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Saul Ewing LLP

Higher Education Practice

Higher Education Highlights

The Newsletter of the Higher Education Practice

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Sent from My Smartphone

By James D. Taylor, Jr. and Danielle N. Petaja

Upcoming changes to the Fair Labor Standards Act salary-basis test may convert many of your smartphone-toting exempt employees into non-exempt employees, requiring you to track the evening and weekend time these employees spend thumbing their way through work email or risk being hit with penalties for failing to account properly for their work hours. This FLSA salary-basis change, which is anticipated sometime in 2016, will more than double the minimum salary requirement of employees who fall within the "white-collar" (administrative or executive) exemptions of the FLSA. Therefore, if implemented, institutions will have to make a choice – increase the exempt employee's salary to retain the exemption and avoid overtime compensation, or keep the current salary, but lose the exemption and begin to track and pay overtime.

This article provides a general backdrop on the current "white-collar" exemptions, and offers practical recommendations to prepare for the anticipated salary-based change.

Application of the Current "White-Collar" Exemptions to Academia

Institutions of higher education commonly rely on two of the FLSA's "white-collar" exemptions that the proposed rule will affect – the administrative exemption and the executive exemption. To qualify for either exemption, FLSA requires that the employee perform certain duties (i.e., the "duties test"). Under the current duties test:

- the **administrative** exemption applies to individuals who perform "office or non-manual work directly related to the management or general business operations of the employer or the employer's customers" and whose "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(1) and (2); and
- the **executive** exemption applies to individuals who manage two or more people, whose "primary duty is management of the enterprise . . . or . . . a customarily recognized department or subdivision thereof" and who have the authority to hire and fire or whose recommendations regarding "hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." 29 C.F.R. § 541.200(a)(2)-(4).

Both exemptions *also* set a minimum salary requirement in order to qualify as an exempt employee. The current salary requirement, set in 2004, is $455/week or $23,660/year.

Importantly, because both the administrative and executive exemptions set a minimum salary requirement for qualification, both will be subject to the minimum salary increase under the anticipated rule change. There is, however, one exception pertinent to academia – faculty will continue to fall within a separate FLSA exemption ("the learned professional exemption"), and will continue to be exempt regardless of this salary-based change.

A Need for Change

On March 13, 2014, President Obama issued a presidential memorandum directing the U.S. Department of Labor to modernize and streamline the overtime regulations and update the "white-collar" exemptions to keep pace with the modern economy. Many industry experts believed a complete overhaul was in the works both to the duties test and to the minimum salary requirement. Nonetheless, the Department of Labor issued a proposed rule addressing only the salary minimum (effectively doubling the minimum salary for white-collar exempted employees), leaving the current duties test unchanged.

As part of the rulemaking process, however, the Department of Labor sought comments on both the salary minimum and the duties test in the proposed rule, and received almost 300,000 comments in response. The Department of Labor is currently reviewing those comments and expects to issue a final rule increasing the minimum salary requirement later this year with an anticipated effective date of sometime in 2017. No change to the duties test is anticipated.

The Proposed Rule

The proposed rule raises the minimum salary for the "white-collar" exemptions to the 40th percentile of full-time, salaried workers nationwide. For 2016, this is estimated to be approximately $971 per week or $50,440 per year. The proposed rule also pegs the minimum salary to the 40th percentile on a going-forward basis in an attempt to keep it current with market wages and reduce the need for future rulemaking changes. In addition, the minimum salary for highly compensated individuals will rise from $100,000 to $122,148 per year in 2016 and will likewise automatically adjust to keep pace with the top 10% of full-time salaried workers. This will have an effect on those employees performing office or non-manual work and otherwise performing at least one responsibility generally associated with the executive, administrative or professional exemption; in other words, the vast majority of administrators in a college or university setting.

Effect of the Proposed Rule

The driving force behind the recent change was retail managers – and for good reason. Retail managers often fall within a "white-collar" exemption and are paid the minimum salary without any entitlement to overtime, despite working far more than 40 hours per week (almost to the point that they are barely making minimum wage if their salary is converted to an hourly rate). To address this disparity, the Department of Labor proposed the increased minimum salary. This increase, however, will have a far more reaching effect than just the retail industry.

