

That's a Lot of Money! Should I Take it, or Leave it?

A Guide for Independent Schools Considering
Federal Financial Assistance

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Introduction

Independent schools are increasingly considering the federal government as a source of financial assistance. The No Child Left Behind Act of 2001, as updated by the Every Student Succeeds Act of 2015, expanded opportunities for independent schools to receive federal financial assistance. In addition, the economy and other factors have led independent schools to explore new sources of financial assistance, including the federal government.

Independent schools that receive federal financial assistance or that are considering receiving such assistance should understand related legal consequences. In doing so, they will be better able to assess fully the ramifications of accepting such assistance and to ensure compliance with applicable law if they choose to accept federal assistance. The federal government conditions receipt of federal financial assistance on compliance with several federal laws. Some of those legal obligations may be new to independent schools, while others may be similar to federal or state legal obligations that may already apply to independent schools regardless of whether they receive federal financial assistance.

This *Guide* is intended to serve as a general primer on select federal legal obligations that are triggered when a school receives federal financial assistance as well as a primer on similar federal legal obligations that do not depend on receipt of federal financial assistance. The authors thought this would be helpful to schools that are curious about whether the receipt of assistance will truly trigger new obligations. Part I explains what constitutes receipt of federal financial assistance for purposes of determining application of certain federal laws. Part II summarizes 12 select federal laws and policies that apply only to recipients of federal financial assistance. Part III summarizes 10 federal laws that are similar to certain laws described in Part II but that may apply to independent schools even if they do not receive federal financial assistance. Where appropriate, this *Guide* provides links to pre-existing NAIS publications on a particular law. Schools should be aware that this guide is not meant to be exhaustive, but is meant to cover the larger laws in these areas in order to give schools a firm background.

The *Guide* focuses on substantive requirements and administrative enforcement. Schools should bear in mind that private plaintiffs, such as students, disappointed applicants, and whistle blowers, may also seek to enforce many of the laws summarized in the *Guide* through administrative complaints or litigation. Such private enforcement may result in injunctive

relief, monetary damages, and/or other penalties. In addition, the government may be able to pursue criminal or civil penalties for violations of certain laws.

The *Guide* focuses on statutes and regulations as currently in effect and does not generally address administrative or judicial interpretations of those statutes and regulations. Schools should bear in mind that the laws discussed in this *Guide* are evolving through legislative and regulatory amendments and judicial interpretations.

The *Guide* summarizes relevant federal laws and does not analyze application of those laws to particular matters. Although this *Guide* addresses those laws likely to be most relevant to an independent school, it is possible that other federal laws would apply to an independent school that receives federal financial assistance. This *Guide* does not address laws that are primarily relevant to federally sponsored research, nor does it address legal obligations under particular federal financial assistance programs. In other words, schools should be aware that certain grants and particular programs may have legal obligations peculiar to those specific applications.

This *Guide* is intended for general informational purposes only and does not constitute legal advice. An attorney should be consulted regarding the specific facts and circumstances associated with any legal matter or case. Schools are encouraged to consult an attorney for additional information regarding federal legal obligations for organizations receiving federal financial assistance, application of those obligations to particular situations, interpretations of and developments in the laws discussed in this *Guide*, and relevant state and other legal obligations. In addition, schools are encouraged to consult an accountant on matters related to cost accounting and audits in connection with receipt of federal financial assistance.

Part I:

Background

"Federal financial assistance" generally means assistance from the federal government that non-federal entities receive or administer in the form of (1) grants or loans of funds, (2) grants, donations, or transfers of real or personal property or interest in such property, (3) services of detailed federal employees, and (4) contracts intended to provide assistance. As described in this *Guide*, certain federal laws and implementing regulations that are triggered by receipt of federal financial assistance define what constitutes federal financial assistance for purposes of that particular law. In addition, different agencies' regulations implementing the same law may vary in their definitions of federal financial assistance, although those variations generally are non-substantive. Needless to say, all of these issues lead to a very confusing structure for those receiving assistance from various federal sources.

Certain federal laws apply only to recipients of federal financial assistance. Some such federal laws apply when a recipient receives federal financial assistance under any federal program. Other such federal laws apply only when a recipient receives federal financial assistance from particular federal programs. This *Guide* focuses on federal laws that are triggered by receipt of federal financial assistance under any federal program or under U.S. Department of Education ("ED") programs. Therefore, schools should always check with the agency sponsoring the program from which the school is going to receive assistance to ensure that the school is aware of all of the legal obligations triggered by the assistance. Many federal agencies are not aware that independent schools are not previously obligated to follow a number of these laws and therefore do not always inform schools about the obligations before assistance is given.

To help identify whether the federal government considers a particular program to constitute federal financial assistance, an independent school may wish to refer to the annual Assistance Listing (formally known as the Catalog of Federal Domestic Assistance ("CFDA")).¹ The CFDA Annual Listing is a government-wide compendium of federal programs, projects, services, and

¹ See United States General Services Administration, [Annual Listing](https://beta.sam.gov/help/assistance-listing), <https://beta.sam.gov/help/assistance-listing> (last visited July 12, 2018).

activities that provide federal financial assistance. The CFDA Annual Listing identifies 15 types of federal assistance,² which may be placed in two categories:

- ▶ Financial (or funded) assistance, including formula grants; project grants; direct payments for specified use; direct payments with unrestricted use; direct loans; guaranteed/insured loans; and insurance.

- ▶ Nonfinancial (or in kind) assistance, including sale, exchange, or donation of property and goods; use of property, facilities, and equipment; provision of specialized services; advisory services and counseling; dissemination of technical information; training; investigation of complaints; and federal employment.

"Federal financial assistance" generally does not include amounts that an organization receives as payment for goods or services provided to the federal government pursuant to a procurement contract.³ Certain federal laws apply only to federal contractors or apply to both federal contractors and federal financial assistance recipients. For example, certain federal laws that apply to contractors forbid employment discrimination on the basis of race, color, religion, sex, national origin, disability, or veteran status and require federal contractors to take certain affirmative action with respect to members of those protected classes.⁴ This *Guide* does not address federal laws that apply only to federal contractors.

² Id.

³ The Federal Grant and Cooperative Agreement Act, as amended, explains the circumstances under which the government uses federal financial assistance agreements, such as grant agreements and cooperative agreements, and procurement contracts. See 31 U.S.C. §§ 6301-6308. Federal agencies are to use a "grant agreement" when the principal purpose is to transfer a thing of value to the recipient in order to carry out a public purpose authorized by federal law, and the federal agency does not expect to have substantial involvement in carrying out the activity. Id. § 6304. Federal agencies are to use a "cooperative agreement" when the principal purpose is to transfer a thing of value to the recipient in order to carry out a public purpose authorized by federal law, and the federal agency is expected to have substantial involvement in carrying out the activity. Id. § 6305. "Grant agreements" and "cooperative agreements" do not include agreements providing direct cash assistance to an individual, subsidies, loans, loan guarantees, or insurance. Id. § 6302. By contrast, the Federal Grant and Cooperative Agreement Act instructs federal agencies to use a "procurement contract" when the principal purpose of the legal instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the federal government. Id. § 6303.

⁴ See, e.g., Executive Order 11246 (race, color, religion, sex, national origin); Rehabilitation Act of 1973 § 503, 29 U.S.C. § 793 (disability); Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. §§ 4211 and 4212 (veterans status).

PART II:

Select federal laws that would apply to an independent school as a recipient of federal financial assistance

This section of the *Guide* summarizes select federal laws that would apply to an independent school as a recipient of federal financial assistance. Those federal laws generally fall into the following categories: (1) non-discrimination laws; (2) workplace laws; (3) student privacy laws; (4) lobbying restrictions; and (5) accountability requirements.

As explained in the background section of this *Guide*, some federal laws apply when a recipient receives federal financial assistance under any federal program. The federal agency from which a recipient receives federal financial assistance administers such laws. Accordingly, each federal agency may promulgate its own regulations implementing the law. Although agency implementing regulations are substantially similar, a federal financial assistance recipient should consult the regulations and guidance of each agency from which it receives federal financial assistance. For simplicity, this *Guide* summarizes primarily ED implementing regulations.

With respect to administrative and audit requirements, the U.S. Office of Management and Budget ("OMB") has issued uniform government standards through publications called "circulars." OMB circulars generally provide uniform definitions, principles, requirements, and standards applicable to federal financial assistance programs. OMB generally requires federal agencies that administer federal financial assistance to adopt regulations implementing the circulars. Although there may be minor agency-specific differences, the substance of regulations implementing OMB circulars is generally the same. Nevertheless, a federal financial assistance recipient should consult the regulations and guidance of each agency from which it receives federal financial assistance. Where appropriate, this *Guide* refers to ED regulations implementing OMB circulars.

Non-discrimination laws

Age Discrimination Act of 1975

Section 504 of the Rehabilitation Act of 1973

Title VI of the Civil Rights Act of 1964

Title IX of the Education Amendments of 1972

Age Discrimination Act of 1975

Brief statement of the law

The Age Discrimination Act of 1975 (the "Act"),⁵ as amended, and its implementing regulations,⁶ prohibit discrimination on the basis of age in programs or activities receiving federal financial assistance.

To whom does the law apply?

The Act and its implementing regulations apply to any "program or activity" receiving federal financial assistance.

▶ "Federal financial assistance" generally means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which a federal agency provides or otherwise makes available assistance in the form of funds, services of federal personnel, or real and personal property or any interest in or use of property.⁷

▶ A "recipient" of federal financial assistance generally is defined as any entity or person to which such assistance is extended, directly or through another recipient, including successors, assignees, or transferees, but excluding the ultimate beneficiary of the assistance.⁸

▶ The Act generally defines "program or activity" as all operations of state or local government

⁵ 42 U.S.C. §§ 6101-6107.

⁶ See, e.g., 34 C.F.R. pt. 110. Because each federal agency administers the Act with respect to its federal financial assistance programs, numerous federal agencies have implemented regulations under the Act. This Guide will cite ED implementing regulations by way of example. However, a federal financial assistance recipient must comply with the implementing regulations of the federal agencies from which it receives federal financial assistance.

⁷ Id. § 110.3.

⁸ Id.

agencies; colleges, universities, and public elementary and secondary schools; and private entities that provide educational and other specified services or receive entity-wide federal assistance.⁹ The law applies to all operations of the entity, not merely the program or activity that receives the federal financial assistance.¹⁰ Accordingly, if a component of an independent elementary or secondary school receives federal financial assistance, all operations of the school must comply with the Act.

What does the law require?

