – Pay Equity Directive (3 of 4)



- Major Implications for the Attorney-Client Privilege:
 - If a desk audit reveals disparities in pay or other concerns about the institution's compensation practices, OFCCP may request additional information to investigate the contractor's compliance. See 41 C.F.R. § 60-2.10(c)
 - As part of the investigation, the OFCCP can request the pay equity audit analysis and any additional records related to employee pay in order to understand compensation practices and pay disparities
 - The OFCCP states that Pay Equity Audits, prepared with the assistance of counsel **may not be withheld** under the Attorney Client Privilege. However, Universities may obtain a separate privileged Pay Equity Audit.

OFCCP – Pay Equity Directive (4 of 4)



- When a college or university prepares a pay equity audit for the purpose of OFCCP compliance, records related to that audit will be subject to review by OFCCP in the event that a desk audit requires further disclosure and analysis
- ❑ **If your institution is a federal contractor, consider whether your institution will seek the assistance of counsel in conducting a pay equity audit, and if so, whether it will seek to obtain a separate privileged audit as well.**



Export Enforcement – Academic Outreach Initiative

With Kylie Stryffeler

Dept. of Commerce – Academic Outreach Initiative (1 of 3)



- On June 28, 2022, Matthew S. Axelrod, Assistant Secretary of Export Enforcement for the Department of Commerce, announced an “Academic Outreach Initiative” to “keep[] our academic research environments thriving – and controlled information secure from unauthorized foreign acquisition.”
- Proprietary research may be subject to the Export Administration Regulations.
 - Proprietary Research is “restricted from publication because it is considered confidential from a business or national security perspective.”

Dept. of Commerce – Academic Outreach Initiative (2 of 3)



- Four Pronged Initiative
 - Strategically Prioritized Engagement
 - Prioritize engagement with elevated risk profile institutions
 - Assignment of “Outreach Agents” for “Prioritized Institutions”
 - For the prioritized research institutions, an Outreach Agent will be assigned to partner with the institution to help prevent unauthorized exports
 - Background Briefings
 - Outreach agents will brief prioritized institutions on national security risks
 - Trainings
 - Regarding export controls, the Export Administration Regulations, etc.

Dept. of Commerce – Academic Outreach Initiative (3 of 3)



- ☐ Stay tuned for more information. We expect additional information regarding the Academic Outreach Initiative in the coming months.
- ☐ In the interim, consider reviewing your research and export compliance programs, or in the event you do not have a compliance program, develop an export management and compliance program.



Proposed Borrower Defense Regulations

With Josh Nolan

**New NPRM
regarding Title IV
consumer safety
measures**

Borrower defense
revisited and on
steroids





NPRM Comments closed

Pay attention to “consumer protection” that prohibit acts and omissions

- **Part of larger enforcement effort** – re-establishment of Office of Enforcement
- **Proposed Regulations:** In proposed § 685.401(b), a [borrower defense] claim could be brought on any of five grounds:
 - Substantial misrepresentation,
 - Substantial omission of fact,
 - Breach of contract,
 - Aggressive and deceptive recruitment, or
 - A Federal or State judgment or Departmental adverse action against an institution that could give rise to a borrower defense claim.

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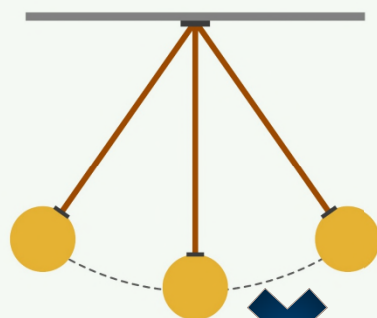
Proposed Title IX Regulations

With Melissa Carleton

Proposed Title IX Regulations



2011 and
2014



2020
regulations

X YOU ARE HERE
(2022 Proposed Regs)

Proposed Changes



- “Sex discrimination” and “Sex-Based Harassment” definitions
 - Sex discrimination includes SBH
 - SBH includes a “hostile environment” definition similar to the one used prior to 2020
 - Special procedures for SBH allegations involving a student as a party
- Single investigator model would be permissible – hearings not required (but watch your court decisions)
- Back to preponderance of the evidence

Proposed Changes – Streamlining



- No more 10/10 day review of evidence
- No more preparation of a duplicative investigative report
- Easier to move quickly through the investigation process

