

# In Brief

Updates from the Office of Legal Affairs



Volume 6, Issue 1

September 2020

## Online Lectures: Quick Tips on Privacy, Accessibility, and Copyright



***"The shift to remote, distance, and hybrid educational models during the current pandemic...has created new privacy, copyright, and accessibility compliance concerns that should be considered and addressed to avoid legal conflict or controversy."***

The shift to remote, distance, and hybrid educational models during the current pandemic has greatly expanded the number of courses or meetings being recorded and posted in various institutional and non-institutional online platforms. This change has created new privacy, copyright, and accessibility compliance concerns that should be considered and addressed to avoid legal conflict or controversy. This quick guide is intended to give an overview of common issues to help avoid problems. However, it is important to review departmental and University instructional resources for up-to-date information on best practices and to consult with the Office of Legal Affairs if you have specific questions or concerns.

### **Family Educational Rights and Privacy Act (FERPA) Online Compliance**

- **New Format, Same Rules.** FERPA still applies to information that a university official or staff employee posts about students, including images of students (e.g., identifiable photos or videos from recorded class lectures) that you share or any alternative platform you utilize to maintain course records. For example, if you use a personal social media account to store, review and give performance feedback on student video assignments, then that account may contain a FERPA-covered educational record.
- **Recordings.** Courses can be recorded and made available for viewing by students enrolled in that course without creating any FERPA compliance concerns. However, it is important to remember that publicly posting or sharing course recordings without obtaining prior written consent or editing out

personally identifiable student images and information could be a violation of FERPA. This same concept also applies to sharing recordings from past semesters with a new cohort of students.

- **Student Work.** FERPA does not necessarily apply to a student-controlled copy of work uploaded by that student to a third-party platform, unless that copy of the work is controlled by the University and/or used to maintain or grade coursework, even if that work is created during the process of fulfilling the requirements of an assignment. This is because that work is generally not an educational record maintained by the University. However, it is a best practice to give students the option to avoid utilizing social media or other third-party platforms that may compromise their privacy or force them to disclose private information.
- **Designated Platforms.** Materials submitted and stored in University-controlled systems, such as Canvas, are stored in a secure manner and are generally automatically maintained for an appropriate time period so that they can be used for assessment purposes or referenced in the event of a grade dispute or academic honesty issue. The University generally has contractual assurances from its vendors with respect to FERPA compliance, data security issues, and privacy that are not present on social media or other third-party platforms.
- **Social Media and Public-Facing Spaces.** It is important to remember that FERPA still applies to social media posts by instructors regarding their own courses to the extent that those posts contain educational records

**See ONLINE, p. 3**

### **Contact Us:**

**Office of Legal Affairs**  
Rodman Hall, Room 115

**Colleen Trembl**  
General Counsel  
[ctrembl@jcu.edu](mailto:ctrembl@jcu.edu)  
216.397.1595

**Kenneth Danton**  
Assistant General Counsel  
[kdanton@jcu.edu](mailto:kdanton@jcu.edu)  
216.397.1994

**Sue Miller**  
Legal Assistant  
[smiller@jcu.edu](mailto:smiller@jcu.edu)  
216.397.1590

## **Employee Accommodations Related to COVID-19**

The COVID-19 pandemic has affected everyone in a variety of ways, but from a medical standpoint, some individuals at greater risk from the virus (i.e., chronic lung disease; diabetes; age 65 or older, etc.—see Centers for Disease Control (CDC) list <https://www.cdc.gov/>) are affected in a unique way. So, those at higher risk related to medical conditions may be considering the need for accommodations to help them perform their job duties.

The U.S. Equal Employment Opportunity Commission (EEOC) has released guidance for employers to use when employees fall into one of

the CDC categories. The guidance provides that some, but not all, conditions that place an individual at higher risk for severe illness from COVID-19 qualify as disabilities which may receive reasonable accommodations under the Americans with Disabilities Act (ADA).

An employee who is 65 years of age or older is not entitled to reasonable accommodations for a disability accommodation on the sole basis of their age alone. To be considered for reasonable accommodations, an employee must have one of the medical conditions that places an individual at higher risk for severe illness from COVID-19 aside

**See COVID-19, p. 3**

## Legal News: Hot Topics in Federal, State and Local Laws

While the world was busy dealing with COVID-19, the courts and regulatory agencies were busy issuing opinions and new regulations that affect employers and businesses. Some of these that may apply or relate to JCU include:

### Non-Discrimination Based on Sexual Orientation & Gender Identity

The U.S. Supreme Court on June 15, 2020 issued an opinion in Bostock v. Clayton County, Georgia, indicating that sexual orientation and gender identity are protected under federal employment law, Title VII. The Court held that firing an individual for being gay or transgender is unlawful.

