



Legal Issues Facing Wisconsin Technical Colleges Conference:

Hot Legal Topics in Higher Education

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November 2017



Agenda

- 1. The Latest on Foundations – Robert W. Mulcahy**
- 2. Memon Litigation Case – Robert W. Mulcahy**
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- 4. Trouble Spots Under FMLA/ADA – Kirk A. Pelikan**
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- 6. The New Open Meetings Law Case Regarding Committees (Appleton Schools) – Luis I. Arroyo**
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UW-Oshkosh Case

Foundations

- Recently, the Board of Regents and UW System asked the Wisconsin Department of Justice (DOJ) to pursue civil legal action against a former UW-Oshkosh Chancellor and Vice Chancellor based upon their actions regarding the UW-Oshkosh Foundation. According to the DOJ complaint, these individuals made financial transfers from UW-Oshkosh to the UW-Oshkosh Foundation related to certain real estate projects. In addition, the individuals were said to have guaranteed UW-Oshkosh Foundation's obligations related to the projects by committing UW-Oshkosh to make payments if the UW-Oshkosh Foundation could not make them.
- April 2, 2017 Journal/Sentinel reported that former Chancellor received from the Foundation free rent for almost two years and \$122,000 more on sale than the assessed value.



UW System Audit Review

- For financial reporting purposes, UW System Administration assesses affiliated organizations on the basis of several factors, such as the legal status of the organization and the financial significance of the organization to UW System. For fiscal year (FY) 2014-15, and as stated in report 16-3, UW System identified 74 such affiliated organizations, which included booster clubs, alumni organizations, and foundations. Generally, because these organizations are separate legal entities, UW System does not control or have direct access to the funds held by these organizations.
- UW-Oshkosh Foundation has recently filed for bankruptcy.



UW System Audit Review

- UW System Administration is currently conducting a review of financial transactions between private foundations and US institutions, and it is examining the existing legal documents defining the relationship between UW institutions and private foundations.
- Some concerns have been raised about the extent to which relationships between UW institutions and private foundations have resulted in UW financial and personnel resources supporting private foundations and private foundation activities.



WTCS Colleges & Affiliated Foundation Relationships

- Mission & Vision of College and Foundation

- Are there any documents (including memorandums of understanding between College and Foundation) that define the working relationship?

- Arm's Length Transactions and Documentation
 - College Employees on Foundation Board (voting or ex-officio non-voting)
 - Space/Rent/Office
 - Supplies
 - In-Kind Contributions



WTCS Colleges & Affiliated Foundation Relationships

- Do College Employees volunteer or work for Foundation?
- Who pays salary of Executive Director and Staff of Foundation?
- Copy of Contracts/Agreements Between College and Foundation



WTCS Colleges & Affiliated Foundation Relationships

- How does money flow between the Foundation and the College?
- Are any College funds used to support Foundation activities?
- Does College guarantee any debt of Foundation?
- 501(c)(3) Tax Law Implications



WTCS Colleges & Affiliated Foundation Relationships

- Insurance Liability – College Foundation needs separate coverage from College DMI policy?
- Does Foundation Follow Open Meeting/Public Records Law?
- Audits - Separate or Joint?
- Accounting – Separate or Joint?



WTCS Colleges & Affiliated Foundation Relationships

- Is the Foundation Board independent in its voting and decision making?
- Is the Foundation considered a public or private entity?



Iftikhar Memon Lawsuit

- Plaintiffs
 - DMI, CVTC, NTC, WCTC, WTC, and WITC
- Defendant Memon
 - 86 complaints of age, sex, religious, and national origin
 - Serial plaintiff
- Claims
 - Abuse of Process
 - Malicious Prosecution
- Status
 - Waukesha County Circuit Court (Judge Maria Lazar)
 - In discovery
 - Temporary Injunction
 - Summary Judgment: November 10
 - Mediation – court ordered





Domestic Partners Health Insurance

- 2017 Wis. Act. 59
 - Ends a Technical College's ability to offer domestic partner coverage effective 4/1/18
 - Ends an individual's ability to obtain domestic partner status in Wisconsin effective 4/1/18
 - Requires affirmative action to cement an existing unregistered domestic partnership, which may not be possible in most instances



Domestic Partners & WFMLA

- 2017 Wis. Act. 59 Additional Effects
 - Wisconsin FMLA recognizes domestic partnerships registered with the county clerk (ending 4/1/18) and unregistered domestic partnerships
 - Standards for an unregistered domestic partnership is changing
 - Limits the population of individuals who will be able to get FMLA for “domestic partner” reasons
 - Will the College amend the policy?