Any exempt administrative or executive employee – in any industry – who is making less than $50,440 per year will lose the exemption unless his or her salary is increased. As noted above, faculty will remain FLSA-exempt under the soon-to-be-final rule, but administrative assistants making $45,000 per year will no longer be exempt. Exempt employees in the "middle manager" ranks (a facilities manager, an HR administrator, etc.) making less than $50,000 per year will need to be evaluated to determine if increasing their salaries to the minimum established in the proposed rule makes practical sense. Many of these employees are likely accustomed to casually answering emails on their phones or logging in remotely to finish an assignment. And while the FLSA does recognize a *de minimus* exception to compensable time for things like checking email, it is not recognized by all courts and those courts that do recognize it, differ in what constitutes a "*de minimus*" amount of time. Without the "white-collar" exemption, all time worked must to be tracked and compensated as overtime when appropriate.

What to Consider Now

Colleges and universities should take a close look at employees falling within the administrative and executive exemptions. For employees making close to the salary minimum now, it likely does not make economic sense to more than double their salaries to stay within the exemption because any potential overtime they will work will likely not exceed the new salary minimum required to keep them exempt. Obviously, the employees making closer to the new salary threshold need to be examined more thoroughly. Colleges and universities should consider tracking their hours now to make an informed decision about their salaries once the final rule becomes effective. In addition, institutions must train these employees and their managers (1) to ensure they are aware of the obligation to keep track of their time, on and off the job, so that they are

paid properly, and (2) to remind them of the institutions' policies regarding advance notice before working overtime.

Prudence dictates that colleges and universities revisit their pay and overtime policies, as well as the classification of employees close to the new threshold to ensure that those employees are classified appropriately and that the institution has the proper mechanisms in place to convert employees as necessary and comply with recordkeeping requirements. And, keep in mind that it remains possible that the Department of Labor could also modify the "duties test," requiring yet another fresh look at many of these same employees to analyze their exempt or non-exempt status.

Saul Ewing's Higher Education Practice has been working with institutions to address these FLSA issues and update their policies and procedures, and is available to assist your institution in complying with the forthcoming rules.

Navigating Faculty Misconduct and Disabilities on Campus

By Dena B. Calo and Brittany E. McCabe

Most higher education institutions have been faced with the situation where a faculty member is exhibiting performance problems or is engaging in misconduct on campus. When you add a potential disability to this equation, it becomes significantly more complex. How and when you react can impact your institution's compliance with the Americans with Disabilities Act (ADA). For example, although the ADA prohibits employment discrimination against qualified individuals with disabilities who can perform the essential functions of their jobs with or without accommodation, it does not protect a faculty member who waits until after a disciplinary process begins before alerting the institution to his/her disability. In that scenario, timing of the disability discovery can be crucial. On the flip side, it is essential that administrators not jump to conclusions about the underlying reasons for a faculty member's performance deficiencies or misconduct, because doing so can, on its own, violate the ADA.

To help maneuver through these tricky situations, here are some common scenarios that may arise on your campus.

During a termination meeting with a faculty member, you learn that the faculty member has a disability. Can you still move forward with termination?

Yes. An employer does not have to stop a termination meeting if a faculty member notifies the school of a disability and asks for a reasonable accommodation during a termination meeting. If the faculty member's conduct is such that the appropriate discipline is termination, and the faculty member waits to request reasonable accommodation until after the termination process begins, the employer may follow through with termination without further investigation into the employee's disability. In this scenario, the faculty member waited too long to request a reasonable accommodation. Faculty members may ask for reasonable accommodation before or after an employer informs them of performance problems or misconduct, but the timing of the request is key. In this scenario, if termination is warranted and the institution had no knowledge of the disability, it does not have to halt the process upon becoming aware of the disability. But note: this scenario and response is dependent upon the school's publication and distribution of a disability accommodation policy. If there is no such policy, and the faculty member has no knowledge of the process of requesting accommodation, the school should act on a verbal request for accommodation as soon as it becomes aware of it.

If the intended disciplinary action is something other than termination, can you still move forward with disciplinary action (assuming you learned of the alleged disability after the disciplinary process commenced)?

Yes, though the institution should simultaneously commence the required interactive process under the ADA. When a faculty member's conduct warrants discipline other than termination, the school is not required to rescind a disciplinary warning or performance improvement plan upon learning of the disability. But, in addition to the discipline, the school should begin the interactive process – the informal discussion between employer and employee to determine if any job modification will enable the employee to perform the essential functions of the job. The school cannot refuse to discuss a request for accommodation or fail to provide reasonable accommodation as a punishment for the performance/conduct problem.

