

Employment Law Update: Pandemics, Politics and Principles – Oh My!



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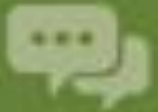
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Employment Law Update

- 2020 Employment Law Trends
- Religion
- Sexual Orientation
- Tenure
- Reductions in Force (RIFs)
- Speech
- Employee Sexual Misconduct
- COVID-19



LINKS



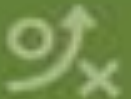
COMMUNICATIONS



BUSINESS
SCHEDULING



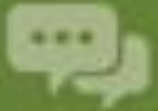
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ANALYTICS



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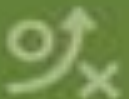
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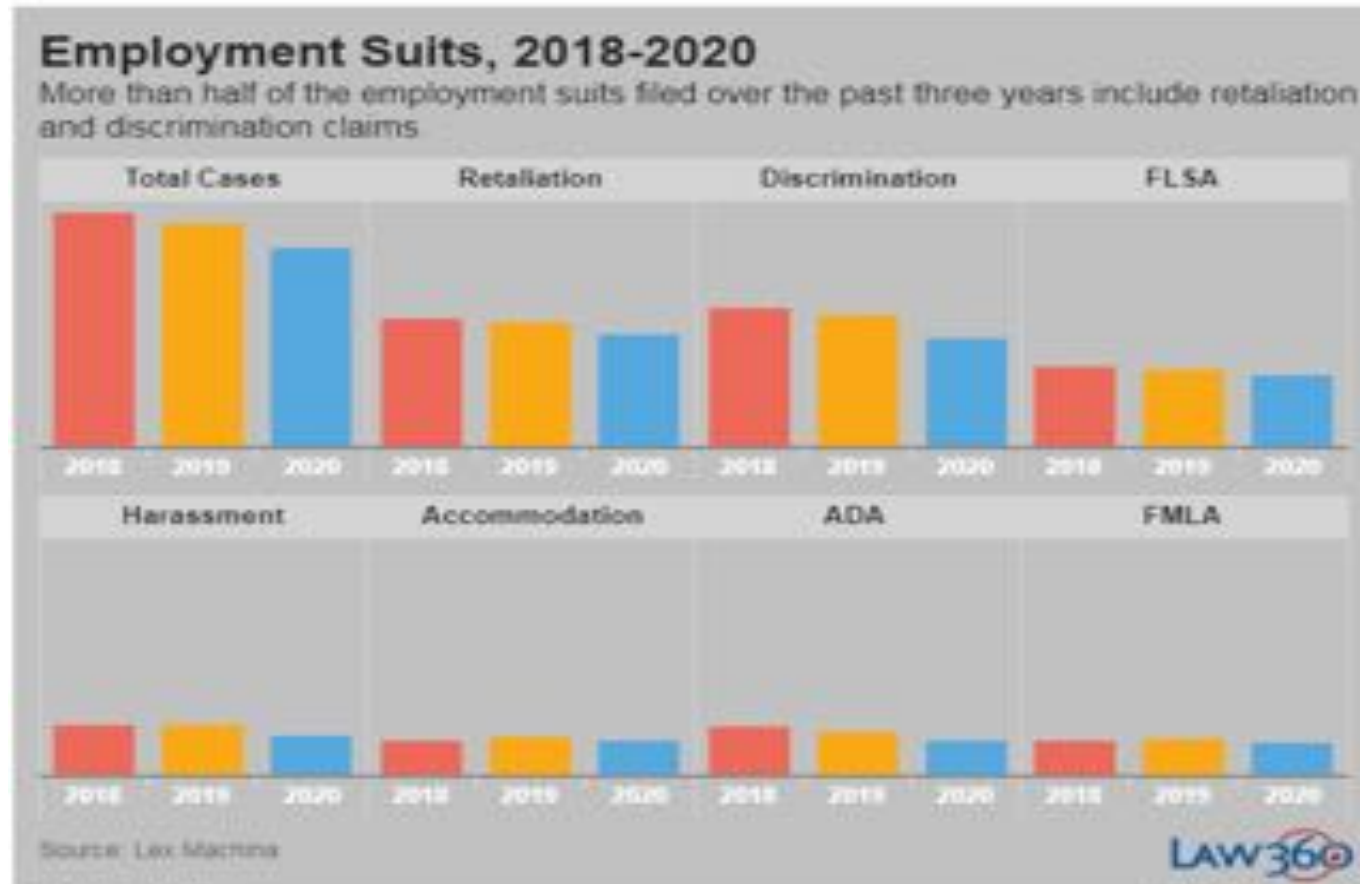
TRENDS

2020 Employment Law Trends

2020 Employment Law Trends

- Employment litigation declined in 2020
- Workers filed just over 14,000 lawsuits in the first three quarters of 2020, compared to about 16,700 and 16,000 in 2018 and 2019, respectively
- Harassment and discrimination cases showed the biggest decrease
- The calm before the storm?

