Legal Issues Impacting Community Colleges

Recent rulings and guidance involve COVID-19 disabilities, equal pay claims, and the use of artificial intelligence in screening job applicants.

By Ira Michael Shepard, ACCT General Counsel

THE FOLLOWING IS A SUMMARY of recent legal developments which impact the day-to-day administration of community colleges throughout the United States.

The U.S. Equal Employment Opportunity Commission (EEOC) issues guidance that COVID, under certain circumstances, may be a disability covered and protected by the Americans with Disabilities Act (ADA) from discrimination. Issued in mid-December 2021, the EEOC guidance states that in certain circumstances COVID may be a disability covered by the ADA, making it illegal for employers to discriminate against employees recovering from the disease. In the guidance, the EEOC Chair pointed out that employees with disabilities resulting from COVID may be eligible for reasonable accommodations.

Depending on each employee's individual circumstances, an employee recovering from COVID may meet the ADA's definition of a disability as a mental or physical impairment that substantially limits a major life activity, or an employer's perception that the individual has a disability. Someone who has COVID and experiences multi-day headaches, dizziness, and brain fog attributable to the disease is an example of an impairment covered by the ADA. However, the EEOC pointed out that not every person with COVID will qualify as disabled. For example, if someone has COVID and is asymptomatic or has mild symptoms similar to the flu that last only a few weeks with no other consequences, that person would not qualify as disabled. The EEOC suggests an individual assessment of each employee with COVID might be necessary to determine whether it is a disability.

EEOC loses attempt to invalidate "negotiation" defense to an equal pay act claim brought by a school district superintendent who was paid less than her male predecessor. The EEOC recently filed a case on behalf of a school district superintendent under the Equal Pay Act, alleging that the school district violated the law by paying the new female superintendent less than it paid her male predecessor. The school district defended its actions, alleging that the female superintendent failed to negotiate a higher salary.

The EEOC argued that failure to negotiate a higher salary is not a valid defense to an Equal Pay Act

"I'm fifty-three, but I have the résumé of a much younger man."

claim. Siding with the school district's interpretation of past court rulings, the federal district court judge hearing the case held that the EEOC failed to show that the "negotiation" defense could not be raised. (*EEOC v. Hunter-Tannersville Central School District*, 2021 Bl 460087, N.D.N.Y. No. 1:21- cv-00352,12/2/21). The judge concluded that whether the defense is valid could be reviewed by the U.S. Court of Appeals.

Arizona's denial of healthcare coverage for transgender surgery in plan covering public universities is subject to discovery. The state of Arizona recently appealed a federal trial court's decision that it turn over "attorney opinions" that its actions excluding transgender surgery from health plan coverage were legal to the Ninth Circuit Court of Appeals, which covers California, Oregon, Washington, Arizona, Nevada, Idaho, and Montana. The plan's exclusions are subject to a lawsuit alleging that the denial of benefits violates the applicable sex discrimination statutes.

The state had claimed that its actions excluding such benefits from coverage were legal and relied on "attorney opinions" to that effect. The plaintiff in the case asked that the opinions be turned over as part of the litigation, and the state refused, claiming the documents were subject to attorney/client privilege. The federal trial court judge agreed with the plaintiff, holding that Arizona waived privilege by implication and concluding that privilege cannot be used as both a sword and shield.

NCAA loses appeal for an expedited ruling denying student athletes' minimum wage claims, which move on to a federal court trial. The National Collegiate Athletic Association (NCAA) was denied a request for fast-track consideration of its appeal of an adverse trial court order over student athlete claims that they are covered by the Fair Labor Standards Act (FLSA) minimum wage and overtime rules as employees. The trial court judge ruled that the question of whether the student athletes are employees is a mixed question of law and fact which should go to trial. The judge concluded that the NCAA can appeal an adverse decision after the trial.

The NCAA countered that similar suits in appeals courts in the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) and in the Ninth Circuit (covering California, Oregon, Washington, Nevada, Arizona, Idaho, and Montana) both held that the NCAA is not the employer of student athletes. In rejecting the NCAA's interlocutory appeal, the Third Circuit (covering Pennsylvania, New Jersey, and Delaware) ruled that the NCAA failed to meet its burden in showing exceptional circumstances justifying departing from the normal policy of delaying appellate consideration until a final judgement is issued.

State and local laws regulate the use of artificial intelligence in job applicant screening tools. New York City established one of the broadest new laws concerning the use of artificial intelligence tools to screen job applicants by city employers. The effective date is unclear, and local counsel should be consulted on the new regulations in the city. Under the New York City law, such artificial intelligence tools will be banned in the city unless they are subject to a "bias audit" conducted a year before the use of the tool.

Illinois has passed a similar law, while Maryland passed a law banning the use of facial recognition in the employment application process without the applicant's consent. The attorney general in the District of Columbia has also made a related proposal addressing "algorithmic discrimination."

The EEOC recently indicated that it would study the use of artificial intelligence job screening tools to see if they contribute to bias in employment decisions.

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