After the faculty member requests accommodation, discussions should begin with the faculty member regarding

how the disability may be affecting performance and what accommodation(s) would assist the faculty member in improving that performance. But remember that the process is interactive, meaning that the school, itself, may also suggest possible accommodations that would allow the faculty member to perform the job. A faculty member is entitled to *reasonable* accommodation(s), not the precise accommodation(s) that he/she wants. This back and forth exchange of information between school and faculty member is an important part of the determination of whether the faculty member will be able to continue performing the essential functions of the position with or without accommodation.

Can a college or university ask a faculty member with a *known* disability whether they need a reasonable accommodation when discussing performance or misconduct problems?

Yes, though there may be a better approach. An employer may ask a faculty member with a known disability who is having performance or conduct problems if he or she needs a reasonable accommodation. For example, the employer knows that a faculty member has bipolar disorder that was previously controlled by medication. Currently, the faculty member is failing to appear regularly for class, exhibiting erratic behavior when appearing in class, and students are complaining that the lectures are unfocused and off topic. While the ADA permits the institution to approach the employee and ask if an accommodation is required, this approach may expose an employer to a "perceived as" disability or harassment claim (assuming that the faculty member believes that he/she is not disabled but is being treated by the employer as if he/she has a disability). Faculty members who are perceived as disabled are protected by the ADA, even if they are not currently suffering from an actual disability defined by the ADA.

The most practical way to address this situation initially would be to approach the faculty member and ask if help is required, without reference to the disability. So, in the example above, the employer should approach the faculty member, address the complaints and witnessed conduct, and ask if the faculty member needs assistance or help. There is no need to address the prior bipolar diagnosis. This approach allows the faculty member to request accommodation if it is required, without the employer raising that issue and exposing itself to the risk of a disability or harassment claim.

If the faculty member does not seek accommodation after being approached in this manner, the employer is free to proceed down the performance path. Generally institutions are given wide latitude to develop and enforce conduct rules. An employer may hold the individual to the same conduct standards that it applies to all other employees, disabled or not. Even if the disability causes the violation of a conduct rule, an employer may discipline a faculty member if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. So long as all faculty members are disciplined consistently for similar violations of conduct rules, there will be no violation of the ADA.

Can a college or university require a faculty member with performance or conduct problems to provide medical information or undergo a medical examination?

Yes. The ADA permits an employer to request medical information or order a medical examination when such a request is job-related and consistent with the institution's "business needs." An employer must have a reasonable and honest belief of the need for a medical examination based on objective evidence that an employee is unable to perform an essential function of the job or poses a "direct threat" to himself or others because of a medical condition.

When confronted with a disabled faculty member with a performance or conduct problem, the best and most practical first step is to seek medical information from the faculty member's medical provider supporting the disability. When accommodation has been sought, the employer can also seek medical certification from the faculty member identifying the functional limitations creating the need for accommodation. If the submitted documentation is insufficient, unclear, or if the employer believes it needs additional information that is not being provided by the faculty member's medical provider, then the employer may seek its own medical examination of the faculty member. By gathering this information, the school can collect as much information as possible about the faculty member's limitations and come to the best possible solution for the school, the professor, and the impacted students.

There are also limited circumstances where the nature of the employee's performance problems or unacceptable conduct itself is evidence that a medical condition may be the cause. For example, consider a situation where a professor with no history of performance or conduct problems suddenly develops both – the professor has mental and emotional breakdowns in class and becomes belligerent when asked questions related to the conduct. This sudden and marked change in performance and conduct reasonably suggests that a medical condition may be the cause of the professor's performance and conduct problems. In this situation, the profes-

sor's performance/conduct alone is enough evidence for the institution to seek an independent medical examination. The institution need only document the behavior (e.g., obtain statements reflecting the conduct or a peer review) to substantiate its reasonable and honest belief in order to take action.