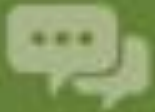
2020 Employment Law Trends



Religion



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Profit

Our Lady of Guadalupe School v. Morrissey-Berru and St. James School v. Biel

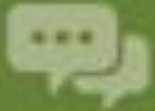
- U.S. Supreme Court
- Broad standard for permitting religious exemptions from employment discrimination claims
- “Ministerial exception”
- Allows a religious employer to use an employee’s status as a “minister” to invoke the First Amendment’s protections against government interference in the employer’s selection of its employees
- Courts are barred from adjudicating employment discrimination claims brought by an employee who performed certain religious tasks for religious employer

NLRB Will No Longer Exercise Jurisdiction Over Religious Educational Institutions

- *Bethany College*, 369 NLRB No. 98
- NLRB will no longer exercise jurisdiction over bona fide religious educational institutions
- Major reversal of a 2014 Obama-era precedent
- Religious institutions can stop union organizing if they meet the new bright-line test

EEOC's New Guidance on Religious Discrimination

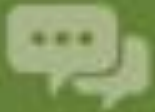
- EEOC approved new guidance on religious discrimination
- The new guidance alters the legal standards applied in workplace disputes for the nation's employers generally and educational institutions specifically
- The updated guidance describes in what ways Title VII of the Civil Rights Act of 1964 (Title VII) protects individuals from religious discrimination in the workplace and sets forth the legal protections available to religious employers



Sexual Orientation



Resources



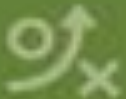
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Future Plans



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Bostock v. Clayton County

- U.S. Supreme Court
- Title VII protects LGBTQ individuals from workplace discrimination
- Workplace discrimination because of an individual's sexual orientation or gender identity — including being transgender — is unlawful discrimination “because of sex” under Title VII of the Civil Rights Act of 1964

President Biden's Executive Order

- 01/20/21 - Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- Applies *Bostock* to Title IX



Documents



Communications



Business Meetings



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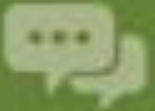


Finance

Tenure Issues



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Trends

Seye v. Trs. of Ind. Univ. (7th Cir. Dec. 8, 2020)

- Former professor at Indiana University (IU) alleged that IU denied his application for tenure in retaliation for his filing a notice of tort claim against the University
- The Seventh Circuit held that professor's tort claim notice was not protected activity under the Rehabilitation Act because it did not allege disability discrimination or anything similar

Crenshaw v. Erskine Coll. (S.C. Sept. 9, 2020)

- Tenured professor at Erskine College alleged that Erskine breached its contract with him when it revoked his tenure and terminated his employment
- Crenshaw was terminated after he forced his way into an ambulance transporting a student with a head injury, for bullying behavior toward his colleagues, and for posting comments critical of Erskine to Facebook
- The court found that Erskine did not breach its contract with Crenshaw, as there was no evidence that Erskine failed to follow its procedures as outlined in the Faculty Manual when pursuing the tenure revocation process
- The court also found that Crenshaw had no contractual right to early retirement

Kaplan v. Univ. of Louisville, et al.

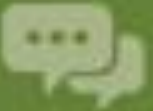
(W.D. Ky. July 23, 2020)

- Kaplan was a tenured professor and Chair of the Department of Ophthalmology and Visual Sciences at the University of Louisville
- The University dismissed Kaplan after it determined that he exceeded his authority as Chair when he executed an unauthorized lease on behalf of the department's clinical practice and sought financing for the practice through an outside entity in violation of the Practice Plan
- Kaplan's procedural due process claims against the individual defendants in their individual capacities failed because he did not hold a property interest in his position as department chair, and defendants provided him with adequate notice and an opportunity to be heard before he was terminated

Reductions in Force (RIFs)



Connect



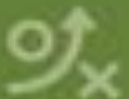
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Grow

The Professional Staff Congress/CUNY v. City Univ. of N.Y. (S.D.N.Y. August 12, 2020)

- The Professional Staff Congress/CUNY (PSC), proceeding on behalf of 2,8000 adjunct faculty at the City University of New York (CUNY) who were laid off as part of a RIF, alleged that CUNY was obligated by the CARES Act to pay its employees to the greatest extent practicable and sought a preliminary injunction requiring CUNY to reinstate its adjunct faculty
- The court found that plaintiff was unlikely to succeed on the merits because it did not allege the existence of a right to continued employment enforceable under Section 1983, and the CARES Act did not contain an express cause of action

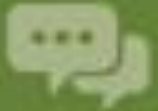
Speech



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Resources



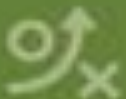
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Employee Speech and Civil Unrest: Dealing with Controversial Speech

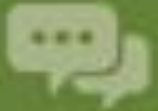


Responding to Employee Speech Regarding Politically Charged Topics

- Does the First Amendment provide unfettered protection for employee speech?
- What about racially or politically charged speech that enters the classroom?
- And how about social media posts, can employees say anything on their Facebook and Twitter Accounts?