1. General nondiscrimination requirements

The Act provides that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance."¹¹ ED regulations also prohibit recipients of federal financial assistance from using age distinctions or taking any other action that has the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity on the basis of age.¹² An "age distinction" is defined as any policy, rule, or method of administration that uses age or an "age-related" term. "Age-related" terms are, for example, words that "necessarily imply a particular age or range of ages (e.g., 'children,' 'adult,' 'older persons,' but not 'student' or 'grade.')." ¹³ The regulations prohibit federal financial assistance recipients from retaliating against persons who assert rights under the Act or who cooperate in investigations of alleged violations.¹⁴

Employment practices are broadly excluded from the Act's coverage,¹⁵ because most employers' practices with regard to age are subject to the requirements of the Age Discrimination in

⁹ 42 U.S.C. § 6107.

¹⁰ Id.

¹¹ Id. § 6102.

¹² 34 C.F.R. § 110.10(b).

¹³ Id. § 110.3.

¹⁴ Id. § 110.34.

¹⁵ Id. § 110.2.

Employment Act of 1964 ("ADEA").¹⁶ The ADEA is a federal statute that applies to employers irrespective of whether they receive federal financial assistance.¹⁷ This Act is discussed in Part III of this *Guide*.

2. Permissible consideration of age

In certain limited circumstances, ED regulations implementing the Act permit action based on age. Specifically, a recipient may "reasonably" take age into account as a factor necessary either to the "normal operation" of a program or activity or the achievement of any "statutory objective" of the program or activity.¹⁸ Reasonable use of age as a factor will be found where all of the following requirements are met:

- ▶ Age is used as a measure or approximation of one or more other characteristics;
- ▶ The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;
- ▶ The other characteristic(s) can be reasonably measured or approximated by the use of age; and
- ▶ The other characteristic(s) are impractical to measure directly on an individual basis.¹⁹

"Normal operation" means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.²⁰ "Statutory objective" means any purpose of

¹⁶ 29 U.S.C. §§ 621-634.

¹⁷ See discussion of the ADEA at pages 88-95 of this Guide.

¹⁸ 34 C.F.R. § 110.12.

¹⁹ Id.

²⁰ Id. § 110.11.

a program or activity expressly stated in the statute by which it was authorized.²¹ If a recipient operates a program or activity that provides special benefits to children or the elderly, the use of age distinctions in the operation of such a program will be presumed to be necessary.²² Similarly, any age distinction contained in ED regulations is presumed to be necessary to meeting the subject program's statutory objective.²³

Federal financial assistance recipients also may take action that disproportionately affects persons of different ages.²⁴ In such cases, the factor upon which the recipient bases action must be one other than age and that non-age factor must bear a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory purpose.²⁵ The federal financial assistance recipient bears the burden of proving that a distinction or other action resulting in a disproportionate impact falls within this exception.²⁶

3. Monitoring requirements

The Act requires agencies administering federal financial assistance to monitor compliance with the Act's requirements. For example, ED requires federal financial assistance recipients to do the following:

- ▶ Provide ED any information it deems necessary to ascertain whether the recipient is in compliance with the Act;

- ▶ Permit reasonable access by ED to the recipient's books, records, accounts, reports, and other materials necessary to monitor compliance;

²¹ Id.

²² Id. § 110.16.

²³ Id. § 110.17.

²⁴ Id. § 110.13

²⁵ Id.

²⁶ Id. § 110.14.

- ▶ Provide a written assurance to ED that the program or activity being supported with federal funds will be operated in compliance with the Act and regulations;
- ▶ Undertake formal self-assessments of any applicable age distinctions under certain circumstances and take corrective actions as necessary;
- ▶ Designate an employee to be responsible for coordinating efforts to comply with the Act, including investigation of complaints of non-compliance; and
- ▶ Notify program beneficiaries of the Act's requirements and establish and publish grievance procedures for persons alleging violations of those requirements.²⁷

Who administers the law?

The federal agencies from which a recipient receives federal financial assistance administer the Act.²⁸ ED's Office for Civil Rights ("OCR") is charged with ensuring that ED grantees are in compliance with the Act. ED may conduct compliance reviews of current recipients as well as pre-award reviews, with or without first receiving a complaint that the recipient has violated the Act.²⁹ Any person may file a complaint with OCR on behalf of him- or herself, or on behalf of another person.³⁰ Individuals alleging a violation of the Act may also file civil suits in federal court,³¹ but may not do so without first exhausting administrative remedies available under the Act.³² Administrative remedies are exhausted when 180 days have passed since the filing of a complaint with OCR and OCR either has made no finding on the merits of the claim or has

²⁷ Id. §§ 110.22 to .25.

²⁸ 42 U.S.C. § 6103.

²⁹ 34 C.F.R. § 110.30.

³⁰ Id. § 110.31(a).

³¹ 42 U.S.C. § 6104(e)(1).

³² Id. § 6104(f); 34 C.F.R. § 110.39.

issued a finding in favor of the institution.³³ If an individual chooses to pursue a claim in court after the waiting period has expired, OCR will not begin, or continue, an administrative investigation.³⁴

What are the consequences of non-compliance?

If ED finds a violation of the Act, it will advise the recipient of the violation and seek voluntary compliance with the Act.³⁵ If voluntary compliance cannot be obtained, ED may seek to terminate its federal financial assistance to the non-complying recipient.³⁶ ED may not terminate federal financial assistance until the recipient has had an opportunity to present its side of the dispute to an administrative law judge.³⁷ In conducting such termination hearings, ED will follow procedures detailed in regulations implementing Title VI of the Civil Rights Act of 1964 ("Title VI").³⁸ Those procedures are referenced in this *Guide* at page 26. ED may defer new awards of federal financial assistance, including renewals of currently funded programs, while a termination hearing is pending.³⁹

ED may also enforce the Act by requiring recipients to take remedial action,⁴⁰ or by any other means authorized by law, including referral to the U.S. Department of Justice or other federal, state, or local agency that could effect compliance.⁴¹

³³ 34 C.F.R. § 110.39(a)(1).

³⁴ See United States Dept. of Education, Office for Civil Rights, [Questions and Answers on Age Discrimination](https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/age.html), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/age.html> (last visited June 15, 2018).

³⁵ 42 U.S.C. § 6104(c); 34 C.F.R. §§ 110.33(b), 110.35(c).

³⁶ 42 U.S.C. § 6104(a)(1); 34 C.F.R. § 110.35(a)(1).

³⁷ 34 C.F.R. § 110.35(a)(1).

³⁸ *Id.* § 110.36 (referencing 34 C.F.R. §§ 100.9, 100.10 and 34 C.F.R. pt. 101).

³⁹ *Id.* § 110.35(d).

⁴⁰ *Id.* § 110.38.

⁴¹ 42 U.S.C. § 6104(a)(2); 34 C.F.R. § 110.35(a)(2).

Individuals bringing suit to enforce the Act may seek available legal remedies, including attorney's fees if the complaint specifies that such fees are requested.⁴²

Additional resources

Many of the Act's provisions as described here are subject to exceptions or refinements as set forth in the statute and its implementing regulations and have been interpreted in judicial and administrative case law and government guidance, which this *Guide* does not address. OCR has compiled a list of "questions and answers" about age discrimination, which is available at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/age.html>.

⁴² 42 U.S.C. § 6104(e); 34 C.F.R. § 110.39(b)(3)(ii).

Section 504 of the Rehabilitation Act of 1973

Brief statement of the law

Section 504 of the Rehabilitation Act of 1973 ("Section 504")⁴³, as amended, and its implementing regulations⁴⁴ generally prohibit discrimination on the basis of disability in programs or activities receiving federal financial assistance. Schools should be aware that the Americans with Disabilities Act, which applies to almost all independent schools, contains many similar obligations.

To whom does the law apply?

Section 504 and its implementing regulations apply to any program or activity receiving federal financial assistance.⁴⁵

- ▶ "Federal financial assistance" generally means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which a federal agency provides or otherwise makes available assistance in the form of funds, services of federal personnel, or real and personal property or any interest in or use of such property.⁴⁶
- ▶ A "recipient" generally is defined as any public or private agency, institution, organization, or other entity or any person to which federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but

⁴³ 29 U.S.C. § 794.

⁴⁴ See, e.g., 34 C.F.R. pt. 104. Because each federal agency administers Section 504 with respect to its federal financial assistance programs, numerous federal agencies have implemented regulations under Section 504. This Guide will cite ED implementing regulations by way of example. However, a federal financial assistance recipient must comply with the implementing regulations of the federal agencies from which it receives federal financial assistance.

⁴⁵ 29 U.S.C. § 794(a).

⁴⁶ 34 C.F.R. § 104.3(h).

excluding the ultimate beneficiary of the assistance.⁴⁷

- ▶ "Program or activity" generally is defined as all operations of state or local government agencies; colleges, universities, and public elementary and secondary schools; and private entities that provide educational and other specified services or receive entity-wide federal assistance.⁴⁸ The law applies to all operations of the entity, not merely the program or activity that receives the federal financial assistance.⁴⁹ Accordingly, if a component of an independent elementary or secondary school receives federal financial assistance, all operations of the school must comply with Section 504.

What does the law require?

1. General nondiscrimination requirements

Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁵⁰ Under ED regulations, prohibited discrimination includes, for example:

- ▶ Denying a qualified handicapped person the opportunity to participate in or benefit from any aid, benefit, or service provided by the recipient.
- ▶ Providing unequal opportunities to participate in or benefit from such aid, benefit or service to qualified handicapped individuals.
- ▶ Providing a qualified handicapped person with an aid, benefit, or service that is not as effective as those provided to others.

⁴⁷ Id. § 104.3(f).

⁴⁸ 29 U.S.C. § 794(b).

⁴⁹ Id.

⁵⁰ Id. § 794(a).

- ▶ Providing different or separate aid, benefits, or services to handicapped persons, unless the difference is necessary to provide those individuals with aid, benefits, or services that are as effective as those provided to non-handicapped persons.

- ▶ Aiding or perpetuating discrimination against qualified handicapped persons by providing significant assistance to an agency, organization, or person that discriminates against qualified handicapped persons in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity.

- ▶ Denying a qualified handicapped person the opportunity to participate as a member of a planning or advisory board.