Practical takeaways:

- Consider implementing a disability accommodation policy.
- Timing is important when evaluating faculty member discipline:
  - If a faculty member waits until after the disciplinary process begins to ask for a reasonable accommodation, an institution is not required to withhold disciplinary action, including termination.
  - But if the disciplinary action is not termination, the institution must also engage in the interactive process upon learning of the faculty member's disability.
- An institution can require a faculty member to provide medical information or undergo a medical examination when it holds a reasonable and honest belief that a medical condition is negatively impacting performance and the faculty member is therefore unable to perform the essential functions of the job.

If your institution needs any assistance navigating these issues or implementing a disability accommodation policy, please contact the authors of this article.

Retirement Age Guidance for Public Pension Plans

By Sally Lockwood Church and Dasha G. Brockmeyer

Many public institutions maintain defined benefit pension plans that qualify as "governmental" pension plans. Although governmental plans are not subject to the provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA), such plans must satisfy certain pre-ERISA tax-qualification requirements under the Internal Revenue Code of 1986, as amended (Code), including vesting rules.

One such tax-qualification requirement is satisfaction of a pre-ERISA vesting rule that governs the definition of normal retirement age (i.e., the age when participants can receive unreduced retirement benefits). Typically, governmental plans do not define a precise "normal retirement age." Instead, most governmental plans use "years of service" (years the participant has worked for the institution) to determine when a participant can start collecting normal retirement benefits.

Using years of service alone, however, may no longer satisfy the Code's vesting rules per recent IRS guidance. In 2007, the IRS issued final rules on how to define "normal retirement age" in a defined benefit plan and provided a safe harbor for plans that defined normal retirement age as age 62 or older. But how the 2007 IRS final rules (including the safe harbor) applied to governmental pension plans remained unclear. Given that uncertainty, the IRS delayed compliance for such plans pending comments from the public sector.

On January 27, 2016, taking into account comments from the public sector (as well as prior IRS guidance and pre-ERISA "normal retirement age" rules), the IRS, issued proposed regulations addressing normal retirement age for governmental pension plans. Although the *proposed* regulations do not require a governmental plan to include an explicit definition of normal retirement age, the plan must specify the earliest age when a participant has the *right* to retire and receive a normal (unreduced) retirement benefit under the plan. Plus, any definition of normal retirement age that a governmental plan does include must be *reasonably representative* of the typical retirement age in the industry in which the covered workforce is employed.

To satisfy the "reasonably representative" requirement, the IRS provides three general safe harbor provisions. First, there is a safe harbor if the plan's normal retirement age is at least age 62.

Second, for those plans that do not use age 62 or older as the normal retirement age, a separate provision may apply if the normal retirement age falls into one of the following safe harbor categories:

- The later of age 60 or the age when the participant is credited with at least five years of service. (For example,

the plan can provide that a participant will reach normal retirement age after completing five years of service, if the participant has attained the age of 60);

- The later of age 55 or the age when the participant is credited with at least 10 years of service. (For example, the plan can provide that a participant will reach normal retirement age after completing 10 years of service, if the participant has attained the age of 55);
- The participant's age plus years of service equals at least 80. (For example, the plan can provide that a participant will reach normal retirement age after the completion of thirty (30) years of service, if the participant has attained the age of 50); or
- An age determined by using a combination of the other safe harbors if the participant has completed at least 25 years of service, if that age is earlier than what the participant's normal retirement age would be under the other safe harbors. (For example, the plan can provide that a participant will reach normal retirement age as the earlier of: when the participant is credited with 25 years of service or the later of age 60 or the age the participant completes five years of service).

Third, the proposed regulations include separate safe harbors for qualified public safety employees (such as employees that provide police protection, firefighting services, or emergency medical services), recognizing that such employees generally commence participation at an earlier age and have careers that continue for a limited period of years. These safe harbors cannot be used for other employees that may participate in the same plan. The safe harbors for qualified public safety employees are: (i) the attainment of at least age 50, (ii) a combined age and service of at least 70; or (iii) the completion of at least 20 years of service (regardless of age). Notably, the regulations explicitly permit the use of different normal retirement ages for different classification of employees.

If a plan fails to satisfy any of the safe harbors, however, then any determination of whether the defined normal retirement age is "reasonably representative of the industry" will be based on all the facts and circumstances. In this circumstance, the plan sponsor will be given deference only if, based upon the facts and circumstances, there is evidence of good faith. But how "good faith" will be established and whether independent data will be required to justify the plan's definition of normal retirement age remains unclear.