Trouble Spots Under FMLA

- FMLA Notices
- Supervisor Training Crucial
 - Inklings are important to meeting deadlines
 - Difference between willful and non-willful violations
- Intermittent FMLA
 - Doctor's not per absence is not permissible
- Failing to factor ADA obligations
 - Internal policies v. legal obligations (*Severson v. Heartland Woodcraft, Inc.*, 7th Cir. 2017)



OCR Website Review

- Colleges received complaints associated with website accessibility
- Letters appeared to come from one complainant
- Web tool: <http://wave.webaim.org/>



Open Meetings – Appleton Schools Decision

- What constitutes a governmental body for purposes of the Open Meetings law?
- Supreme Court ruled “unanimously” that the Appleton Area School District violated the Open Meetings Law
 - “Where a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are "created by . . . rule" under § 19.82(1) and the Open Meetings Law applies to them. Here, the Board's Rule 361 provided that the review of educational materials should be done according to the Board-approved Assessment, Curriculum, & Instruction Handbook (the "Handbook"). The Handbook, in turn, authorized the formation of committees with a defined membership and the power to review educational materials and make formal recommendations for Board approval.”



Open Meetings – Krueger v. Appleton Schools

- The Krueger decision expands the scope of what will be considered a meeting of a governmental body for Open Meetings Law purposes.
- What you can do:
 - Determine what committees are created by “rule” of the Board.
 - Review policies and handbooks for rules authorizing committees to address duties of the governing body or chief administrators.
 - Take care with practices regarding the appointment of staff review committee
 - The concurring opinion and existing A.G. opinions note that that the directive of a superintendent or other ranking public official creating a committee to carry out a statutory or board delegated function would likewise be treated as a governmental body.
 - Ask staff to consider issues informally and provide feedback.
 - Committees or entities formed by board rules authorizing or delegating board duties to staff need to comply with Open Meetings laws.



Open Meetings – Krueger v. Appleton Schools

- Considerations in Determining if a Committee is a “Governmental Body”
 - What body created the committee?
 - Is there a rule or policy of the governing board that relates to the topic of the committee’s work?
 - Is the committee addressing a topic that is explicitly the governing board’s responsibility?
 - To whom does the committee report?



Open Meetings – Krueger v. Appleton Schools

- Big question left unanswered: **Can a “high ranking official” create a committee by rule or order?**
 - Krueger had argued that if the Court found that the school board did not create CAMRC by “rule or order,” then the fact that high-ranking administrators created CAMRC is enough to bring it under the Open Meetings Law.
 - Note: Attorney General voiced support for this proposition.
 - Court did not address the question because of its finding that CAMRC was created by board rule.



Title IX Update

- Continuing litigation on how colleges and universities handle Title IX matters.
- OCR has recently taken two important steps on Title IX:
 - OCR will no longer automatically turn an OCR complaint regarding sexual misconduct into a 3 year audit. Investigators will focus on specific facts in the complaint. (Similar to EEOC-type investigations.)
 - Withdrew the 2011 Dear Colleague Letter and 2014 Questions and Answers on Title IX and Sexual Violence.
 - 2001 Guidance and 2006 Dear Colleague Letter still in place.



Title IX Update

- New guidance from OCR on sexual assault investigations
 - Before the first interview of the accused, the accused should receive sufficient details and time to prepare a response. “Sufficient details” include:
 - identities of the parties involved,
 - section of code of conduct violated,
 - conduct alleged to violate the code,
 - date and location of the incident,
 - sufficient notice in advance of any interview hearing with sufficient time to prepare for meaningful participation.
 - Voluntary participation in informal resolution is appropriate.
 - Can use “clear and convincing” evidentiary standard as opposed to “preponderance of the evidence.”
 - Parties should have an opportunity to respond in writing to the report of the investigator *before* the decision regarding responsibility is issued.
 - The right to appeal may be restricted to the charged party.



FLSA Update

- On August 31, 2017, a District Court granted summary judgement and made a final injunction against the implementation of the new overtime regulations.
 - Many schools had already moved forward with job modifications and salary increases triggered the final rule.
- On July 16, 2017, Trump Administration issued a request for information seeking comment on questions relating to the definition of exemptions under the FLSA. Numerous higher ed. institutions responded in September with the following summary of positions:
 - Keep duties test as is
 - Threshold salary should be increased but at a level less than what was required under the 2016 rule
 - No indexing of salary threshold
 - Compliance guidance on higher ed. employees issued in conjunction with 2016 rule should be reaffirmed



Speech & Facility Use Issues

- Institutions expected to provide an environment that fosters debate and dissent, all while ongoing diverse perspectives and ensuring student, faculty and visitor safety.
- Recent Issues effecting free speech issues
 - Hate speech, Charleston, California speaker cancellations
 - Jeff Sessions at Georgetown
 - FIRE's letter to the President
- Academic Freedom/First Amendment Considerations
 - Incitement to riot doctrine Focus usually on what happens after what was said.
- Fighting words doctrine
- Need content neutral policies
 - Focus on safety, capacity, staffing and procedural compliance
- Avoid overbreadth, vagueness, and content discrimination



Questions





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