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LEGAL ISSUES and TRENDS ON CAMPUS

Introduction.

The perspective as general counsel to a comprehensive research university allows me to bring to your attention certain legal issues which are emerging on campus and are of importance to you because they are important to your future employees. While we have most of the rest of the legal problems that any corporate or nonprofit organization would have — environmental law, employment issues, contract and business problems, litigation — we have some legal problems that may be somewhat unique and are presently major issues on our campuses.

Some of these problems are especially focused among our student populations. Since this pool represents a major part of the country's future workforce (especially for professional employees), I thought it might be useful to note these current campus legal problems in the context of this rising labor pool. The end of this outline includes some demographic data on what the coming student (and thus employment) pools are expected to look like.

A note about "fedlaw". Also included at the end of this outline are some examples from our office's specialized website on federal law applicable to private universities. This site includes a substantial amount of information that would be applicable to any employer and to many other nonprofit organizations. It is available at http://counsel.cua.edu

A. Learning Disability Issues

According to a new study by the American Council on Education, the number of college freshmen identifying themselves as learning disabled (LD) has almost tripled from 1988 to 1998 (to 58, 000 freshmen nationwide), the fastest growing category of all disabilities. In 1998, 41 % of students with a disability reported a learning disability. One in 11 first- time, full-time freshmen entering college in 1998 self-reported a disability.

At The Catholic University of America (CUA), out of a total student population of about 6,000 for the 1999-2000 academic year, CUA enrolled 222 students with disabilities. Of that number, 182 students were diagnosed as having either Attention Deficit Disorder (ADD) or a learning disability. For undergraduates, LD/ADD was clustered in politics and communications majors, and for graduate students, in the areas of law, social work and library science, in that order.

How are colleges and universities dealing with this influx? Almost all college and universities provide extended time on tests. Other accommodations include note takers for those who have difficulty with writing and listening at the same time. Students with disabilities are less likely to work while enrolled in school and are more likely to take remedial courses than their peers without disabilities.

What does this mean for their future employers? It means many of these students will come to the job with expectations (in many cases supported by the law) that their learning disability must be accommodated. Extensive accommodations occur even in graduate schools such as law, business and medicine. Employers can expect that employees will request extra time to complete certain tasks, and may ask for assistance such as note takers, real-time captioning for meetings, etc.

Court cases on this issue have gone both ways. One that bears watching is *Bartlett v. New York State Board of Bar Examiners,* 156. F. 3d. 321 (2nd. Cir. 1998), judgment vacated and remanded, 119 S. Ct. 2388 in light of *Sutton v. United Air Lines*, 527 U.S. 471 (1999). This case involved a candidate for the bar examination with a cognitive disorder that impaired her ability to read. The New York State Board of Bar Examiners denied her request for unlimited or extended time on the test. The 2nd Circuit did not address the appropriateness of the particular

accommodations, but did rule that she was indeed entitled to accommodation. The Court found a person's ability to self-accommodate does not foreclose a finding of disability.

The Supreme Court in *Sutton* and *Albertson's Inc. v. Kirkinburg* 527. U.S. 516, (1999) held that mitigating measures must be taken into account in judging whether an individual possesses a disability (e.g., if someone has a vision impairment that can be corrected by wearing glasses, then accommodation may not be necessary). Accordingly, the 2nd Circuit's protection of the bar applicant was at least temporarily overturned and remanded for further action in light of *Sutton*.

Universities at this point are hesitant to reevaluate on a large scale the existence or non-existence of a learning disability in light of the above holdings, without further guidance from the courts. However, the entire issue is one that will remain a point of debate for some time to come. Universities are also facing issues confronting the costs of testing for disability, the timeliness of such documentation and similar implementation issues. As an anecdotal matter, CUA is also experiencing a significant increase among students and employees who had "masked" their mobility impairments for a long period of time, but now are seeking modifications in access to facilities.

Materials available on the General Counsel's web page at CUA include Americans with Disabilities Act compliance guidance regarding job descriptions, job advertising and applicant interviews (Attachment A). See the web site at http://counsel.cua.edu

B. Use of Technology and Intellectual Property issues

Nearly half of all U.S. colleges and universities offer classes taught outside the traditional classroom (audio, video, or over the Internet). A survey by the U.S. Department of Education found that the number of distance education programs had increased by 72% from 1995 to 1998, with 1.6 million students enrolled in these courses. Public institutions are entering this market faster than the privates, and the larger institutions are also entering this marker with greater speed. Seventy-seven percent of the institutions kept the tuition for similar online and traditional courses the same.