Proposed Changes – Reporting



- Higher Ed employees sometimes must report to Title IX Coordinator and sometimes can, instead, provide notice as to how to contact the Coordinator
- No prohibition against maintaining a rule that all employees must report
- ☐ **Consider whether it would be helpful to collect information from campus stakeholders about the proposed regulations.**
- ☐ **Listen to our webinar recording for more in-depth detail at www.bricker.com/titleix**

VAWA Reauthorization



- Climate surveys will now be required every two years for institutions of higher education
- Domestic violence definition changed to say “crimes of violence” (effective Oct. 1, 2022)
 - This is a change from the definition we use for Clery purposes
- ☐ **Adjust your Title IX policy accordingly.**

Note: the remainder of the definition of domestic violence does not apply for Title IX purposes. See 87 FR 41418 (July 12, 2022).

Bonus: Title IX Guidance Update



- July 2021 Q&A was revised on June 28, 2022

Question D (page 29): Despite the [VRLC] court’s decision, may a postsecondary school choose to maintain the prohibition on considering statements made by a party or witness who does not submit to cross-examination at a live hearing as part of its Title IX grievance process?

Answer D: No. [see guidance for more explanation]

- ☐ **Consider revising your policy in this regard.**



OCR Manual Update

With Rob Kent

OCR Manual Update (1 of 3)



Dept. of Ed. OCR Releases revised Case Processing Manual (July 18)

see <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

The Case processing manual sets procedures for Ed.'s investigation of Title IX, ADA, 504 complaints, and others.

OCR Manual Update (2 of 3)



Changes:

- Limits scope of what is considered a complaint to written statement of allegation; oral, anonymous, cc's don't count
- Allows dismissal only where there are no systemic issues
- Recognizes FOIA and its restrictions apply to reports
- Reduces transparency to institutions:
 - OCR now not required to provide copy of complaint
 - No draft letter of findings
 - No draft resolution letter and proposed resolution agreement
- Limits timeline for adoption of proposed resolution agreements
- Removes provision addressing First Amendment protections

OCR Manual Update (3 of 3)



- ☐ Consider whether you need to bolster you climate assessment capabilities
- ☐ Consider using FOIA the next time you receive notice of an OCR complaint
- ☐ Review recent resolution agreements to see if you could meet the standards (<https://ocrcas.ed.gov/ocr-search>)
- ☐ Discuss with counsel the impact of the changes on pending complaints



Athletic Update

With Kasey Nielsen

NCAA Sexual Misconduct Policy



- NCAA attestation regarding sexual violence incidents involving student athletes is now effective for the 2022-2023 academic year
 - Colleges must ask their student-athletes about their sexual misconduct history (if transfer, pending TIX proceeding)
 - Colleges must take reasonable steps to confirm a student-athlete's information on the disclosure form
-
- ☐ **Ensure you are asking your student-athletes this year about their history involving sexual misconduct.**
 - ☐ **Ensure you are taking reasonable steps to confirm the student-athlete's disclosure.**
 - ☐ **Remind administrators regarding FERPA, privacy, and consent to disclose.**

Name, Image, and Likeness



Has been in effect for more than a year now (since July 1, 2021) and it has evolved greatly

- We now have “collectives” (now creeping into DII and DIII programs)
- We now have athletic departments getting more involved in NIL opportunities

NCAA provided guidance in May 2022

- The guidance's primary purpose is eliminating a booster's involvement in recruiting

Ohio NIL law has not changed – but we have seen other states repeal their laws to be more competitive

- ☐ **Confirm you are following state law and all NCAA guidance on NIL**
- ☐ **Review your institution's stance on NIL.**
- ☐ **Consider educating student-athletes and staff on NIL.**

Student-Athlete Experience



DI NCAA Transformation Committee – NCAA bylaws to be deregulated in the areas of student-athlete's personal health, safety and well-being so schools can now make campus-level decisions

Call for collective bargaining (Big Ten and Penn State football players)

- Demanded independent medical care, post-football health protections, and a percentage of media rights revenue
- Might see unionization in the future?

- ☐ **If DI, Consider how your campus will respond to NCAA bylaw changes.**
- ☐ **Be aware of the potential changes of employment status of student-athletes on a national level.**

Student-Athletes and Hazing Training (Ohio)




Collin's Law

If a student-athlete does not complete hazing educational programming, they are prohibited from participating in athletics (workouts, practice, games) until the programming is completed

- Orientation!

☐ Review that your student-athletes have completed hazing training.