As drafted, it appears that the proposed regulations recognize (a) the potential need for legislative session to amend certain governmental plan terms, and (b) the potential detriment that the proposed regulations may have on current plan participants. As a result, the regulations are proposed to be effective only with respect to employees hired during plan years beginning on or after **the later of** (a) January 1, 2017, or (b) the close of legislative session with authority to amend the plan that begins after the date that is three months after the final regulations are published. In the interim, the IRS is permitting governmental plan sponsors to rely on the proposed regulations, for periods prior to the effective date. Although permitted, government plan sponsors are not required to rely on the proposed regulations, and if they choose, can wait for the final rules to be issued.

If you have any questions about the proposed regulations or the potential impact at your institution, Saul Ewing's Higher Education Practice Group is available to assist.

Faculty Freedom of Speech

By Alexander R. Bilus and Marisa R. De Feo

A public institution of higher education must tread carefully when it fires or refuses to hire a professor because of something he or she said, even when that speech is offensive, racist, or otherwise repugnant. For instance, a professor may express racist opinions while teaching a class or in his scholarship, or a professor may post on social media her discriminatory views relating to the education of mentally challenged students. What happens when the public university or college takes an adverse employment action against a professor based on that professor's speech?

This article canvasses the history and current state of the law of faculty speech and recommends that public colleges and universities carefully consider certain factors before making employment decisions regarding professors on the basis of their speech.

Government Employee Free Speech Rights

In a line of cases beginning in 1968, the United States Supreme Court created, and then refined, the First Amendment analysis that applies when a government employee (such as a professor who works for a public institution of higher education) is disciplined because of his or her speech. As explained by that line of cases, the First Amendment protection of a government employee's speech depends on a balance between the interests of the employee, as a citizen, in speaking upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.

The Supreme Court has declared that when a government employee speaks pursuant to his or her job duties—except perhaps when a faculty member speaks in the scholarship or teaching context, as discussed in the next section—the employee is not speaking as a citizen on a matter of public concern and the Constitution does not protect him or her from employer discipline. In such circumstances, the government entity "should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."

By contrast, when a government employee speaks as a citizen addressing a matter of public concern, the First Amendment protects the employee's speech. In such circumstances, a court is to consider whether the government entity had an adequate justification for treating the employee differently from any other member of the general public. If there is no adequate justification, the employer has violated the First Amendment.

A quick rundown of the key Supreme Court cases sheds some light on how the Court strikes this balance:

Employee's Speech Was *Protected* By The First Amendment

- In *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968), the Court held that a teacher who wrote a letter to the editor of a newspaper that criticized the local school board on fiscal matters was speaking as a citizen on a matter of public concern and thus the First Amendment protected his speech.
- In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court determined that a teacher at a two-year state college who spoke out on whether the college should be elevated to four-year status was speaking on a matter of public concern; accordingly, the Court decided that the district court should not have granted summary judgment against the plaintiff when it appeared that his contract had not been renewed as a reprisal for engaging in protected expression.
- In *Lane v. Franks*, 134 S. Ct. 2369 (2014), the Court held that truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen, even when the testimony relates to his public employment or concerns information learned during that employment. Furthermore, that testimony involved a matter of public concern because it related to corruption in a public program and the misuse of state funds. The Court noted that it was not addressing the different question of whether a public employee speaks as a citizen when he or she testifies in the course of his or her ordinary job responsibilities.

Employee's Speech Was *Not Protected* By The First Amendment

- In *Connick v. Myers*, 461 U.S. 138 (1983), the Court held that an assistant district attorney's circulation of a workplace questionnaire that revealed her dissatisfaction with her job was not speech on a matter of public concern, except for one question that asked whether her colleagues ever felt pressured to work in political campaigns on behalf of office supported candidates. Because the government employer reasonably believed that the assistant district attorney's speech would disrupt the office, undermine her superior's authority, and destroy close working relationships, the Court held that her discharge did not offend the First Amendment.
- In *City of San Diego v. Roe*, 543 U.S. 77 (2004), the Court held that a police officer was not speaking on a matter of public concern when he produced, marketed, and sold sexually explicit videotapes for profit and in a manner that was linked to his official status as a police officer and designed to exploit his employer's image.
- In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held that a deputy district attorney was speaking pursuant to his official duties when he wrote in a memorandum to his supervisor that an affidavit used to obtain a search warrant contained misrepresentations; when an employee speaks pursuant to his or her official duties, the Court held, an employee would not be speaking as

a citizen on a matter of public concern and thus his or her speech was not entitled to protection under the First Amendment. As discussed further below, however, the Court expressly stated that it was not deciding whether speech by faculty in the scholarship or teaching context would be considered to be speech made pursuant to an employee's official duties and thus unprotected.

