

In Brief

Updates from the Office of Legal Affairs



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FERPA & HIPAA: Which Rules Apply?

Almost all employees in a university setting have some knowledge of the Family Educational Rights and Privacy Act ("FERPA"), and most of us encounter the Health Insurance Portability and Accountability Act ("HIPAA") in our personal lives at some point. HIPAA is a set of federal privacy regulations that covers most healthcare providers in the United States, health plans, and most medical records. FERPA, on the other hand, is a federal law that regulates the privacy of student educational records. A question that eventually arises at a university when it runs a health center, offers counseling activities, or engages in other activities that involve student health records is: Is this information governed by FERPA, HIPAA, or both?

The short answer to this question is that FERPA generally reigns supreme in an educational setting with respect to student records, although there are some exceptions where HIPAA still applies. Student healthcare records at a university generally fall into two categories under FERPA: 1) "Treatment Records" are special records under FERPA that are created by medical professionals in the course of treating a student, are used solely for the treatment of that student, and are not available to anyone other than the persons providing treatment (including the student), and 2) "Education Records" is the general designation for records protected under FERPA. The definition of Protected Health Information ("PHI") covered by HIPAA rules specifically excludes both Education Records and Treatment Records governed under FERPA from HIPAA coverage (45 CFR § 160.103).

Student Health Records Under FERPA

Records containing student health information are subject to the same protections, disclosure requirements, and exceptions that would typically apply to other records held by a school and governed by FERPA. Here are examples of scenarios where a university may lawfully disclose Education Records containing student health information:

- **Consent:** The student consents to a disclosure in a signed and dated writing via an acceptable authorization.
- **Students' Own Records:** Unless the records fall into a special category such as Treatment Records, students may request to review their own records subject to FERPA regardless of the presence of medical information.
- **Health and Safety Exception:** The school may disclose information protected by FERPA in order to protect the health and safety of the subject student or other persons.
- **Tax Dependent Exception:** A school official *may*, at the discretion of the *institution*, disclose information protected by FERPA to the parents of a student while that student is a dependent for federal tax purposes. This category of disclosure is governed by institutional and departmental policy.
- **Other University Officials Exception:** The school may disclose records containing student health information to other school officials in an organization when there is a **legitimate educational interest** sup-

porting such disclosure. It is important to weigh whether the person to whom the records are being disclosed has a need to know the information being disclosed and to protect the student's privacy when possible. When contemplating the disclosure of medical information subject to this exception, school officials should give increased weight to the student's privacy interests.

Treatment Records Under FERPA

Treatment Records are excluded from the definition of Education Records and have a special status under FERPA. In order to be considered a Treatment Record, a record that would otherwise be an Education Record under FERPA must meet **all** of the following factors:

- a medical and/or psychological treatment record;

See **RECORDS**, p. 3

Upcoming Training Session

March 25, 2020

9:00 a.m.-10:30 a.m.

"Legal Update for Supervisors:
Current Legal Issues
That Impact Supervisors"

Jardine Room

Presented by
Office of Legal Affairs

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New University Policies

Policies help guide the University's compliance and help assure a consistent process for handling compliance or risk management matters. In light of the University's adoption of several new policies via the University's established policy review processes (such as with review via the University Committee on Administrative Policies or via the HR Policy Review Committee), here are some highlights of the policies that have been recently put into place:

Alcohol Use and Service Policy

The [Alcohol Use and Service Policy](#) sets out the requirements for use or service of alcohol on JCU property or in connection with a University-sponsored event. The policy describes permissible



State of Ohio use and service of alcohol at an event 1) in a licensed premises where the sale of alcohol is permissible in accordance with the University's liquor license for that particular licensed location on campus; 2) at a location with a F or F-2 Temporary Liquor Permit issued by the State of Ohio, permitting the temporary sale of alcohol in that location; or 3) a Private Event as defined in the policy where alcohol is not sold but may be given away.

The policy requires the scheduling of an event

See **POLICIES**, p. 2

From POLICIES, p. 1

where alcohol will be served in SpaceFinder or via a Facilities Use Agreement. The policy describes requirements for an event where alcohol is served, including limitations on service of alcohol; training and eligibility requirements for servers; service of alcohol to minors; security requirements; and tailgating rules. The policy also sets out events for which the policy's rules and procedures do not apply, but where federal, state and local laws must be followed.

For more information on the Alcohol Use and Service Policy, contact the Director of Regulatory Affairs and Risk Management.