- ▶ Otherwise limiting a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service provided by the recipient.⁵¹

An aid, benefit, or service is "equally effective" if it affords handicapped persons an equal opportunity to obtain the same result or reach the same level of achievement, in the most integrated setting appropriate to the person's needs, as non-handicapped persons.⁵² An aid, benefit or service need not produce the identical result or level of achievement for handicapped and non-handicapped persons in order to be "equally effective".⁵³

Federal financial assistance recipients also are prohibited from using criteria or methods of administration that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap or have the purpose or effect of substantially impairing accomplishment of the program's objectives with respect to handicapped persons.⁵⁴ Such effects are commonly referred to as "disparate impact." Recipients may not make site selections for facilities in which covered programs will operate that have the effect of excluding

⁵¹ 34 C.F.R. § 104.4.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

handicapped persons from those programs.⁵⁵

2. Employment practices and facility accessibility

ED regulations impose Section 504 requirements on a recipient's employment practices and facility accessibility. In the area of employment, ED has issued rules relating to employment criteria that could have the effect of discriminating against disabled persons, pre-employment inquiries about potential disabilities, and reasonable accommodation of disabled applicants and employees.⁵⁶ With regard to the accessibility of facilities to disabled persons, ED regulations establish separate requirements for existing facilities and new construction, and provide a limited exemption for health, welfare and social service providers with fewer than 15 employees.⁵⁷ In addition, small providers are not required to make "significant structural alterations," if alternative means of providing the services are available.⁵⁸

3. Educational programs

ED regulations specifically address Section 504 obligations particular to private elementary and secondary schools that receive federal financial assistance. Those regulations prohibit private schools from excluding qualified handicapped students from their programs if such students can, with minor adjustments, be provided an appropriate education by the school.⁵⁹ Similarly, recipients that provide preschool education may not exclude qualified handicapped children on the basis of disability.⁶⁰ In addition, private schools may not charge more for provision of an appropriate education to a handicapped student than to a non-handicapped student, except to

⁵⁵ Id.

⁵⁶ Id. §§ 104.11-.14.

⁵⁷ Id. §§ 104.21-.23.

⁵⁸ 29 U.S.C. § 794(c).

⁵⁹ 34 C.F.R. § 104.39(a).

⁶⁰ Id. § 104.38.

the extent that such a charge is justified by a substantial increase in cost to the school.⁶¹ Private schools that provide special education to handicapped students also must comply with the evaluation and placement requirements and procedural safeguards (relating to notice, hearings, and review) to which public schools are subject.⁶²

All schools, whether public or private, must provide educational services to handicapped students within the regular educational environment operated by the recipient, unless the recipient can demonstrate that it cannot do so, even with the use of supplementary aids and services.⁶³ If education of a handicapped student must take place outside of the regular educational environment, selection of the alternative setting must take into account proximity to the student's home.⁶⁴

With respect to extracurricular activities for handicapped students, including meals, recess periods, and other nonacademic activities (such as counseling services, physical education and athletics, and special interest groups and clubs), recipients must ensure that handicapped students participate with nonhandicapped students in those activities and services to the maximum extent appropriate to the needs of the student.⁶⁵ A school must provide qualified handicapped students an equal opportunity to participate in generally available physical education and athletics programs.⁶⁶ A school may offer separate or different physical education or athletic activities to handicapped students only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.⁶⁷

61 Id. § 104.39(b).

62 Id. § 104.39(c) (referencing 34 C.F.R. §§ 104.35 and 104.36).

63 Id. § 104.34(a).

64 Id.

65 Id. § 104.34(b) (referencing 34 C.F.R. § 104.37(a)(2)).

66 Id. § 104.37(c).

67 Id.

4. Assurances and administrative requirements

Applicants for federal financial assistance from ED must submit an "assurance" that the supported program will be operated in compliance with Section 504 requirements.⁶⁸ A recipient must evaluate its programs to determine the effect of its policies and practices on handicapped persons and modify any practices that do not meet Section 504 requirements.⁶⁹ A recipient with 15 or more employees must designate an employee to coordinate its efforts to comply with Section 504 and must adopt grievance procedures for the resolution of complaints arising under it.⁷⁰ A recipient with 15 or more employees must give notice to participants, beneficiaries, applicants, and employees that the recipient does not discriminate on the basis of handicap.⁷¹ ED may apply similar administrative requirements to smaller organizations when ED finds a violation of Section 504 or determines that compliance with such requirements will not significantly impair the recipient's ability to provide benefits or services.⁷²

5. Remedial action

ED may require recipients to take whatever remedial actions it deems necessary to overcome the effects of discrimination on the basis of disability.⁷³ ED may require such remedial action with respect to handicapped persons who are no longer participating in the recipient's program but were participants when the discrimination occurred or with respect to handicapped persons who would have been participants had the discrimination not occurred.⁷⁴

Who administers the law?

⁶⁸ Id. § 104.5.

⁶⁹ Id. § 104.6(c).

⁷⁰ Id. § 104.7.

⁷¹ Id. § 104.8.

⁷² Id. § 104.9.

⁷³ Id. § 104.6(a)(1)

⁷⁴ Id. § 104.6(a)(3).

The federal agencies from which a recipient receives federal financial assistance administer Section 504. OCR is charged with ensuring that ED grantees are in compliance with Section 504. OCR's administration of Section 504 follows the procedures used for enforcement of Title VI.⁷⁵ This *Guide* references those enforcement procedures at page 26.

Individuals may also bring suit to challenge alleged violations of Section 504.⁷⁶

What are the consequences of non-compliance?

As noted above, ED's enforcement of Section 504, including with respect to the penalties imposed on violators, is generally in accordance with its procedures enforcing Title VI. This *Guide* references those procedures at page 26.

Individuals who bring suit alleging Section 504 violations may seek any available legal remedies, such as compensatory damages or an injunction. An individual may not obtain punitive damages.⁷⁷

Additional Resources

Many of the provisions as described here are subject to exceptions or refinements as set forth in Section 504 and its implementing regulations and have been interpreted in judicial and administrative case law and government guidance, which this *Guide* does not address.

"Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities," an OCR publication, is available online at www.ed.gov/about/offices/list/ocr/504faq.html. OCR also has published a number of other technical assistance documents, which are available online at www.ed.gov/about/offices/list/ocr/disabilityresources.html.

⁷⁵ *Id.* § 104.61 (referencing 34 C.F.R. §§ 100.6 to 100.10 and 34 C.F.R. pt. 101).

⁷⁶ Because courts generally interpret Section 504 coextensively with Title VI, the Supreme Court's decision prohibiting private suits to enforce Title VI's disparate impact regulations may likewise prohibit private suits under Section 504's disparate impact regulations. See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁷⁷ *Barnes v. Gorman*, 536 U.S. 181 (2002).

Title VI of the Civil Rights Act of 1964

Brief statement of the law

Title VI,⁷⁸ as amended, and its implementing regulations,⁷⁹ generally prohibit discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.

To whom does the law apply?

Title VI and its implementing regulations apply to any program or activity receiving federal financial assistance.

- ▶ "Federal financial assistance" generally is defined to include (1) grants and loans of federal funds, (2) the grant or donation of federal property and interests in property, (3) the detail of federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or at reduced consideration in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any federal agreement, arrangement, or other contract that has as one of its purposes the provision of assistance.⁸⁰ ED regulations include a list of federal financial assistance programs to which the regulations apply,⁸¹ and make clear that certain types of transfers, including transfers of real or personal surplus property for educational uses, also are covered by Title VI.⁸²

⁷⁸ 42 U.S.C. §§ 2000d to 2000d-7.

⁷⁹ See, e.g., 34 C.F.R. pt. 100. Because each federal agency administers Title VI with respect to its federal financial assistance programs, numerous federal agencies have implemented regulations under the Act. This *Guide* will cite ED implementing regulations by way of example. However, a federal financial assistance recipient must comply with the implementing regulations of the federal agencies from which it receives federal financial assistance.

⁸⁰ *Id.* § 100.13(f).

⁸¹ *Id.* App. A to Part 100. This list predates enactment of the No Child Left Behind Act of 2001, among other laws, and thus should not be considered exhaustive.

⁸² *Id.* § 100.5(e).

- ▶ A "recipient" generally is defined as any entity or person to which federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but excluding the ultimate beneficiary of assistance.⁸³
- ▶ Title VI generally defines "program or activity" as all operations of state or local government agencies; colleges, universities, and public elementary and secondary schools; private entities that provide educational and other specified services or receive entity-wide federal assistance; and joint ventures of any of the above.⁸⁴ The law applies to all operations of the entity, not merely the program or activity that receives the federal financial assistance.⁸⁵ Accordingly, if a component of an independent elementary or secondary school receives federal financial assistance, all operations of the school must comply with Title VI.

What are the law's requirements?

1. General nondiscrimination requirements

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁸⁶ ED regulations implementing Title VI specify that such prohibited discrimination includes, for example, taking any of the following actions based on race, color, or national origin:

- ▶ Denying an individual any service, financial aid, or other benefit provided under the program.
- ▶ Providing any service, aid, or other benefit to an individual that is different, or is provided in a different manner, from that provided to others under the program.
- ▶ Subjecting an individual to segregation or separate treatment in any matter related to his or

⁸³ Id. § 100.13(i).

⁸⁴ 42 U.S.C. § 2000d-4a; 34 C.F.R. § 100.13(g).

⁸⁵ 42 U.S.C. § 2000d-4a.

⁸⁶ Id. § 2000d.

her receipt of any service, aid, or other benefit under the program.

- ▶ Restricting an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or other benefit provided under the program.
- ▶ Treating an individual differently from others in determining whether he or she satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition that individuals must meet to be provided any service, aid, or other benefit provided under the program.
- ▶ Denying an individual an opportunity to participate in the program or otherwise affording him or her an opportunity to do so that is different from that afforded others (except that coverage of employment practices is limited, as described below).
- ▶ Denying any person the opportunity to participate as a member of a planning or advisory body that is an integral part of the program.⁸⁷

Title VI also prohibits federal financial assistance recipients from utilizing criteria or methods of administration, either directly or through contracts with other parties, that have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin or that have the effect of substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.⁸⁸ Such effects are commonly referred to as "disparate impact." In determining the location or site of a facility, federal financial assistance recipients may not make selections that have the effect of excluding such individuals from programs subject to the regulation.⁸⁹

Title VI forbids use of intimidation or retaliation against persons asserting rights or filing

⁸⁷ 34 C.F.R. § 100.3(b)(1).

⁸⁸ *Id.* § 100.3(b)(2).

⁸⁹ *Id.* § 100.3(b)(3).

complaints under the law.⁹⁰

2. Remedial action and voluntary affirmative action⁹¹

Under certain conditions, where discriminatory practices were utilized in the past to exclude individuals on the basis of race or nationality and have since been abandoned, but the consequences of those practices continue to impede access to the benefit for members of the previously excluded group (or groups), ED regulations require federal financial assistance applicants and recipients to take affirmative steps to make the benefit fully available to members of that group (or groups).⁹² The regulations suggest that such affirmative action may include special arrangements for obtaining referrals to the program or selection procedures that ensure that previously underserved groups are adequately represented in the program, where the normal information and outreach efforts required under the regulations have not mitigated the adverse effects.⁹³

ED regulations permit federal financial assistance applicants and recipients that have never discriminated against persons on the basis of race or nationality voluntarily to give special consideration to race or national origin to make their program more accessible to underrepresented groups.⁹⁴ As an illustration, the regulations note that a university that is not adequately serving members of a particular racial or nationality group may establish "special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service."⁹⁵ While not the subject of this *Guide*, the U.S. Supreme Court and lower federal courts have decided a number of

⁹⁰ Id. § 100.7(e)

⁹¹ The U.S. Supreme Court and lower federal courts have decided a number of significant cases relating to affirmative action. See, e.g., Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198 (2016) (Fisher II); Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013) (Fisher I); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Grutter v. Bollinger, 288 F.3d 732 (2002), cert. granted, 123 S. Ct. 617 (2002); Taxman v. Board of Educ. of Township of Piscataway, 91 F.3d 1547 (3d Cir. 1996), cert. granted, 521 U.S. 1117, cert. dismissed, 522 U.S. 1010 (1997); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995).