JCU has had a non-discrimination policy for sexual orientation for years and a non-discrimination policy based on gender identity and expression since 2019. For all employers, this decision now makes it a violation of federal employment law to discriminate against individuals based on either of these protected classes.

### Dreamers

In a 5-4 decision, the U.S. Supreme Court in Department of Homeland Security vs. Regents of University of California ruled that the Department of Homeland Security failed to follow proper procedures to seek to end the Deferred Action for Childhood Arrivals (DACA) program, which provided certain undocumented persons brought to the U.S. as children a registration process to obtain work permits and avoid deportation. The Court found that the administration failed to follow the Administrative Procedures Act (APA) and failed to give a reasoned explanation to end the program. Therefore, the DACA program remains in place at this time.

### Title IX Regulations

On August 14, 2020, new regulations issued by the U.S. Department of Education went into effect, altering procedural obligations for colleges and

universities to address complaints of sexual harassment under Title IX of the Education Amendments of 1972 ("Title IX"). For those cases that fall under new Title IX definitions including complaints involving matters occurring on campus or in a sponsored University program or activity, the regulations require live hearings including cross examination of witnesses by parties' advisers, a narrower definition of Title IX sexual harassment, limitations on evidence that can be used in hearings, and specifications of who can be decision-makers in the process. While the new regulations require the dismissal of complaints that do not fall within the Title IX definitions, the regulations permit universities to address those complaints (such as sexual harassment that occurs in an off-campus location or on study abroad) under its own non-Title IX sexual harassment procedures.

JCU's Title IX Office issued a revised Title IX policy and procedure for 2020-21 that incorporates the new regulatory provisions, and provides procedures for reporting and holding hearings on Title IX sexual harassment complaints. However, many of the University's procedures remain unchanged for non-Title IX complaints of sexual harassment, including the University's Mandatory Reporting Policy requiring all JCU employees to report known instances of sexual harassment.

Questions about the policy or reports related to Title IX can be addressed to Eric Butler, Title IX Coordinator.

### COVID-19 Legislation

#### Payroll Deferral

On August 8, 2020, the Trump Administration issued a payroll deferral memo, which permits, but does not require, employers to postpone payroll taxes from Sept. 1 through Dec. 31, 2020. Employers would then be required to collect from employees and submit the deferred taxes between January 1 and April 30, 2021. While the provision could provide

employees payroll tax relief now, it would require withholding from employees all taxes that were deferred in 2020 when taxes are withheld in 2021. As a result of this and related administrative burdens, JCU and other employers have decided to opt-out of the voluntary provision. Any questions about this issue can be referred to Human Resources or the Office of Legal Affairs.

### Local Tax Withholding

Did working remotely within the state of Ohio change how your local income tax is withheld? Per Ohio House Bill 197 passed back in March 27, 2020, the answer is no. That law requires employers during the pandemic emergency to withhold local taxes for each employee in the municipality that was the principal place of work prior to the pandemic. This law remains in effect until 30 days after the State of Emergency for the pandemic is no longer in place. The result is that JCU continues to withhold local tax for employees for University Heights, and not for the employee's municipality where they reside and may be working now if they are working remotely.

While the Ohio legislature has proposed new legislation to alter that law, that pending legislation had not been passed as of this time.

For questions about this tax law, please contact Human Resources or Legal Affairs, or consult with your personal tax adviser.



### Upcoming Training Sessions

**September 24, 2020**

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

**"COVID-19: Reasonable Accommodation Process"**

**Via Zoom**

*Presented by  
Office of Legal Affairs  
and  
Human Resources*

\*\*\*\*\*

**October 8, 2020**

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

**"Family Educational Rights and Privacy Act (FERPA) and Other Privacy Requirements"**

**Via Zoom**

*Presented by  
Office of Legal Affairs  
and  
Office of the Registrar*

---

## From ONLINE, p. 1

relating to a student. The key is to ask yourself whether individuals outside of the course (other than University officials with a legitimate educational interest) will be able to access FERPA-protected information.