By the same token, many online courses are only non-credit courses. Many online course providers still rely on accredited institutions to recognize the online credits towards a degree. As Xerox's Chief Scientist John Seely Brown points out in his recent book, "A Social Life of Information," traditional higher education still provides many components of an educational experience that the Internet cannot. The teaching that occurs at universities, in Brown's view, is more than "a delivery service, and schools [more than] a loading site." It's too "blinkered" to "think of educational technology as a sort of intellectual forklift." (p. 219).

Nonetheless, ubiquitous campus technology raises many questions that are new for campuses and certainly new for our students. Many of our students will leave campus without a clear understanding of what legal rules apply in the corporate environment, and will bring to the workplace the same expectations they had in the campus computing culture.

My view is that many students who have grown up with easy Internet access are part of the culture of copyright anarchy, believing that information "wants to be free" and "data want to be used." These are not necessarily bad values: I just point out that they are held by many of our students. They think that anything they find on the Internet can be freely used. They sometimes confuse free access to computing resources with free speech. They sometimes think that because something is technologically possible on a computer, they have a right to do it.

Copyright continues to be a major compliance problem on campuses. No sooner does the recording industry try to bring Napster to heel than Gnutella and other "peer to peer" software schemes emerge widely, continuing to baffle the attempts of information owners to grapple with this emerging culture that actively resists for the electronic world the legal and business paradigms that operated in the paper world.

Colleges are also grappling with questions about intellectual property ownership. Graduate students are beginning to assert rights in their publications that have not previously been asserted by students. Faculty are asking previously unasked questions about who owns the courses that faculty create for the Internet. Is software that relates to traditional scholarly publishing owned by the professor, or an invention, or a work for hire owned by the university?

These questions are being faced by every university in the country. A decade ago not much thought was given to university intellectual property policies. Today many of these policies would be considered overly simplistic. Universities are struggling to draft intellectual property policies that allocate ownership to faculty, but also grant the University an interest in works to which it contributes significant resources. See *"When Professors Create Software, Do They Own It, or Do Their Colleges?"* in the July 21, 2000 issue of the Chronicle of Higher Education for more on this topic.

Another significant change in the intellectual property arena is the decision in *State Street Bank and Trust Co. v. Signature Financial Group, Inc.* , 149 F. 3d 1368 (Fed. Cir. 1998). Software applications and computer systems may now be patented, and there has been an explosion in patent applications at the United States Patent and Trademark Office, most of which can be attributed to applications for patent protection for

software. This expansion is creating some confusion on many research campuses, where patents are traditionally covered by a clear policy about ownership, but software (and certainly software that is outside of the hard sciences) is traditionally not covered.

The import for prospective employers is simply that graduate students and others entering professional positions where they will be producing marketable intellectual property may have some or all of these expectations that are part of the evolving IP culture on our campuses. Employers would be well advised to have policies that address these issues in as clear a way as possible.

Policies on privacy for students are also being rethought due to technological advances. Students have unique rights regarding the privacy of their records, protected by federal statute. They have enjoyed this protection from primary grades through graduate school. Accordingly, they have an expectation of privacy that they may be surprised to find may not be fulfilled in the world of work. Most institutions also provide significant privacy

expectation of privacy that they may be surprised to find may not be fulfilled in the world of work. Most institutions also provide significant privacy protections for students (and faculty) as regards their computers and use of computer resources. Emerging concerns about "identity theft" (*Washington Post*, July 2000) are leading to legislative proposals regarding the sale and use of social security numbers (uses of which are already limited on campuses by federal student records laws), including the Kyl-Feinstein bill that would impose new burdens on credit-card issuers in an attempt to reduce identity theft and fraud.

In the meantime, employers with recent college graduates coming into their work forces may find it helpful to review their polices on privacy and define the privacy rights of their computer users. For interesting articles/books on the topic of protecting privacy see the June 30, 2000 issue of the Chronicle of Higher Education: *Colleges must Protect Privacy in the Digital Age*, by Larry White, and *The Unwanted Gaze: The Destruction of Privacy in America*, by Jeffrey Rosen. For general information on the Electronic Communications Privacy Act see http://counsel.cua.edu/FEDLAW/Ecpa.htm

Information on CUA's general counsel website related to legal issues in intellectual property compliance includes information on copyright and digital images (sample pages regarding the Visual Resources Association Guidelines are Attachment B). General information from our federal law summary on copyright laws is found at http://counsel.cua.edu and a sample from the copyright material is included with Attachment B.