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First Amendment Challenges to Public Employee Speech

In 1892, Justice Oliver Wendell Holmes commenting on a decision to discharge a police officer soliciting political contributions in violation of workplace rules stated the following:

"[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

The ***Pickering v. Bd. of Education*** (1968) and ***Connick v. Myers*** (1983) balancing test:

- Employee's speech must address a "matter of public concern."
- Balancing test used to determine whether the ER's interest in efficient workplace operations outweigh EE's interest in commenting on the public matter.
- Employee must show that her speech was motivating factor that led to disciplinary action

Gaining insight from *Waters v. Churchill*

- “To be protected, the speech must be on a matter of public concern, and the employee’s interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to ‘the interest of the State, as an employer, in promoting the efficiency of public services it performs through its employees.’”

Waters v. Churchill, 511 U.S. 661, 668 (1994)

Garcetti and Its Holding

- “. . . when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline”

Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)

- However, Appellate Courts have held that with respect to speech by academics at colleges and universities “. . . scholarship or teaching” falls outside of *Garcetti*

Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014)

And at Private Colleges and Universities?

- The First Amendment's protection of academic freedom prevails at private institutions via contractual obligations to protect academic freedom. In a 2018 decision, a professor's blog post was found to be an improper basis for disciplinary action because the private university adoption of the AAUP's standards on academic freedom.

John McAdams v. Marquette University, 383 Wisc. 2d 358, 914
N.W.2d 708 (2018)

What About Classroom Speech?

- Recent disturbing examples:
 - Duquesne University professor suspended for using a racial slur during a zoom class (Pittsburgh Post Gazette, Sept. 2020)
 - Stanford University professor uses the n-word to illustrate how racism stoked opposition to the Constitution (Daily Report Online, June 2020)
 - Emory University law professor was suspended for using n-word to discuss race discrimination in class (Daily Report Online, June 2020)
 - University of Massachusetts at Amherst lecturer was removed from teaching after showing an offensive video in class parodying Adolf Hitler (The Chronicle, December 2019)

Legal Issues that flow from Controversial Classroom Speech

- Race Discrimination
- Hostile Learning Environment Claims
- Academic Freedom
- Germaneness Analysis
- Internal Investigations
- Disciplinary Action
 - dismissal, warnings, censure, suspension, reassignment, demotion, classroom monitor, mandatory counseling, sensitivity training, monetary penalties.

A Faculty Member's Facebook Comments Offers Another Example

This Tenured Professor Said His College's Reopening Plans Risked Deaths. That's Now in His Personnel File.

By Megan Zahneis | SEPTEMBER 10, 2020



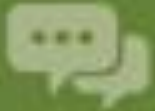
- A tenured faculty member at Juniata College, in Pennsylvania, is facing censure after writing a comment on Facebook critical of his institution's reopening plans in light of the pandemic.

Social Media Speech

- **Social Post and Blogging and University Policy**
 - Tenured Professor's retaliation claim that he was fired from blogging conspiracy theories about Sandy Hook school shooting failed because he refused to disclose blog in outside-activity reports. Tracy v. FAU, (11th Cir. Nov. 2020).



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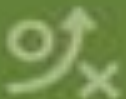
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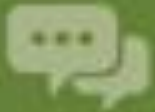
How to React!

- Scope – Speech from a student, faculty, both?
- Informal Inquiry – listen (not talk) to witnesses
- Collective Action – deans, department heads, directors, etc.
- Bad news travels fast – be prepared to make a statement
- Gather material information, not rumors
- Remedial Action – protect students; no rush to judgment
 - Short run and long run (faculty removed from classroom, investigation process, etc.)
 - Be aware of social media barrage
 - Demands from Alumni groups
- Big Picture – Rely on workforce policies; consistency is a good thing

Employee Sexual Misconduct



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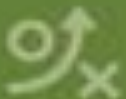
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Miles v. Simmons Univ.