Animals on Campus

While most may love a furry dog, others may not wish for pets to be present at work due to issues related to potential disruption, hygiene, allergy, or fearfulness. The new [Animals on Campus Policy](#) addresses this by permitting animals – including dogs, cats, birds, snakes, etc. – to be present outdoors on campus grounds if leashed or attended at all times, but not permitting them in any JCU building. Exemptions under the policy for service animals, research, etc. are described in the policy. Students in residence halls are required to



follow rules on animals in residence halls. For questions about the policy, contact the Director of Regulatory Affairs and Risk Management.

Consensual Relationships Policy

The new [Consensual Relationships Policy](#) describes restrictions on relationships between those in an employment or supervisory role and JCU students or supervisees. This policy prohibits any faculty member, staff member, or graduate assistant from engaging in any consensual romantic and/or sexual relationship with a student or employee over whom that individual exercises academic, supervisory, or professional authority unless a management plan is approved, as provided in the policy. For example, a faculty or staff member cannot have a consensual romantic relationship with a JCU student if they supervise, teach or advise that student. Or, a staff member cannot supervise an employee with whom they are having a romantic or sexual relationship. Instead, a management plan under the policy must be put into place. This applies similarly to students with whom the individual previously had a romantic or sexual relationship.

The policy indicates that other types of romantic consensual relationships where

there is a significant authority or power differential also are strongly discouraged.

The process for disclosing such relationships and developing a written management plan to assure objective evaluation, professional oversight and/or supervision is set out in the policy.

For questions about the Consensual Relationships Policy, contact Human Resources or the Office of Legal Affairs.

OLA has a new Contract Review Process!

The OLA is pleased to announce that it has a new electronic submission and tracking process for contract creation and review. This process will create a workflow via the Legal Contract Routing Form to track contract reviews and to capture important information on the University's contracts for the Finance division. More information on the contract review and approval process and a link to the Legal Contract Routing Form are available at <https://jcu.edu/legal-affairs/contract-approval>.

Election Season is Here – And So Is the Political Activity Policy

Election season is around the corner, and with it often comes a variety of questions about what is permissible political activity for JCU and its employees and students. That's because JCU, as a 501(c)(3) not-for-profit educational institution that has federal tax-exempt status, must comply with certain obligations to continue to be excused from payment of federal income tax. This includes the responsibility to follow Internal Revenue Service (IRS) guidelines restricting University-related political participation and the use of University resources for political activities.

With these obligations in mind and to help guide University employees regarding political activity on campus, the University has adopted a [Political Campaign Activity Policy](#) to make clear permissible and impermissible uses of University resources. This policy complements the already existing [Student Organization Political and Campaign Activities Policy](#) applicable to student-related political activity, which is governed by slightly different obligations under federal law.

The policy provides restrictions and guidance on employee political activity; public forums or debates; candidates appearing on campus for varying reasons; voter registration activities; issue advocacy activities; and use of JCU facilities and resources.

For example, the policy sets out the following permissible and impermissible activities, and provides guidance as to each:

Permissible Activities

- Public forums or debates conducted in a non-partisan way, as detailed in the policy

- Candidates appearing on campus with equal opportunity for all candidates (i.e., invitations, time, conduct, etc.)
- Voter registration or voter education activities not related to a candidate or political party
- Issue advocacy not related to a specific candidate or party
- Educational classroom discussions that may examine contemporary or historical political or policy issues
- Use of University property as a polling site for an authorized political election and permissible political activity or signs related to polling sites.

Impermissible Activities

- Employees supporting a particular candidate or political party on University property or during working hours
- Use of University email or IT systems, letterhead, logo, copiers or mailing lists for campaign use for a candidate.
- Hosting or linking to content on the University website that supports a political candidate or party
- Use of University facilities for political fundraising
- Signs of support for a candidate in public-facing locations or during University working hours that could be viewed as University endorsement of a candidate.

The policy provides that all political activity must be coordinated with the University's Government and Community Relations Department. Questions about the Political Activity Policy can be directed to Government and Community Relations or the Office of Legal Affairs.

Religious Accommodations: Protecting Your Religious Expression in the Workplace



While it may be clear that John Carroll University's mission includes welcoming individuals of all or no faiths, it may be less clear what the law requires of John Carroll University and its supervisors to accommodate employees of different faiths.

Federal law requires an employer to provide a reasonable accommodation for an employee's religious beliefs if the employee's beliefs conflict with a work requirement and the accommodation does not pose an undue hardship. Some common examples of religious accommodations include schedule changes to attend a church service, breaks and space for prayer, and exceptions to permit wearing a headscarf.