Faculty Speech in Academic Scholarship or Classroom Instruction

Unfortunately, the Supreme Court has reserved judgment on how the analysis described above applies to academia. In the 2006 *Garcetti* case (summarized above), the Court recognized that expression related to academic scholarship or classroom instruction may implicate additional constitutional interests. For this reason, the Court stated that it did not decide whether its analysis would apply in the same manner to a case involving speech related to scholarship or teaching.

This gap in the Supreme Court's jurisprudence has been addressed by the United States Courts of Appeals for the Fourth and Ninth Circuit, both of which have held that the *Garcetti* analysis–that speech made pursuant to a government employee's official duties does not qualify for First Amendment protection–was improper when considering the academic work of a public university faculty member.

In *Adams v. Trustees of the Univ. of N. Car.–Wilmington*, 640 F.3d 550 (4th Cir. 2011), an associate professor was declared to be speaking as a citizen on matters of public concern when he wrote columns regarding academic freedom, civil rights, campus culture, sex, feminism, and other issues and then included those materials in an application for a promotion.

Similarly, in *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014), an associate professor at Washington State University alleged that university administrators retaliated against him for distributing a pamphlet and drafts from an in-progress book. The Ninth Circuit recognized *Garcetti*'s holding that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens, and thus the First Amendment does not protect their statements. Nonetheless, the Ninth Circuit held that the rule announced in *Garcetti* did not extend to speech related to scholarship or teaching. Instead, the Ninth Circuit held that teaching and academic writing can be protected by the First Amendment if the employee shows that the speech relates to matters of public concern and if the employee's interest in commenting upon matters of public concern outweighs the interest of the State in promoting the efficiency of the public services it performs through its employees.

Beyond the Fourth and Ninth Circuits, this issue remains open. And although it is possible that the Supreme Court eventually will resolve this matter, until it does, institutions should take note of the law of the circuit in which they are located, as well as any trends that may emerge nationwide.

Factors to Consider When Deciding Whether To Take An Adverse Employment Action Against An Employee on the Basis of His or Her Speech

Public institutions should consider the following questions before making any employment decisions involving faculty on the basis of their speech:

Speech as a Citizen

Is the speech at issue ordinarily within the scope of an employee's duties? Or it is speech "as a citizen?" If the latter, it is more likely that the speech is protected by the First Amendment.

Speech in Scholarship or the Classroom

Is the speech at issue made within the scholarship or teaching contexts? If your institution is located within the Fourth or Ninth Circuits, a faculty member's speech in his or her scholarship or in the classroom is more likely to be protected by the First Amendment, even though such speech might be considered to be made pursuant to that faculty member's official duties. Outside the Fourth and Ninth Circuits, this is an open issue.

Speech on a Matter of Public Concern

Can the speech be fairly considered as relating to any matter of political, social, or other concern to the community, and/or does it address a subject of legitimate news interest–that is, a subject of general interest and of value and concern to the public? If speech by an employee relates to a matter of public concern, it is more likely to be protected by the First Amendment.

Adequate Justification for an Adverse Employment Action

Does your institution have an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer? In other words, is the employee's speech disrupting the workplace, undermining the authority of his or her supervisors, or interfering with workplace relationships? The institution must be able to demonstrate that it was seeking to protect its interests in effectively and efficiently fulfilling its responsibility to the public, promoting efficiency and integrity in the discharge of official duties, or maintaining proper discipline in public service.

Conclusion

Public colleges and universities must be cognizant that their employment decisions can be challenged as violating a faculty member's First Amendment right to free speech. Institutions should have policies in place that address faculty speech, and should train their administrators on the First Amendment aspects of their employment actions. Furthermore, institutions should be aware that the state of the law on faculty speech in the classroom or scholarship context is unsettled and varies from jurisdiction to jurisdiction. Please contact the authors of this article if you have questions or would like assistance with policy drafting or training on this issue.

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