(D. Minn. Jan. 20, 2021)

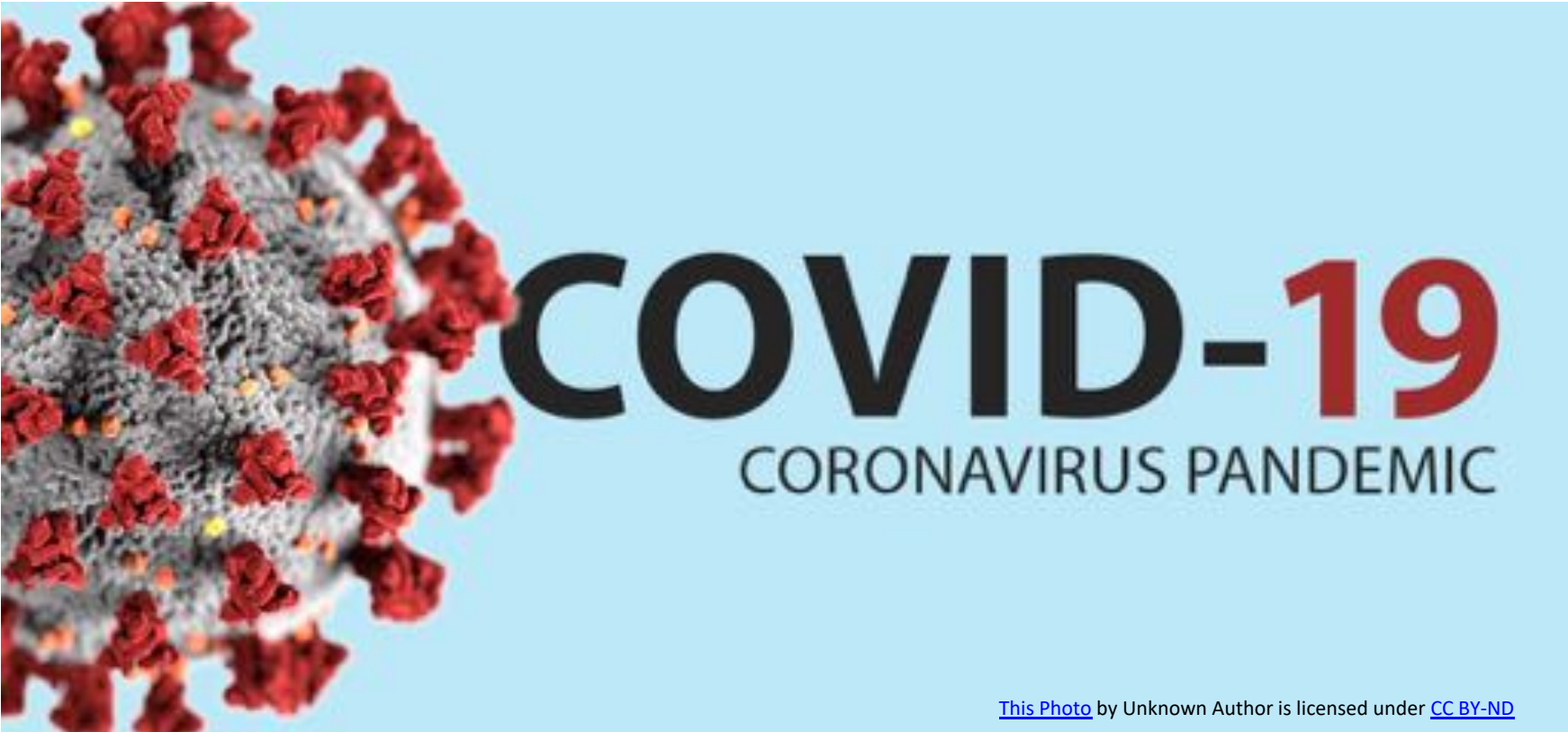
- Miles, a graduate student at Simmons University, used the restroom during an online class but was unaware that she was still visible to her classmates through her webcam
- She alleged that her professor committed several torts when he recorded a video of the incident with his cell phone and posted it online, and that Simmons was vicariously liable for the professor's torts
- The court found that the University could not be held vicariously liable for the professor's actions because he was not acting within the scope of his employment when he recorded and posted the video
- Miles did not allege any facts showing that the professor's actions were or should have been foreseeable to Simmons

Doe v. Winona State Univ., et al.

(Minn. App. Aug. 24, 2020)

- Plaintiff, a former student at Winona State University, alleged that WSU was vicariously liable for the sexual misconduct of a former counselor at WSU's counseling center
- The court held that the alleged sexual misconduct did not occur within the scope of the counselor's employment at WSU because it occurred off of WSU's campus and after plaintiff's treatment with the counselor at WSU ended
- Plaintiff's allegations that "grooming" occurred during her treatment with the counselor at WSU did not fall within an action for damages due to sexual abuse under Minnesota law

COVID-19



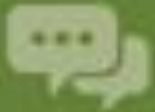
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COVID-19

- Litigation Trends
- Statutory Immunity Protections
- Mandatory Vaccination Requirements
- Vaccination Incentives



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QUESTIONS



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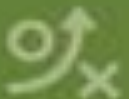
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