- **Outreach is OK.** FERPA does not prevent faculty from using public-facing communications, social media, or other general outreach messaging as a way of providing supportive communications designed to keep students engaged without disclosing information from educational records.

## Accessibility

- **Still Required.** The Americans with Disabilities Act and Section 504 of the Rehabilitation Act require the University to provide reasonable accommodations to students enrolled in online courses. Generally speaking, these accommodations can be provided upon request, and instructors are not required to pursue more burdensome accommodation requirements unless there is a particularized request. Although the format and particular technologies at issue are different, students with a letter of accommodation are entitled to reasonable accommodations under the same process and standards that would apply to an in-person course. If a student requests a disability-related accommodation and does not have a letter of accommodation from [Student Accessibility Services](#), then they should be referred to SAS so they can obtain a letter of accommodation, which will outline the scope of needed accommodations. SAS also can assist when there is a question or disagreement regarding such accommodations.
- **Different Standard for Publicly Available Content.** The accessibility standard for public-facing information (i.e., JCU's



---

## From COVID-19, p. 1

from the employee's age.

However, the University has provided a more flexible COVID-19 accommodation process than required by law. Any employee who has a condition that places them at higher risk for severe illness from COVID-19 may request reasonable accommodations from the University. The employee can make a request for reasonable accommodations by filling out the Reasonable Accommodation Request Form [https://docs.google.com/forms/d/1r2O2cCp-g0ZWOW9i-jc428V\\_6tuGmIeBi-Gix8SAoc4/viewform?ts=5ee106cd&edit\\_requested=true](https://docs.google.com/forms/d/1r2O2cCp-g0ZWOW9i-jc428V_6tuGmIeBi-Gix8SAoc4/viewform?ts=5ee106cd&edit_requested=true) and provide it to Human Resources. If supervisors receive requests for accommodations from an employee directly, the employee should be advised to fill out the accommodation form and forward it to Human Resources. Employees should be aware that if they indicate that they have a disability that places them at higher risk of severe disease from COVID-19, then they typically will be asked to provide documentation to verify the existence of the disability. Consistent with the ADA's requirements, the University keeps all information provided from disability-related inquiries confidential.

Once the necessary information is provided, Human Resources will engage in an interactive process with the employee to review and determine reasonable accommodations to accommodate the disability or condition.

website, You Tube, etc.) created as part of the University's educational activities is much higher than the standard for course materials or lectures hosted on non-public platforms such as Canvas. In a non-public context, it is permissible to create materials and then deliver accessible versions or alternative means of access upon request, as an accommodation. However, in a public-facing context, materials must generally be instantly accessible as posted, consistent with the ADA's Title III standards and other related laws. These accessibility-related compliance issues can create liability for the public posting of course materials, even free lectures or other educational postings offered for the benefit of the public. Creating video-presentation materials that comply with ADA requirements for public content can be quite expensive, and this barrier has caused many universities to curtail or end the posting of free lectures.

## Copyright Compliance:

- **Public Posting.** Posting copyrighted materials or portions of such materials publicly or in generally accessible locations may give rise to copyright claims and/or other legal action against the individual posting the content and/or the University. Many uses of copyrighted materials that would generally be considered permissible "fair use" when shared via the University's learning management system with an enrolled class of students would **likely not be protected** under copyright's fair use doctrines if posted in a public-facing platform (i.e., Facebook, etc.) because sharing the content publicly can easily have a significant impact on the commercial value of the work. Additionally, posting content in such a manner undermines the ability to rely on the exceptions for educational use under the TEACH Act (which creates copyright safe harbors for online education) since it runs afoul of the Act's requirement that content must be restricted to a specific number of students enrolled in a specific class.
- **Automated Enforcement.** Even in the absence of a legal claim, many public-facing online platforms have internal and external automated systems that flag and remove copyrighted material, which can make such content unavailable and sometimes lead to sanctions against the content poster, including content removal, account suspension, or account deactivation.

If an employee is seeking a work adjustment based only on age making them high-risk or based on a family member's disability, the employee should contact Human Resources to discuss the situation, and other potential non-ADA work accommodations or adjustments.

Students also may request reasonable accommodations if they have a disability that is one of the conditions (excluding age) on the CDC's list of conditions that place an individual at higher risk of severe illness from COVID-19. Students will complete the process to request accommodations through JCU's Student Accessibility Services. <https://jcu.edu/accessibility>.