⁹² 34 C.F.R. § 100.5(h) (citing 34 C.F.R. § 100.3(b)(6)).

⁹³ Id. (citing 34 C.F.R. § 100.6(d)).

⁹⁴ Id. § 100.5(i).

⁹⁵ Id.

significant cases relating to affirmative action and admissions which may limit the parameters set forth in these regulations.

3. Employment practices

Employment practices are generally exempt from Title VI. However, if a "primary objective" of the federal financial assistance is to provide employment, a recipient may not discriminate on the basis of race, color, or national origin in its employment practices.⁹⁶ Such programs include those aimed at (i) reducing unemployment among participants or assisting them in meeting subsistence needs through employment; (ii) assisting individuals in obtaining employment to meet costs related to their education or training; (iii) providing work experience that contributes to education or training; or (iv) providing remunerative activity to such individuals who because of disability cannot readily be absorbed into the competitive labor market.⁹⁷ Discriminatory practices are also prohibited where employment is not a primary objective of the covered program but employment discrimination would have the effect of excluding individuals from participation in the program on the basis of their race or national origin.⁹⁸

4. Assurances and covenants

Applications for federal financial assistance must include an "assurance" that the program will be conducted, or the facility operated, in compliance with Title VI requirements.⁹⁹ In addition, assistance that is provided in the form of a transfer of real property must be subject to a deed covenant running with the land assuring that there will be no prohibited discrimination for the period during which the property is used for the purpose for which the grant was given.¹⁰⁰ With assistance that takes the form of improvements to real property, the recipient must agree to

⁹⁶ Id. § 100.3(c)(1). This section of the regulations includes a non-exhaustive list of programs that ED has determined to have employment as a "primary objective". See id.

⁹⁷ Id.

⁹⁸ Id. § 100.3(c)(3).

⁹⁹ Id. § 100.4 (a), (b).

¹⁰⁰ Id. § 100.4(a)(2).

attach such a covenant to any subsequent transfer.¹⁰¹

5. Reporting requirements

Recipients are required to submit compliance reports to federal officials charged with enforcement of Title VI and to make available to those officials, upon request, such additional information as is necessary for them to determine that the recipient is in compliance.¹⁰² In addition, recipients are required to make available to participants, beneficiaries and other interested parties such information as is necessary to inform them of their rights under Title VI.¹⁰³

Who administers the law?

The federal agencies from which a recipient receives federal financial assistance administer Title VI. OCR is charged with ensuring that ED grantees are in compliance with Title VI. OCR is charged with undertaking periodic compliance reviews of recipients of federal financial assistance and with investigating complaints from individuals alleging discrimination (on their own behalf or as representatives of a class of individuals).¹⁰⁴

Individuals may also bring suit to enforce Title VI. However, individuals may not sue to enforce Title VI regulations prohibiting policies or actions that have the effect of discriminating on members of a protected class, or so-called disparate impact discrimination.¹⁰⁵

What are the consequences of non-compliance?

If OCR finds a violation of Title VI or its implementing regulations, it will first attempt to resolve

¹⁰¹ Id.

¹⁰² Id. § 100.6(b), (c).

¹⁰³ Id. § 100.6(d).

¹⁰⁴ Id. § 100.7(a), (c).

¹⁰⁵ Alexander v. Sandoval, 532 U.S. 275 (2001).

the matter through informal means.¹⁰⁶ If a violation cannot be resolved informally, or if a recipient refuses to provide the required assurances of compliance, as described above, ED may seek to suspend or terminate existing federal financial assistance or refuse to grant or continue new assistance.¹⁰⁷ The following steps must occur before an order suspending, terminating, or refusing to grant or continue federal financial assistance can go into effect:

- ▶ ED must advise the applicant or recipient of its failure to comply and must determine that compliance cannot be secured voluntarily;

- ▶ There must be an express finding on the record, after the recipient has been given an opportunity for a hearing, of a failure to comply; and

- ▶ The congressional committees with jurisdiction over the affected program must be notified, and 30 days must elapse between notice and termination.¹⁰⁸

ED regulations describe the procedures that apply when ED determines to suspend, terminate or refuse to grant or continue federal financial assistance based on an alleged violation of Title VI.¹⁰⁹ Among other procedural protections, a recipient must be given notice of the alleged violation (with detailed information regarding the basis of the allegation) and the time and place of a hearing on the matter. The grantee may be represented by legal counsel at the hearing. Termination actions are subject to review by a court.¹¹⁰

In addition to termination actions, OCR may enforce Title VI through any other means authorized by law, including referral to the U.S. Department of Justice ("DOJ"), with a recommendation that proceedings be brought against the recipient to enforce the rights of the United States under the assurance provided by the recipient or under any other applicable

106 34 C.F.R. § 100.7(d)(1).

107 Id. § 100.8(a), (b).

108 Id. § 100.8(c).

109 Id. § 100.9.

110 42 U.S.C. § 2000-d2.

federal law.¹¹¹ OCR may not refer the matter to DOJ or take other authorized enforcement action until the following have occurred:

- ▶ OCR determines that it cannot obtain voluntary compliance;
- ▶ The recipient has been notified of the violation and the action necessary to remedy that violation; and
- ▶ At least 10 days have passed since the notice of violation was mailed to the recipient.¹¹²

During this 10-day period, OCR must make additional efforts to persuade the recipient to comply with Title VI and implement the necessary corrective action.¹¹³

Individuals who bring suit alleging Title VI violations may seek any available legal remedies, including attorney's fees under 42 U.S.C. § 1988, compensatory damages, or an injunction. An individual may not obtain punitive damages.¹¹⁴

Additional resources

Many of Title VI provisions as described here are subject to exceptions or refinements as set forth in Title VI and its implementing regulations and have been interpreted in judicial and administrative case law, which are not addressed in this *Guide*. Additionally, various administrations have issued or withdrawn guidance pertinent to Title VI;¹¹⁵ which shift the government's position but do not themselves alter the law, and are not addressed in this *Guide*.

¹¹¹ 34 C.F.R. § 100.8(a).

¹¹² *Id.* § 100.8(d).

¹¹³ *Id.*

¹¹⁴ *Barnes v. Gorman*, 536 U.S. 181 (2002).

¹¹⁵ See United States Dept. of Justice, Office of Public Affairs, *Attorney General Jeff Sessions Rescinds 24 Guidance Documents*, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents> (last visited July 12, 2018).

Title IX of the Education Amendments of 1972

Brief statement of the law

Title IX of the Education Amendments of 1972 ("Title IX")¹¹⁶ and its implementing regulations¹¹⁷ generally prohibit discrimination on the basis of sex in education programs or activities receiving federal financial assistance. In its focus on education programs, Title IX differs to some extent from the Age Discrimination Act, Section 504, and Title VI, discussed in this *Guide*.

To whom does the law apply?

Title IX and its implementing regulations apply to recipients of federal financial assistance that is provided for education programs.¹¹⁸

- ▶ "Federal financial assistance" generally is defined as any of the following: (1) a grant or loan of federal financial assistance, including funds made available for the acquisition, construction, renovation, restoration or repair of a building or facility or any portion thereof and scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity; (2) a grant of federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the federal government; (3) provision of the services of federal personnel; (4) sale or lease of federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use federal property or

¹¹⁶ 20 U.S.C. §§ 1681-1688.

¹¹⁷ See, e.g., 34 C.F.R. pt. 106. Because each agency administers Title IX with respect to its federal financial assistance programs, numerous federal agencies have implemented regulations under the Act. This Guide will cite ED implementing regulations by way of example. However, a federal financial assistance recipient must comply with the implementing regulations of the federal agencies from which it receives federal financial assistance.

¹¹⁸ 20 U.S.C. § 1681; 34 C.F.R. §§ 106.11-106.17.

any interest therein without consideration; and (5) any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.¹¹⁹

- ▶ A "recipient" generally means any state or political subdivision thereof, or any instrumentality of a state or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to which federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance.¹²⁰

- ▶ Title IX generally defines "program or activity" as all operations of state or local government agencies; colleges, universities, and public elementary and secondary schools; private entities that provide educational and other specified services or receive entity-wide federal assistance; and joint ventures of any of the above.¹²¹ The law applies to all operations of the entity, not merely the program or activity that receives the federal financial assistance. Accordingly, if a component of an independent elementary or secondary school receives federal financial assistance from ED, all operations of the school must comply with Title IX.¹²²

As explained more fully below, Title IX prohibits sex-based discrimination in education programs that receive federal financial assistance. The following entities are exempt from Title IX coverage:

- ▶ Educational institutions that are controlled by religious organizations, if compliance with Title IX requirements would be inconsistent with the religious tenets of the controlling

¹¹⁹ 34 C.F.R. § 106.2(g).

¹²⁰ *Id.* § 106.2(i).

¹²¹ *Id.* § 106.2(h).

¹²² Courts have differed as to whether Title IX applies to a recipient's entire operation or only to the recipient's education programs and activities. *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993) ("[I]f any arm of an educational institution received federal funds, the institution as a whole must comply with Title IX's provisions[.]"); *Preyer v. Dartmouth College*, 968 F. Supp. 20, 25 (D.N.H. 1997) (Title IX applies "only to those operations of a college or university that are educational in nature or bear some relation to the education goal of the institution").

organizations.¹²³

- ▶ Educational institutions that prepare individuals for service in the military or in the merchant marine.¹²⁴
- ▶ Fraternities and sororities, Boys State and Boys Nation and Girls State and Girls Nation conferences, father-son and mother-daughter activities, and beauty pageants.¹²⁵ ED regulations implementing Title IX also exempt Girl Scout, Boy Scout, Camp Fire Girl, YMCA and YWCA programs, and voluntary youth service organizations.¹²⁶

In addition, with regard to admissions policies, Title IX applies only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.¹²⁷

For Title IX purposes, "educational institution" is defined to include any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education.¹²⁸ In cases where an institution is made up of more than one school, college, or department that are administratively separate units, the term means each school, college or department, taken separately.¹²⁹ However, Title IX covers any education program or activity supported with federal financial assistance regardless of whether it is sponsored by an "educational institution" or another entity.¹³⁰

123 20 U.S.C. § 1681(a)(3).