C. Immigration Law

"Give me your tired, your poor, your huddled masses yearning to breathe free; I'll also take your skilled employees under the temporary visa program, H-1B". So begins an article in the May 25, 2000 business section of the New York Times by Alan Krueger, commenting on the lack of coherency and a comprehensive policy in U.S. immigration law. As Krueger points out, we are in the midst of the Second Great Migration, the first in 1880, and the second beginning in the late 1970's, with more immigrants coming to the U.S. since 1980 than in the 60 years from 1920-1980.

With the increase in immigration, there has been an increase in statutory regulation, and as Krueger points out, not always well thought-through regulation. The INS has not been able to keep up with the increased regulation. For example, a statutory change in 1996 to employment verification procedures imposed a mandate that the INS issue new regulations updating the I-9 form by September of 1997. The regulations were not ready at that time, so interim rules were issued. Proposed regulations were issued in Feb. 1998, but final regulations have not yet been issued as of this date (July 2000). As the INS falls behind, Congress does not slow down the pace of regulation, but rather, seeks to impose the regulatory burden and cost on businesses and institutions of higher education.

An example of this trend on campuses is one of the changes made in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (ILLIRA). Under ILLIRA, students and exchange visitors in the F-1, J-1 and M-1 non-immigrant categories will be subject to payment of a $95 fee, to be collected by the educational institution and forwarded to the federal government. This requires institutions to establish a means to collect, remit and account for all fees collected from these students, among many other tasks imposed by immigration law and regulations. The education community has fought for repeal of the law, and at the present time, enforcement of the law is on hold while the INS grapples with implementation problems. It doesn't seem much of a leap to extend the fee collection and reporting burden to employers for similar or other visa categories.

Another area that bears close tracking is constant political activity around the issue of how many H-1B visas will be issued each year. The H-1B visa program was established in 1990, and allows employers to hire skilled foreign workers for up to six years. With unemployment rates down, and rapid growth in the technology sector, this has become a popular program. The visa cap was reached this year on March 21, 2000, with the new application year commencing Oct. 1, 2000. Present projections are that this cap will be increased in order to help meet the demand for technology workers. As part of the American Competitiveness and Workforce Improvement Act of 1998, (ACWIA), an additional $500 filing fee was imposed on employers seeking to hire H-1B non-immigrants. There is a proposal before Congress to raise the fee to $1000, and use the money to fund job training and education programs.

Our web page materials on immigration include in depth memoranda about employers' compliance obligations regarding I-9 verification, H1-B visas and other materials. Sample pages from our I-9 materials are included as Attachment C.

D. Alcohol Abuse

Alcohol abuse is still America's most pervasive drug problem, with 10 million underage drinkers and 33 million binge drinkers. The problems that arise from alcohol abuse continue to plague universities and employers. Today's intoxicated students become tomorrow's problem employees. In an interesting study done by the Harvard School of Public Health (the 1998 Corporate Alcohol Study) it was shown that light and moderate drinkers cause 60 percent of alcohol-related incidents of absenteeism, tardiness and poor quality of work, while dependent drinkers cause 40 percent. In other words, it is not actual alcoholics who are responsible for most workplace problems related to alcohol.

The most recent Harvard School of Public Health study on the issue, entitled College Binge Drinking in the 1990s: A Continuing Problem - Results of the Harvard School of Public Health 1999 College Alcohol Study, found that binge drinking and abstention had both increased significantly. See http://www.hsph.harvard.edu/cas/pubs.shtml for a copy of the full report. According to the Center for Disease Control & Prevention, marijuana and cocaine use is also up markedly among young people in the last decade (*Washington Post,* p. A27, July 13, 2000).

In the District of Columbia, more than one-half of 13-20 year olds have purchased alcohol with no identification required, and more than half use a fake identification card. It is estimated that the damage to health, increases in crime and decrease in worker productivity as a result of alcohol use costs the District of Columbia more than $700 million per year (July 2000 *Washington Post* article by Kimberly Miller, College Initiatives Alcohol Policies Project Center for Science in the Public Interest).

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Student record privacy laws were amended several years ago to allow colleges to release information to parents of students under the age of 21 information about a violation of any rule or policy of the institution governing the use or possession or alcohol or a controlled substance. Colleges and universities are also required to publish an annual safety report that discloses crimes on campus, including alcohol and drug violations and disciplinary actions. It is foreseeable that large employers may someday be required to report instances of drug and alcohol abuse occurring in the workplace that don't rise to the level of reporting presently required under the Drug Free Workplace act.

Many universities are involved in various efforts to reduce binge drinking, but it is not a problem that will be resolved overnight, and the issue is one that will remain for both employers and educational institutions.

E. Attachments.

Attachment A is Americans With Disabilities Act materials.

Attachment B is selected Copyright Compliance information.

Attachment C is selected immigration I-9 verification compliance materials.

Attachment D is demographic information on the future American college population.