



Legal Issues Impacting Community Colleges

Recent rulings and guidance involve social media, school bathrooms, and student athletics.

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THE FOLLOWING RECENT LEGAL DEVELOPMENTS ARE IMPORTANT TO THE day-to-day administration of community colleges.

Tenured public school teacher’s termination for unprofessional social media posts reversed. A tenured public school history teacher who was terminated after publicly posting “unprofessional” and “disrespectful” social media posts had her termination reversed by an Illinois appellate court.

The teacher claimed not to realize that her posts were public as opposed to being just distributed to “friends” on Facebook. Among other posts, the teacher shared a Facebook post from a group called Bored Teachers which stated, “I can think of no better form of birth control than to have people observe my class for a day.” In another post, she described a student’s parents as “clearly crazy” and “nuts.” The teacher was terminated for making unprofessional remarks about students on Facebook, and the termination had previously been affirmed by a trial court. The head of HR testified that the plaintiff was not remorseful and thought the posts were therapeutic.

The Illinois Appellate Court concluded that the plaintiff’s posts were “clearly foolish” and “unprofessional.” Nevertheless, the appellate court concluded that the Illinois state statute afforded tenured teachers the right to warning and a chance to remedy their transgressions. (*Kelleher v. Illinois State Board of Education*, Ill App. Ct. 1st Dist. No. 1–22–0058, Order 2/14/23).

A divided appeals court rules that separating bathrooms by biological sex does not violate the Constitution or Title IX. The full 11th Circuit Court of Appeals (covering Florida, Alabama, and Georgia) recently held in a sharply divided 7-4 decision that separating school bathrooms by biological sex is constitutional and does not violate Title IX. (*Adams v. School Board of St. Johns County, Florida*, 11th Cir. No. 18–13592, 12/30/22).

The case involved a Florida school board which restricted bathroom use by biological sex, barring students who identified as a sex different from their biological sex to use the bathroom of their choice. The majority decision, which was subject to multiple dissents, rejected the transgender plaintiff’s reliance on the Supreme Court decision in *Bostock v. Clayton County*, which held that under federal job discrimination law sex discrimination includes bias based on gender identity or sexual orientation.

The majority decision pointed out that a school setting “is not the workplace” and that *Bostock* expressly decided not to tackle the issue of segregated lockers or bathrooms. The majority concluded that the U.S. has a long history of separating sexes when it comes to the use of public bathrooms, and such sex-based classifications have never necessarily violated the equal protection clause. It is likely that other circuits may decide this issue differently, setting up the ultimate decision on this issue by the Supreme Court.

National Labor Relations Board (NLRB) general counsel concludes that the NCAA violated the National Labor Relations Act by failing to treat student athlete basketball

and football players as employees. The decision by the NLRB's general counsel could eventually lead to the ability of these student athletes to form labor unions. The final decision rests with the full NLRB, which will eventually address this matter.

Barring settlement of the case, the NLRB's Los Angeles regional office will issue a complaint against the NCAA, and likely the Pac-12 Conference and the University of Southern California, for failure to treat these student athletes as employees. The case was brought to the NLRB by the National College Players Association, an advocacy group seeking to organize student athletes.

Department of Labor office rescinds Trump Administration religious carveout that allowed federal contractors to ignore anti-discrimination obligations based on their faith. The Office of Federal Contract Compliance Programs (OFCCP) announced new regulations on February 28, 2023, rescinding Trump Administration regulations allowing government contractors to ignore certain anti-discrimination obligations based on their faith. The soon-to-be-revoked Trump Administration rule faced continued opposition by civil rights groups and LGBTQ advocates.

The new regulations will bring back the prior standard, which had been in place for nearly two decades. The new regulations will be published shortly and effective 30 days after publication. This rule applies to the OFCCP enforcement of anti-discrimination rules under Executive Order 11246 and is applicable to all federal government contractors.

Attempts to increase a unionized employee's production are permissible "coaching" on job performance improvement. An NLRB administrative law judge recently dismissed a union's claim that an employer committed an unfair labor practice by unilaterally changing working conditions when it suggested that a unionized staff reporter increase his output of written articles. The judge concluded that when the newspaper's editors suggested that the reporter "strive" to write 15 articles every 30 days, this action was a permissible attempt to "coach," develop, and improve the quality and production of the reporter's work (*The News Guild v. The Morning Call LLP*, NLRB ALJ No. 04-CA-292410, 3/9/23).

The newspaper's editors began meeting with the reporter every two weeks when they noticed he was lagging behind the standard article production goal of five articles per week. The judge noted that the editors did not threaten the reporter with penalties if he did not meet the goals. More importantly, the judge concluded that the goals were not a change in working conditions because they were actually less than the goals given to the rest of the newsroom. The case clearly reinforces an employer's prerogative to meet with a unionized employee and suggest ways to improve job performance consistent with applicable workplace standards.

While overall union membership reaches historic low, U.S. labor unions engaged in the most strikes in 2022 since 2007, led by education service employees including teachers. More than 225,000 employees engaged in 314 strikes last year, more than any year since 2007. Education service employees accounted for three out of every five of those workers, according to an analysis by Bloomberg News.

The largest strike of the year was at the University of California, where approximately 48,000 graduate student workers struck for six weeks,

demanding increased wages and changes to working conditions. This strike was the largest strike occurring at any college or university since at least 1990, according to the Bloomberg database. The graduate student workers were represented by the United Auto Workers union.

Separately, the American Federation of Teachers (AFT) and the National Education Association (NEA) collectively engaged in the second highest number of work stoppages during 2022, only surpassed by the Service Employees Union (SEIU). Collectively these two unions had the largest share of union members involved in strike activity in 2022. Analysts conclude that dual economic factors — a tight labor market and rising inflation — led to the increase in strike activity. Union leaders also claim that in addition to the rise in strike activity, many other contract negotiations narrowly avoided strike situations as a result of diligent negotiation activity on both sides of the table.

Nonetheless, overall union membership dropped to a historic low percentage of the U.S. workforce in 2023, falling to 10.1%, lower than the previous low of 10.3% recorded in 2019. In 1983, the first year the government began collecting these numbers, union membership was over 20% of the total American workforce.

The U.S. Equal Employment Opportunity Commission (EEOC) reports a 20% increase in discrimination charges and a substantial increase in monetary benefits for victims of discrimination in FY 2022. The EEOC reported that charges filed against employers rose from 61,331 in FY 2021 to 73,485 in FY 2022, "as the nation emerged from the pandemic." The announcement came as the Biden Administration proposed an increase in EEOC funding for the new fiscal year.

The EEOC also announced that it increased the amount of monetary benefits it obtained for victims of discrimination in FY 2022. The agency reported that it obtained \$513 million in benefits for victims of discrimination in FY 2022, up from \$484 million in benefits obtained for discrimination victims in FY 2021.

OSHA reports a 20% increase in inspectors under the Biden Administration. The number of federal workplace safety inspectors has increased by 20% during the Biden Administration, according to the Occupational Safety and Health Administration (OSHA). The federal safety agency hired 227 inspectors during 2022, bringing its total inspectors to 900. Across all OSHA staff positions, the agency has grown by 17% from 1,800 to 2,100 employees.

This growth enhances OSHA's ability to perform more workplace safety inspections and investigate more pending employee workplace safety complaints. Another result of this significant growth of inspectors is that one in five inspectors now have less than one year of experience on the job. OSHA had faced criticism that it had not adequately responded to worker complaints.



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