124 Id. § 1681(a)(4).

125 Id. § 1681(a)(6), (7), (8), (9).

126 34 C.F.R. § 106.14.

127 20 U.S.C. § 1681(a)(1).

128 Id. § 1681(c).

129 Id.

130 34 C.F.R. § 106.1.

What does the law require?

1. General nondiscrimination requirements

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."¹³¹ Prohibited sex discrimination includes sexual harassment.¹³² As described below, implementing regulations prohibit discrimination on the basis of sex in a variety of contexts.

2. Admissions

ED regulations forbid sex-based discrimination in admissions.¹³³ As explained above, that prohibition applies only to vocational education, professional education, graduate higher education, and public undergraduate higher education institutions.

3. Education programs and activities

ED regulations forbid sex-based discrimination in education programs and activities.¹³⁴ Recipients may not exclude from participation in, deny the benefits of, or otherwise subject to discrimination, any person, on the basis of sex, in "any academic, extracurricular, research, occupational training, or other education program or activity."¹³⁵ For example, ED regulations provide that recipients may not do the following:

- ▶ Treat one person differently from another on the basis of sex in determining whether such

¹³¹ 20 U.S.C. § 1681(a).

¹³² See United States Dept. of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Student By School Employees, Other Students, or Third Parties (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (last visited June 19, 2018).

¹³³ 34 C.F.R. § 106.21.

¹³⁴ Id. § 106.31.

¹³⁵ Id.

person satisfies any requirement or condition for the provision of any aid, benefit or service;

- ▶ Provide different aid, benefits or services, or provide aid, benefits or services in a different manner on the basis of sex;
- ▶ Deny any person any aid, benefit or service on the basis of sex;
- ▶ Subject any person to different rules of behavior, sanctions, or other treatment on the basis of sex;
- ▶ Apply any rule concerning the domicile or residence of a student or applicant, including eligibility rules for in-state fees and tuition, on the basis of sex;
- ▶ Aid in discrimination against any person by providing significant assistance to entities that discriminate on the basis of sex; or
- ▶ Otherwise limit any person in the enjoyment of any right, privilege, advantage or opportunity on the basis of sex.¹³⁶

An exception to these prohibitions is provided for programs of study in foreign countries administered by a recipient but funded by foreign or domestic wills or trusts or foreign governments, where participation is limited to members of one sex, provided that reasonable opportunities for similar study by members of the other sex also are made available by the recipient institution.¹³⁷

A recipient generally may not provide any course only to members of one sex, or refuse or require participation in particular courses by any of its students on the basis of sex.¹³⁸ However, classes or portions of classes in elementary and secondary schools dealing primarily

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ Id. § 106.34(a).

with human sexuality may be conducted in separate sessions for girls and boys.¹³⁹ In addition, physical education instructors may separate students by sex during participation in wrestling, boxing, ice hockey, basketball, and other sports that involve bodily contact.¹⁴⁰ Distinctions on the basis of vocal range or quality that result in choruses of one or predominantly one sex also are allowed.¹⁴¹

A recipient that “operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities” if each such class or activity is based on an “important objective” of the recipient and the single-sex nature of the class or activity is “substantially related to achieving that objective.”¹⁴² An “important objective” may involve enhancing the educational achievement of a recipient’s students through an “overall established policy to provide diverse educational opportunities” or meeting the “particular, identified educational needs” of the recipient’s students.¹⁴³ Students’ participation in the single-sex class or activity must be “completely voluntary.”¹⁴⁴ In addition, the recipient is required to carry out its “important objective” in an “evenhanded manner” and must provide to “all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.”¹⁴⁵ The recipient must evaluate single-sex classes and activities at least every two years in accordance with ED regulations.¹⁴⁶

ED regulations prohibit sex-based discrimination in the guidance of students or applicants and specify that entities using testing or other instruments for the appraisal and counseling of students may not use different materials for students on the basis of their sex or use materials

139 Id. § 106.34(a)(3).

140 Id. § 106.34(a)(1).

141 Id. § 106.34(a)(4).

142 Id. § 106.34(b). This provision of ED’s regulations does not apply to interscholastic, club, or intramural athletics, which are covered by separate provisions in the regulations. Id. § 106.34(b)(5).

143 Id. § 106.34(b)(1)(i).

144 Id. § 106.34(b)(1)(iii).

145 Id. § 106.34(b)(1)(ii),(iv).

146 Id. § 106.34(b)(4).

that permit or require different treatment of students on that basis unless it is necessary to overcome sex bias.¹⁴⁷ In addition, where the use of a counseling test or other instrument results in a substantially disproportionate representation of one sex in a particular course of study, the school is required to assure itself that such disproportion is not the result of discrimination in the test or its application.¹⁴⁸ Where a school finds a substantial imbalance of students in a particular class, it is also required to ensure that the imbalance is not due to discrimination by counselors.¹⁴⁹

4. Financial aid

A recipient may not discriminate in the provision of financial aid on the basis of sex or treat persons of one sex differently from persons of the other sex with regard to marital or parental status.¹⁵⁰ However, a recipient may administer sex-specific scholarships, fellowships, or other forms of financial assistance established pursuant to a will, trust, or bequest, so long as the overall effect of the award is not discrimination on the basis of sex.¹⁵¹ ED regulations provide guidelines on achieving such a result. If a recipient provides athletic scholarships to student athletes, "reasonable opportunities" for such awards must be provided to members of each sex in proportion to their participation rates in interscholastic or intercollegiate athletics.¹⁵²

5. Housing and health benefits

A recipient may not discriminate in providing housing, or in its cost or quality of the housing, on the basis of sex.¹⁵³ However, a recipient may provide separate housing on the basis of sex.¹⁵⁴ A

¹⁴⁷ Id. § 106.36.

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ Id. § 106.37.

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ Id. § 106.32.

¹⁵⁴ Id.

recipient also may not discriminate on the basis of sex in providing medical, hospital, accident or life insurance benefits to students.¹⁵⁵ A recipient is not prohibited, however, from providing, or failing to provide, a benefit that is used predominantly or entirely by one sex.¹⁵⁶ In addition, Title IX expressly states that it neither requires nor prohibits recipients to provide abortion-related services.¹⁵⁷

6. Athletics

A recipient may not discriminate in athletic programs on the basis of sex. ED regulations provide:

- ▶ “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”¹⁵⁸

ED regulations allow separate teams for male and female athletes under certain circumstances.¹⁵⁹ Where a team is operated for only one sex, and athletic opportunities for the other sex have previously been limited, members of the excluded sex must be allowed to try out for the team unless the sport involved is a contact sport.¹⁶⁰

A recipient must provide equal athletic opportunities for members of both sexes.¹⁶¹ Factors to be considered in determining whether opportunities are equal include: whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members

¹⁵⁵ Id. § 106.39.

¹⁵⁶ Id.

¹⁵⁷ 20 U.S.C. § 1688.

¹⁵⁸ 34 C.F.R. § 106.41(a).

¹⁵⁹ Id. § 106.41(b).

¹⁶⁰ Id.

¹⁶¹ Id. § 106.41(c).

of both sexes; the provision of equipment and supplies, locker rooms and other facilities; the assignment and compensation of coaches and tutors; and a number of other considerations.¹⁶² While unequal aggregate expenditures for members of each sex or for male and female teams do not constitute noncompliance with Title IX, the failure to provide adequate funds for teams for one sex may be considered in assessing equality of opportunity.¹⁶³

7. Employment practices

Under Title IX, discrimination on the basis of sex in employment and recruitment for employment is prohibited.¹⁶⁴ In addition, a recipient is barred from contracting with employment or referral agencies, unions, or benefits administrators whose policies or practices have the effect of discriminating against applicants or employees on the basis of sex.¹⁶⁵ This section of the law applies to hiring; promotion; assignments; compensation and other benefits; the terms of collective bargaining agreements; and any other term, condition, or privilege of employment.¹⁶⁶

A recipient also is prohibited from using any test or criterion for employment that has the effect of discriminating on the basis of sex, unless use of the test can be shown to predict successful performance in the position in question, and alternative, nondiscriminatory tests or criteria are not available.¹⁶⁷ A recipient may not recruit primarily or exclusively from institutions from which applicants are predominantly or entirely members of one sex if such recruitment has the effect of discrimination on the basis of sex.¹⁶⁸ Where an employer has been found to be currently discriminating on the basis of sex, or to have discriminated on that basis in the past, it must recruit members of the excluded sex to overcome the effects of the past or present

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ Id. § 106.51.

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ Id. § 106.52.

¹⁶⁸ Id. § 106.53.

discrimination.¹⁶⁹

A recipient may take employment actions that would otherwise be prohibited by Title IX if it can be shown that sex is a bona-fide occupational qualification for the affected position.¹⁷⁰

However, neither stereotyped characterizations of one or the other sex nor the preferences of recipients, their employees, or their students are acceptable evidence that sex is such a bona fide qualification.¹⁷¹

8. Assurances and affirmative action

Recipients of federal financial assistance for education programs are required to provide assurances to the granting agency that they will operate their programs in compliance with Title IX.¹⁷² In addition, recipients are required to undertake self-evaluations to determine whether their policies and practices comply with Title IX, to modify those that do not comply, and to take affirmative steps to eliminate existing sex discrimination and the effects of past sex discrimination through remedial action.¹⁷³ Recipients also may take affirmative action to overcome the effects of societal conditions that result in limited participation by persons of one sex, even where no finding of discrimination has been made.¹⁷⁴

9. Other requirements

A recipient must designate at least one employee to coordinate its Title IX compliance efforts and publish procedures providing for prompt and equitable resolution of any employee or student complaints that might arise under Title IX.¹⁷⁵ A recipient must make continuing efforts to inform employees and applicants for employment, students and parents of elementary and

¹⁶⁹ Id.

¹⁷⁰ Id. § 106.61.

¹⁷¹ Id.

¹⁷² Id. § 106.4.

¹⁷³ Id. § 106.3(a), (c).

¹⁷⁴ Id. § 106.3(b).

¹⁷⁵ Id. § 106.8.

secondary school students, and other relevant parties (i.e., unions, sources of referrals) of its policy of compliance with Title IX.¹⁷⁶

Who administers the law?

OCR enforces Title IX. Although Title IX covers sex-based employment discrimination, OCR generally refers employment-related complaints to the Equal Employment Opportunity Commission ("EEOC").¹⁷⁷

OCR's administration of Title IX follows the procedures used for enforcement of Title VI.¹⁷⁸ This *Guide* references those enforcement procedures at page 26.

Individuals may also bring suit to challenge alleged violations of Title IX.¹⁷⁹

What are the consequences of non-compliance?