The employee requesting a religious accommodation needs to meet two requirements under the law: first the employee needs to give the employer notice, and second the employee's religious accommodation needs to stem from a "sincerely held" religious belief. Regarding notice, the employee needs to ensure the employer knows of both the need for the religious accommodation and that the requested accommodation resulted from a

conflict between the employee's religious expression and the employer's work expectations. Religious accommodations are available under the law for "sincerely held" religious beliefs, observances, and practices. This includes: a) traditional, organized religions (such as Christianity, Islam, etc.), b) new or uncommon beliefs, even if the beliefs are not a part of a formal church, c) moral or ethical beliefs, d) beliefs that seem illogical, and e) no religious beliefs. If the employer has a bona fide question about the basis for the request, the employer can make an inquiry into the facts and circumstances of the employee's request. Factors that may lead to this bona fide inquiry include if a) the employee has behaved in a manner inconsistent with the professed belief, b) the accommodation is likely to be sought for a secular reason, c) the timing renders the request suspect, or d) the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

It is key for the employee and the University to engage in interactive dialogue about the request. Title VII of the Civil Rights Act does not require employers to

accommodate a religious belief if the religious accommodation imposes an undue hardship on the employer. A hardship in this context means more than a de minimus cost or burden to the employer. Factors to help determine an undue hardship include the nature of the duties, the cost of the accommodation, the burden on operations, the infringement on others' rights, any safety impairments, and the number of people needing the accommodation. For example, if an employee requests not to work weekends for religious reasons and working weekends is an essential function of the position, then the University would engage in an interactive process with the employee to determine if an accommodation can be made that does not pose an undue hardship on the department or University (i.e., are others available to work weekends without undue burden).

For requests or questions related to religious accommodations, please contact Human Resources or Legal Affairs.

From RECORDS, p. 1

- used only in connection with the treatment of the student; and
- shared **only** amongst the individual professionals or para-professionals providing treatment.

Records that qualify as a Treatment Record are excluded from the general Education Record category, and universities are **not required** to share treatment records with the student. However, as soon as a Treatment Record is disclosed for **any** purpose other than treatment, then the record is no longer considered a Treatment Record. Although treatment records are granted a limited exception from some FERPA rules such as disclosure to the student being treated, they are still generally governed by FERPA rather than HIPAA.

Treatment Records tend to include other information that is protected by state medical privacy laws and records that are protected



from disclosure through confidentiality and/or professional ethics rules. Thus, it is generally a best practice to maintain Treatment Records with a similar level of privacy to that accorded to medical records covered by HIPAA. Despite this, Treatment Records are still subject to the exceptions to FERPA, including those exceptions outlined above.

Issues involving the intersection of state law, confidentiality obligations, and FERPA exceptions are factually intensive and individualized. Therefore, University employees should consult with the Office of Legal Affairs when dealing with issues concerning the disclosure of Treatment Records beyond routine health care provider transfers of records subject to a written authorization.

Fair Labor Standards Act Update

In January of this year, the Department of Labor revisions to the federal regulations governing the federal Fair Labor Standards Act (FLSA) became effective. These changes in the law affect which employees are entitled to pay for all hours worked and to overtime pay under the law. These new regulations only affect employees who had been classified as exempt and who are earning less than the new salary threshold.

Under the new regulations, for an employee to be considered an exempt (salaried) employee, the employee must meet a salary threshold of \$684 per week (or \$35,568 a year for a 12-month employee). This is up from the previous salary threshold of \$455 per week (or \$23,660 a year for a 12-month employee). If the employee's salary is below the threshold, the employee becomes a non-exempt or hourly employee, entitled to be paid for all hours worked and entitled to overtime of one and one-half times their regular rate of pay for all hours worked over 40 hours in a week. If an employee's salary is above the threshold and the employee otherwise serves in an administrative, professional or executive position, the employee will remain exempt from hourly wage and overtime requirements under the law.

For others, the new regulations will not change their status. In particular, faculty members, part-time faculty, many coaches and other faculty or staff whose primary job duties involve teaching, tutoring, instructing, or lecturing remain in a professional exemption, not subject to overtime requirements. Similarly, graduate and undergraduate students engaged in a graduate assistant or research position in pursuit of their degree, or students who serve as resident advisors (RAs) in residence halls are viewed primarily as students and are not subject to the federal regulations related to overtime pay.

While the new change in the salary level for exempt employees affects only a few employees at the University, the Human Resources Department has worked with those individual departments affected by this change in the law, and coordinated adjustments to address the change for those positions.