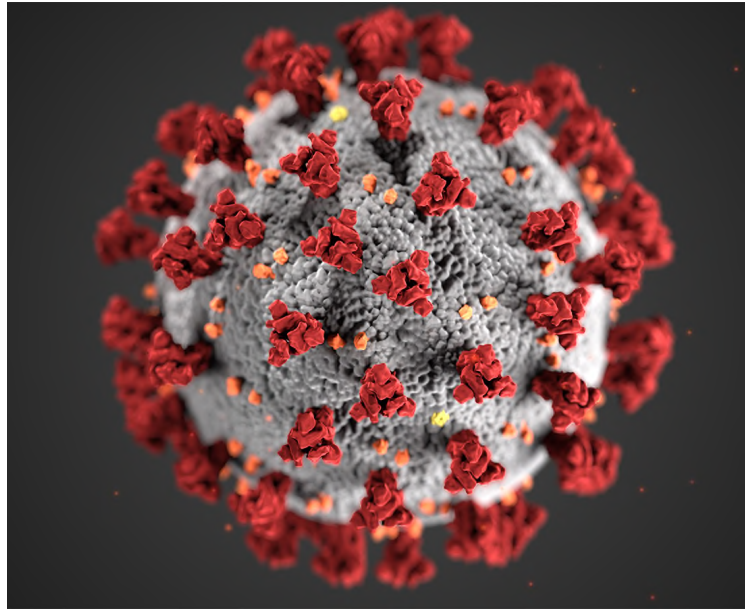
A photograph of two binders stacked vertically. The top binder is blue and has a white label with the word "MONKEYPOX" in black, uppercase, sans-serif font. The bottom binder is white and has a white label with the text "COVID-19" in black, uppercase, sans-serif font. Both binders have a circular hole on the right side.

Pandemic Update

With Josh Nolan

COVID and Monkeypox:

Concurrent health emergencies in higher education.



CDC Issues New COVID Guidelines



Vaccinate, Isolate (shorter), Adapt

Summary of Changes

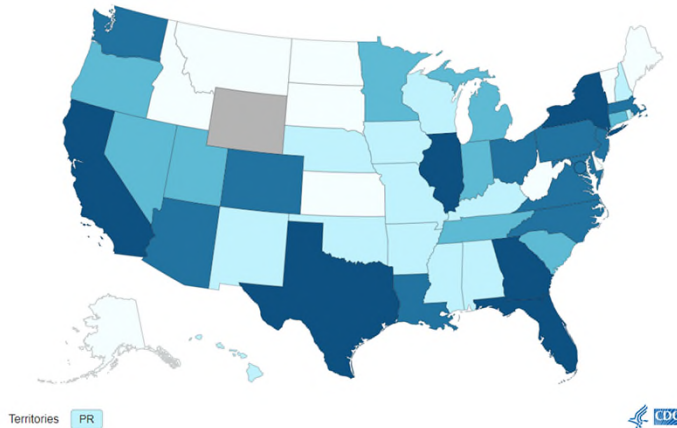
- **Exposure:** rather than quarantine, wear a high-quality mask for 10 days and get tested on day 5.
- **Shorter Isolation** – If positive test, 5-day isolation; if fever-free without medication, then can end isolation
- **Immunocompromised?** – may need to isolate longer (10 days)

Action items:

- ☐ Stay alert to community spread information and follow local health official's recommendations
- ☐ Develop on-line/remote learning policy
- ☐ Masking, ventilation, and distancing will still be considered by CDC

11,890 Total confirmed monkeypox/orthopoxvirus cases

*One Florida case is listed here but included in the United Kingdom case counts because the individual was tested while in the UK



CDC Issues Monkeypox Guidelines – July 26, 2022

Congregate Housing settings have specific guidance:

- Educate and Isolate
- Isolation guidelines (dedicated bathroom)
- PPE for entering isolation areas
- Laundry concerns
- Employment leave/remote work (2-4 weeks)

CDC Issues Monkeypox Guidance



No specific higher education guidance – BUT...

Congregate Housing, Employment, Treatment recommendations VERY relevant

- Sexually transmissible, not an STI –
- Contact with blisters (clothing, bedsheets, skin-to-skin, etc.)
- Flu-like symptoms + rash and blisters

Action items:

- ☐ Stay alert to community spread information and follow local health official's recommendations
- ☐ Develop student and employee process for long-term remote work or LOAs;
- ☐ On-line/remote learning policy
- ☐ Develop student housing protocols regarding isolation and use of bathrooms
- ☐ CDC recommends using blood borne pathogen protocols