As noted above, ED's enforcement of Title IX, including with respect to the penalties imposed on violators, is generally in accordance with its procedures enforcing Title VI.¹⁸⁰ This *Guide* references those procedures at page 26.

Individuals bringing suit under Title IX may seek any available legal remedies, including

¹⁷⁶ Id. § 106.9.

¹⁷⁷ See United States Dept. of Education, Office for Civil Rights, Sex Discrimination: Overview of the Law, <https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html> (last visited June 19, 2018).

¹⁷⁸ 34 C.F.R. § 106.71; see id. § 104.71 (referencing 34 C.F.R. §§ 100.6 to 100.11 and 34 C.F.R. pt. 101).

¹⁷⁹ Because courts generally interpret Title IX coextensively with Title VI, the Supreme Court's decision prohibiting private suits to enforce Title VI's disparate impact regulations may likewise prohibit private suits under Title IX's disparate impact regulations. See Alexander v. Sandoval, 532 U.S. 275 (2001).

¹⁸⁰ See 34 C.F.R. § 104.71.

attorney's fees under 42 U.S.C. § 1988, compensatory damages, or an injunction.¹⁸¹

Additional resources

Many Title IX provisions as described here are subject to exceptions or refinements as set forth in Title IX and its implementing regulations and have been interpreted in judicial and administrative law and guidance, which this *Guide* does not address. OCR has provided a summary of Title IX's requirements. OCR also has posted on its webpage a number of sources for information regarding sexual harassment and gender equity in athletics. All of these resources may be found at www.ed.gov/about/offices/list/ocr/publications.html#TitleIX. Through OCR, various administrations have issued or withdrawn guidance pertinent to Title IX; those guidance materials and any related recent government actions are not addressed in this *Guide*.¹⁸²

¹⁸¹ Because courts generally interpret Title IX coextensively with Title VI, the Supreme Court's holding that punitive damages may not be awarded in private suits under Title VI and Section 504 may likewise prohibit awards of punitive damages in private suits under Title IX. See *Barnes v. Gorman*, 536 U.S. 181 (2002).

¹⁸² See United States Dep't of Education, [Department of Education Issues New Interim Guidance on Campus Sexual Misconduct](https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> (last visited July 12 2018).

Workplace laws

Drug-Free Workplace Act of 1988

Drug-Free Workplace Act of 1988

Brief statement of the law

The Drug-Free Workplace Act of 1988 ("DWA"), as amended,¹⁸³ and its implementing regulations¹⁸⁴ generally require recipients of federal awards and federal contractors to maintain drug-free workplaces.

To whom does the law apply?

The DWA and its implementing regulations apply to all entities that receive awards directly from any federal agency,¹⁸⁵ including formula grants that have no application process.¹⁸⁶ An "award" includes a federal grant or cooperative agreement, in the form of money or property in lieu of money, but not loans, loan guarantees, interest subsidies, insurance, direct appropriations, veterans' benefits awarded to individuals, or technical assistance in the form of service rather than money.¹⁸⁷ Because only entities that receive awards directly from a federal agency are considered "recipients" under the DWA's implementing regulations,¹⁸⁸ the regulations do not apply to recipients of sub-grants that originate at a federal agency but pass through a state or local government.¹⁸⁹

What does the law require?

The DWA requires each recipient to agree that it will provide a drug-free workplace, as a

¹⁸³ 41 U.S.C. §§ 8101-8106.

¹⁸⁴ See Government-wide Requirements for Drug-Free Workplace (Financial Assistance), 68 Fed. Reg. 66,534, 66,557-60 (Nov. 26, 2003) ("Drug-Free Workplace Regulations") and 48 C.F.R. §§ 23.500-23.506. Most federal agencies have adopted these regulations.

¹⁸⁵ The Drug-Free Workplace Regulations explain that they carry out the portion of the DWA that applies to grants. Drug-Free Workplace Regulations, 68 Fed. Reg. at 66,557. The regulations also apply the DWA's provisions to cooperative agreements and other financial assistance awards, "as a matter of Federal Government policy." *Id.* at 66,557-58.

¹⁸⁶ *Id.* at 66,559-60 (defining "award").

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 66,560.

¹⁸⁹ With some exceptions, the DWA also governs all government contracts with individuals and government contracts with others that are in amounts over \$100,000 and are performed in the United States. 48 C.F.R. § 23.501; *id.* § 2.101.

condition for receiving any award.¹⁹⁰ The commitment to provide a drug-free workplace includes a commitment to:

- ▶ Publish a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of controlled substances is prohibited in the workplace and specifying what actions will be taken against employees who violate such prohibition;
- ▶ Require that each employee engaged in the performance of the grant or contract receive a copy of this published statement;
- ▶ Notify employees, in the published statement, that as a condition of their employment under the grant or contract, they must abide by the terms of the statement and notify the employer in writing within five days of any conviction for violating any criminal drug statute in the workplace;
- ▶ Notify the grantor agency or contracting officer in writing within 10 days after learning of an employee's conviction for violating a criminal drug statute in the workplace (notice should include position title of the convicted employee);
- ▶ Take one of the following actions with regard to an employee so convicted:
 - (1) take appropriate personnel action, up to and including termination; or
 - (2) require satisfactory participation in an approved drug abuse assistance or rehabilitation program;
- ▶ Establish an ongoing drug-free awareness program to inform employees about the dangers of drug abuse in the workplace, the grantee's or contractor's policy of maintaining a drug-free workplace, any drug counseling, rehabilitation and employee assistance programs, and the penalties employees may suffer for drug abuse violations in the workplace; and
- ▶ Make a good faith effort to continue to maintain a drug-free workplace through the foregoing

¹⁹⁰ Drug-Free Workplace Regulations, 68 Fed. Reg. at 66,558-59. Government contractors also must agree to provide a drug-free workplace in order to be eligible for a contract. 48 C.F.R. § 23.504.

measures.¹⁹¹

Who administers the law?

Individual agency heads, their official designees, and contracting officers determine when a grantee or contractor has violated the DWA.¹⁹²

What are the consequences of non-compliance?

Failure to certify compliance with the DWA may prevent an entity from receiving an award from a federal agency.¹⁹³

In addition, an award recipient or contractor violates the DWA by failing to take the actions specified above, or indicating that it is not making a good faith effort to provide a drug-free workplace due to the number employees convicted of criminal drug statutes in the recipient's or contractor's employ.¹⁹⁴ When an award recipient commits such violations, payments under the award may be suspended, the award may be suspended or terminated, or the award recipient may be suspended or debarred for a specified period of time, not to exceed five years.¹⁹⁵

Additional Resources

Many of the DWA provisions as described here are subject to exceptions or refinements as set forth in the DWA and its implementing regulations and have been interpreted in judicial and administrative interpretations, which are not addressed in this *Guide*. Award recipients or contractors subject to the DWA may consult their funding agency or agencies for additional guidance regarding applicable requirements.

191 41 U.S.C. §§ 8102(a)(1), 8103(a)(1); Drug-Free Workplace Regulations, 68 Fed. Reg. at 66,558-59; 48 C.F.R. § 23.504.

192 Drug-Free Workplace Regulations, 68 Fed. Reg. at 66,559; 48 C.F.R. § 23.506.

193 Drug-Free Workplace Regulations, 68 Fed. Reg. at 66,559.

194 Id. at 66,559; 48 C.F.R. § 23.506.

195 41 U.S.C. § 8103(b). Suspension or termination of payment and suspension or debarment proceedings shall be conducted in accordance with all applicable laws, including Executive Order 12549. Id. Executive Order 12549 called for development of a government-wide debarment and suspension system for transactions with federal agencies. See 51 Fed. Reg. 6370 (Feb. 18, 1986); see also 5 C.F.R. §§ 919.100-919.1020 (implementing regulations).

Student privacy laws

Family Educational Rights and Privacy Act

Military recruiting – 10 U.S.C. § 503.

Protection of Pupil Rights Amendment

Family Educational Rights and Privacy Act

Brief statement of the law

The Family Educational Rights and Privacy Act ("FERPA"), as amended,¹⁹⁶ and its implementing regulations,¹⁹⁷ generally require schools to comply with certain policies regarding student education records and personally identifiable information contained in such records.

To whom does the law apply?

FERPA and its implementing regulations apply only to schools that receive funds under a program administered by the Secretary of Education. A school is a recipient of such funds if the funds (1) are provided to the school by grant, cooperative agreement, contract, subgrant, or subcontract or (2) are provided to students attending the school and the funds may be paid to the school by those students for educational purposes.¹⁹⁸ If a school receives funds under programs administered by the Secretary of Education, FERPA applies to the school as a whole, including each of its components (such as a department within a school).¹⁹⁹

What does the law require?

1. Key definitions

FERPA and its implementing regulations require schools to comply with certain policies regarding student "education records" and "personally identifiable information" contained in such records. A "record" is "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche."²⁰⁰

¹⁹⁶ 20 U.S.C. § 1232g.

¹⁹⁷ 34 C.F.R. pt. 99.

¹⁹⁸ *Id.* § 99.1.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* § 99.3.

An "education record" is defined to include, with certain exceptions, records that "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."²⁰¹ A student's "personally identifiable information" includes, but is not limited to (a) the student's and family members' names and addresses, (b) a "personal identifier, such as the student's social security number, student number, or biometric record," (c) "[o]ther indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name," (d) "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty," or (e) information sought by an individual who the school "reasonably believes knows the identity of the student to whom the education record relates."²⁰²

FERPA generally provides certain protections and rights to parents and "eligible students" with respect to disclosure and review of education records. An "eligible student" is a student who is 18 or older or is attending a postsecondary institution.²⁰³ When a student becomes an "eligible student", protections and rights afforded the student's parents under FERPA are transferred to the eligible student.²⁰⁴

2. Disclosure requirements

With certain notable exceptions, FERPA generally requires written consent of a parent or eligible student before a school may disclose the student's education records or personally identifiable information contained in those records.²⁰⁵ Consent must be written, signed, and dated and must specify the records that may be disclosed, the purpose of the disclosure, and the

²⁰¹ 20 U.S.C. § 1232g(a)(4); see 34 C.F.R. § 99.3.

²⁰² 34 C.F.R. § 99.3.

²⁰³ Id.

²⁰⁴ Id. § 99.5.

²⁰⁵ 20 U.S.C. § 1232g(b); 34 C.F.R. §§ 99.30, 99.31.

party or class of parties to whom the disclosure may be made.²⁰⁶ "Disclosure" means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record."²⁰⁷

FERPA and its implementing regulations specify the circumstances under which non-consensual disclosure of education records is permitted.²⁰⁸ For example:

- ▶ Written consent is not required for disclosure of student information to school officials, including teachers, who the school has determined have legitimate educational interests in the information.²⁰⁹ If the school has a policy of disclosing education records to such school officials, it must annually notify parents and eligible students of its "criteria for determining who constitutes a school official and what constitutes a legitimate educational interest."²¹⁰
- ▶ Written consent is not required for release of information that the school has designated as "directory information."²¹¹ "Directory information" includes, but is not limited to, "the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.*, undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended."²¹²
Directory information also includes "a student ID number, user ID, or other unique personal

206 34 C.F.R. § 99.30. ED regulations provide that a signed, dated, and written consent "may include a record and signature in electronic form that – (1) Identifies and authenticates a particular person as the source of the electronic consent; and (2) Indicates such person's approval of the information contained in the electronic consent." *Id.* § 99.30(d).

207 *Id.* § 99.3.

208 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.31.

209 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1). School officials may include contractors, consultants, volunteers, or other parties to whom a school has "outsourced institutional services or functions" for which the school "would otherwise use employees" if the outside party is "under the direct control" of the school with respect to the "use and maintenance of education records" and is subject to the implementing regulations' requirements "governing the use and redisclosure of personally identifiable information from education records." 34 C.F.R. § 99.31(a)(1)(i)(B).

210 34 C.F.R. § 99.7(a)(3)(iii).

211 *Id.* § 99.37.

212 *Id.* § 99.3; *see* 20 U.S.C. §§ 1232g(a)(5)(A), 1232g(b)(1); 34 C.F.R. §§ 99.31(a)(11), 99.37.

identifier used by the student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user."²¹³ A student' social security number is not directory information.²¹⁴ A school must give "public notice" of the types of personally identifiable information that it has designated as directory information.²¹⁵ A parent or eligible student may object in writing to a school's designation of any or all of the student's personal information as directory information.²¹⁶ If a student objects, the school may not release what would ordinarily be directory information about that student without written consent.²¹⁷ A parent or eligible student may not, however, object to disclosures of the student's name, identifier, or institutional email address in a class in which the student is enrolled, or prevent a school from requiring a student to wear or disclose and ID card or badge that exhibits directory information.²¹⁸

- ▶ Schools should consult ED regulations for a complete list of the circumstances under which a school may disclose education records without consent.

3. Recordkeeping and redisclosure requirements

A school must maintain a record of each request for access to and each disclosure of personally identifiable information in a student's education records to persons other than the parent or student or certain other parties.²¹⁹ Generally, a school may disclose personally identifiable information from an education record only on the condition that the party to whom the

²¹³ 34 C.F.R. § 99.3.

²¹⁴ Id.

²¹⁵ 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37.

²¹⁶ 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37.

²¹⁷ 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37.

²¹⁸ 34 C.F.R. § 99.37(c).

²¹⁹ 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § 99.32.

information is disclosed will not disclose the information to any other party without written consent.²²⁰ This requirement does not prohibit schools from disclosing such information “with the understanding that the party receiving the information may make further disclosures of the information” on the school’s behalf if the disclosures are otherwise consistent with FERPA and any recordkeeping requirements are met.²²¹

4. The USA PATRIOT Act

The USA PATRIOT Act, which Congress enacted in response to the September 11, 2001 terrorist attacks, amended FERPA to permit a school to disclose education records—without consent or knowledge of the student or parent—to the United States Attorney General or his designee in response to an *ex parte* order related to a terrorism investigation or prosecution.²²² The Attorney General may designate a United States Assistant Attorney General or a higher ranking official.²²³ A court must issue an *ex parte* order for education records if the Attorney General or his designee certifies to the court that “specific and articulable facts” support the request and the education records are relevant to a terrorism investigation or prosecution.²²⁴ A school need not record a disclosure pursuant to such an order.²²⁵ In addition, unlike other FERPA provisions permitting disclosure of education records, a school “shall not be liable to any person” for good faith disclosure of education records in response to such an order.²²⁶

5. Inspection of and amendments to education records

FERPA also gives parents and eligible students the right to inspect, review and request amendment of the student's education records.²²⁷ A school must respond to a request for

²²⁰ 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33.

²²¹ 34 C.F.R. § 99.33(b)(1).

²²² USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, § 507 (Oct. 26, 2001); see also 34 C.F.R. § 99.31(a)(9)(ii)(C).

²²³ 20 U.S.C. § 1232g(j).

²²⁴ Id.

²²⁵ Id.

²²⁶ Id.

²²⁷ 34 C.F.R. §§ 99.10, 99.20.

access to records within 45 days after it has received the request, and must respond to reasonable requests to explain or interpret the records.²²⁸ A school may ordinarily charge a fee for copying requested records.²²⁹ FERPA generally does not give a parent or eligible student the right to inspect records of another student, financial records of the student's parents, or letters of recommendation as for which the student has waived his or her right of review.²³⁰

In the event that a parent or eligible student believes records relating to the student contain information that is inaccurate, misleading or in violation of the student's privacy rights, FERPA sets forth procedures according to which the school must respond to the amendment request. The school must decide whether to amend the record within "a reasonable time" after it receives such a request, and if it decides not to amend the record, it must inform the parent or eligible student of his or her right to a hearing.²³¹ At the parent's or eligible student's request, the school must hold a hearing that gives the requestor a full and fair opportunity to present evidence and that complies with other procedural requirements set forth in FERPA regulations. If the school determines not to amend the record as requested, the parent or eligible student has the right to place a statement in his or her record commenting on the contested information and/or stating why he or she disagrees with the school's determination.²³²

6. Annual notice requirements

FERPA requires that schools annually notify parents and eligible students of their rights under FERPA.²³³ A school may provide this notice by any means that are reasonably likely to inform parents or eligible students of their rights.²³⁴

²²⁸ *Id.* § 99.10.

²²⁹ *Id.* § 99.11.

²³⁰ *Id.* § 99.12.

²³¹ *Id.* § 99.20.

²³² *Id.* § 99.21.

²³³ *Id.* § 99.7.

²³⁴ *Id.*

Who administers the law?

ED's Family Policy Compliance Office ("FPCO") administers FERPA.

What are the consequences of non-compliance?

If ED determines that a school has violated FERPA, it may terminate the school's funding under ED-administered programs. If ED finds that a third party improperly redisclosed personally identifiable information, the school may not allow that third party access to such information for at least five years.²³⁵ Individuals may not bring private actions under FERPA.²³⁶

Additional resources

Many of the FERPA provisions as described here are subject to exceptions or refinements as set forth in the statute and regulations and have been interpreted in case law and ED letter rulings, which are not addressed in this *Guide*. *The Family Educational Rights and Privacy Act: A Legal Compendium* (Steven J. McDonald, ed., 2d ed. 2002), available from the National Association of College and University Attorneys, is a useful resource. Other good sources are *The AACRAO 2013 FERPA Guide*, available from the American Association of Collegiate Registrars and Admissions Officers (www.aacrao.org), and the FPCO website (www.ed.gov/policy/gen/guid/fpc/index.html?exp=0). In addition, NAIS has [many](#) documents relating to [educational records and independent schools](#) on its web site.

²³⁵ *Id.* § 99.67(e).

²³⁶ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

Military recruiting – 10 U.S.C. § 503

NAIS has a very thorough article on military recruiting in independent schools. Click on this link to access this document: <http://www.nais.org/Articles/SiteAssets/Pages/Is-Your-School-Required-to-Give-Military-Recruiters-Access-to-Your-Students/MilitaryRecruiterAccess.pdf>.

Or, you may search the NAIS web site for the document entitled: *Is Your School Required to Give Military Recruiters Access to Your Students?*

Protection of Pupil Rights Amendment

Brief statement of the law

The Protection of Pupil Rights Amendment ("PPRA")²³⁷ generally provides certain rights to parents in connection with elementary and secondary schools that survey minor children, collect information from students for marketing purposes, or perform certain non-emergency medical examinations.

To whom does the law apply?

Certain PPRA provisions apply to surveys funded by ED and require schools or contractors administering such surveys to take certain action.²³⁸ Other PPRA provisions apply to surveys funded by third parties and require "local educational agencies" that receive funds under any ED program to take certain action with respect to such surveys.²³⁹ The PPRA defines "local educational agencies" ("LEAs") to include elementary schools, secondary schools, school districts, or local boards of education.²⁴⁰ Thus, the PPRA apparently applies to independent elementary and secondary schools that receive funds under any ED program. This is a different definition than many ED program applications, as LEAs are usually defined only in the context of public schools.

What does the law require?

The PPRA provides certain rights to parents in connection with schools that survey minor children, collect information from students for marketing purposes, or perform certain non-emergency medical examinations. The No Child Left Behind Act of 2001 (the "NCLB Act") significantly amended the PPRA to apply to non-ED funded surveys as well as ED-funded

²³⁷ 20 U.S.C. § 1232h.

²³⁸ *Id.* § 1232h(a), (b).

²³⁹ *Id.* § 1232h(c).

²⁴⁰ *Id.* § 1232h(c)(6)(C).

surveys.²⁴¹ To date, ED has not promulgated regulations implementing the NCLB Act's amendments to the PPRA.

1. ED-funded surveys

Under the PPRA, schools must make available to parents materials that will be used in connection with any ED-funded survey, analysis, or evaluation report.²⁴² In addition, a school must obtain prior written consent of the student (if the student is an adult or emancipated minor) or the parent (if the student is an unemancipated minor) before the student can be required to participate in an ED-funded survey, analysis, or evaluation that reveals information regarding at least one of the following eight items:

- ▶ political affiliations or beliefs of the student or parents
- ▶ mental or psychological problems of the student or student's family
- ▶ sex behavior or attitudes
- ▶ illegal, anti-social, self-incriminating, or demeaning behavior
- ▶ critical appraisals of other individuals with whom respondents have close family relations
- ▶ legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers
- ▶ religious practices, affiliations, or beliefs of student or parent
- ▶ income (other than that required by law to determine eligibility for student aid under the

²⁴¹ See Pub. L. 107-110, Title X, § 1061.

²⁴² *Id.* § 1232h(a).

relevant program).²⁴³

2. Third-party-funded surveys

The PPRA provides that an LEA that receives funds under ED programs must develop and adopt policies, in consultation with parents, on matters related to surveys funded by third parties and physical examinations or screening that the LEA administers.²⁴⁴ In particular, the policies must address:

- ▶ Parents' rights to inspect upon request a survey created by a third party before the survey is administered or distributed by a school to a student and applicable procedures related to such right.
- ▶ Arrangements to protect student privacy in the event of the administration or distribution of a survey to a student that contains at least one of the eight items listed above in connection with ED-funded surveys.
- ▶ Parents' right to inspect, upon request, any instructional material used as part of the educational curriculum for the student and procedures for granting such requests.
- ▶ Administration of physical examinations or screenings that the school may administer to a student.
- ▶ Collection, disclosure, or use of information collected from students for the purpose of marketing or selling that information, including arrangements to protect student privacy.
- ▶ Parents' right to inspect, upon request, any instrument used in the collection of personal information for the purpose of marketing or selling before the instrument is administered or distributed to a student and procedures for granting such requests.²⁴⁵

LEAs must notify parents of the above policies.²⁴⁶ At a minimum, the LEA must provide such notice annually, at the beginning of the school year, and within a reasonable period of time after any substantive change to such policies. In the notification, LEAs must offer parents and, where

²⁴³ *Id.* § 1232h(b).

²⁴⁴ *Id.* § 1232h(c)(1).

²⁴⁵ *Id.*

²⁴⁶ *Id.* § 1232h(c)(2).

appropriate, students, an opportunity to remove the student from participation in the following activities:

- ▶ Activities involving the collection, disclosure, or use of personal information collected from students for the purpose of marketing or selling that information.
- ▶ The administration of any non-ED-funded survey containing at least one of the eight items of information described above in connection with ED-funded surveys.
- ▶ Any non-emergency, invasive physical examination or screening that is required as a condition of attendance, is administered by the school and scheduled by the school in advance, and is not necessary to protect the immediate health and safety of the student or other students.²⁴⁷

The notice must inform parents of the approximate dates on which the above activities will occur.²⁴⁸

PPRA requirements related to activities involving the collection and disclosure of personal information from students for marketing purposes does not apply to the collection, disclosure, or use of such information for the exclusive purpose of developing, evaluating, or providing educational products or services for, or to, students or educational institutions.²⁴⁹ For example, the requirements do not apply to college or other postsecondary recruitment; book clubs, magazines, and programs providing access to low-cost literacy products; curriculum and instructional materials used by elementary and secondary schools; tests and assessments used by elementary and secondary schools to provide cognitive, evaluative, diagnostic, clinical, aptitude, or achievement information about students; the sale of products or services to raise

²⁴⁷ Id.

²⁴⁸ Id.

²⁴⁹ Id. § 1232h(c)(4).

funds for school-related or education-related activities; and student recognition programs.²⁵⁰

Rights provided to parents under the PPRA transfer from the parent to the student when the student turns 18 years old or is an emancipated minor under applicable law.²⁵¹

Who administers the law?

FPCO administers the PPRA.

What are the consequences of non-compliance?

The Secretary of Education may take such action as he or she deems appropriate, including termination of assistance provided under an ED program, if a recipient violates the PPRA.²⁵²

Additional resources

Many of the PPRA provisions described here are subject to exceptions or refinements as set forth in the PPRA, have been interpreted in ED guidance and may be subject to administrative and judicial interpretation, which are not addressed in this *Guide*. The FPCO website (<http://www.ed.gov/policy/gen/guid/fpc/index.html?exp=0>) provides useful information about the PPRA, including model notices.

²⁵⁰ Id.

²⁵¹ Id. § 1232h(c)(5)(B).

²⁵² Id. 1232h(e).

Lobbying laws

Byrd Amendment

OMB Circular A-122, Cost Principles for Non-Profit Organizations

Byrd Amendment

Brief statement of the law

The Byrd Amendment, as amended,²⁵³ and its implementing regulations²⁵⁴ generally regulate use of federal funds in connection with lobbying activities.

To whom does the law apply?

The Byrd Amendment and its implementing regulations apply generally to recipients of federal contracts, grants, loans, or cooperative agreements,²⁵⁵ as well as to those who seek to participate in such arrangements with the federal government.²⁵⁶

- ▶ A "federal contract" is "an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR."²⁵⁷

- ▶ A "federal grant" is "an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person."²⁵⁸ A federal grant "does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an

²⁵³ 31 U.S.C. § 1352.

²⁵⁴ OMB required major agencies, including ED, to adopt common regulations implementing the Byrd Amendment. *See* 54 Fed. Reg. 52306 (Dec. 20, 1989). Although there may be minor agency-specific differences, the substance of all regulations implementing the Byrd Amendment is generally the same. This *Guide* will cite ED's implementing regulations by way of example. *See* 34 C.F.R. pt. 82.

²⁵⁵ 31 U.S.C. § 1352(a)(1).

²⁵⁶ *E.g.* *id.* § 1352(b). Unless otherwise specified, this *Guide's* discussion of the Byrd Amendment uses the term "recipient" to refer to those who request federal grants, contracts, loans, and cooperative agreements, as well as to those who actually participate in such arrangements with the federal government.

²⁵⁷ 34 C.F.R. § 82.105(c).

²⁵⁸ *Id.* § 82.105(e); *see* 31 U.S.C. § 1352(g)(6)(A)(ii) (defining federal grant as "a grant made by an agency or a direct appropriation made by law to any person").

individual."²⁵⁹

- ▶ A "federal cooperative agreement" is "a cooperative agreement entered into by an agency."²⁶⁰
- ▶ A "federal loan" is "a loan made by an agency," but "does not include loan insurance or a loan guaranty."²⁶¹
- ▶ The term "recipient", when used "with respect to funds received in connection with a Federal contract, grant, loan, or cooperative agreement," includes "contractors, subcontractors, or subgrantees (as the case may be) of the recipient."²⁶²
- ▶ An "agency" includes any federal "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency" of the federal government.²⁶³

What does the law require?

1. Impermissible use of federal funds

The Byrd Amendment and its implementing regulations prohibit any recipient of a federal contract, grant, loan, or cooperative agreement from using any appropriated federal funds to influence, or attempt to influence, federal agency employees, members of Congress, or Congressional employees with respect to any "covered Federal actions."²⁶⁴ Covered federal actions are the "awarding of any Federal contract," the "making of any Federal grant" or loan, the "entering into of any cooperative agreement," or the "extension, continuation, renewal,

²⁵⁹ 34 C.F.R. § 82.105(e).

²⁶⁰ 31 U.S.C. § 1352(g)(6)(A)(iii); see 34 C.F.R. § 82.105(d). Federal contracts, grants, and cooperative agreements, as those terms are used in the Byrd Amendment and its implementing regulations, do not, however, include "direct United States cash assistance to an individual," loans, loan insurance, or a loan guaranty. 31 U.S.C. § 1352(g)(6)(B).

²⁶¹ Id. § 1352(g)(7).

²⁶² Id. § 1352(g)(1)(A). The term does not include Indian tribes or other Indian organizations that are exempt from the Byrd Amendment's provisions by other federal law. See id. § 1352(g)(1)(B).

²⁶³ 5 U.S.C. § 552(f)(1); see 31 U.S.C. § 1352(g)(2) (defining "agency" as having "the same meaning provided for such term in section 552(f) of title 5").

²⁶⁴ 34 C.F.R. § 82.100(a); see 31 U.S.C. § 1352(a).

amendment, or modification of any Federal contract, grant, loan, or cooperative agreement."²⁶⁵

2. Permissible use of federal funds

Neither the Byrd Amendment nor its implementing regulations prohibit a recipient from using federal funds to pay its officers or employees "for agency and legislative liaison activities not directly related to a covered Federal action,"²⁶⁶ because those activities are not considered lobbying under the Byrd Amendment. The regulations clarify the circumstances in which certain "agency and legislative liaison activities" will not be deemed lobbying subject to the Byrd Amendment's restrictions. For instance, provision of information specifically requested by Congress or an agency "is allowable at any time."²⁶⁷ For example, if a head of school is asked to testify before Congress about the implementation of a voucher program in which his school participates, this preparation and appearance fall into the areas of permissible use.

Other agency and legislative liaison activities related specifically to the recipient's product or services, such as technical discussions regarding the application of the product or service for agency use, are likewise allowable at any time if "they are not related to a specific solicitation for any covered Federal action."²⁶⁸ Other activities, such as "[t]echnical discussions regarding the preparation of an unsolicited proposal prior to its official submission," are exempt from the Byrd Amendment's restrictions on the use of federal funds only where those activities take place "prior to formal solicitation of any covered Federal action."²⁶⁹

A recipient may use federal funds to make payments of reasonable compensation to its officers, employees, or others if the "payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative

²⁶⁵ 34 C.F.R. § 82.105(b).

²⁶⁶ *Id.* § 82.200(a); *see* 31 U.S.C. § 1352(d)(1)(A).

²⁶⁷ 34 C.F.R. § 82.200(b).

²⁶⁸ *Id.* § 82.200(c).

²⁶⁹ *Id.* § 82.200(d).

agreement."²⁷⁰ The regulations clarify that "professional and technical services" include only "advice and analysis directly applying any professional or technical discipline."²⁷¹ For example, it is permissible to use federal funds to pay an attorney to draft a legal document that accompanies a recipient's bid or proposal, but not to conduct lobbying activities on the recipient's behalf.²⁷² Another example would be the retention of a grant writer to prepare a grant proposal on the school's behalf.

3. Certification and disclosure requirements

The Byrd Amendment and its implementing regulations require those who request or receive a federal contract, grant, loan, cooperative agreement, or agency commitment to insure or guarantee a loan, to file certain written declarations with the relevant agency.²⁷³ In the case of federal contracts, grants, loans, or cooperative agreements, the declaration must include a certification that the person making the declaration has not made, and will not make, any payment prohibited under the Byrd Amendment, as well as a disclosure of any and all individuals who have "made lobbying contacts on behalf of that person with respect to that Federal contract, grant, loan, or cooperative agreement."²⁷⁴ With respect to loan insurance or guarantees, a person need disclose only the name of any individual "who has made lobbying contacts on behalf of the person in connection with that loan insurance or guarantee."²⁷⁵ The regulations clarify that these certification and disclosure requirements apply only with respect to federal grants, contracts, or cooperative agreements of more than \$100,000, as well as to federal loans or commitments to insure or guarantee a loan of more than \$150,000.²⁷⁶ The required

²⁷⁰ Id. §§ 82.205(a), 82.300(a); see 31 U.S.C. § 1352(d)(1)(B). Requirements imposed by or pursuant to law as a condition of receipt of a federal contract, grant, loan, or cooperative agreement "include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents." 34 C.F.R. § 82.205(c).

²⁷¹ 34 C.F.R. § 82.205(b).

²⁷² Id.

²⁷³ 31 U.S.C. § 1352(b)(1); see 34 C.F.R. § 82.100(b)-(e).

²⁷⁴ 31 U.S.C. § 1352(b)(2). In addition, the person requesting or receiving a federal contract, grant, loan, or cooperative agreement must also file copies of similar declarations by any subcontractors or subgrantees to those contracts, grants, loans, or cooperative agreements. Id. § 1352(b)(5).

²⁷⁵ Id. § 1352(b)(3).

²⁷⁶ 34 C.F.R. § 82.110(a), (b). Similarly, under the regulations, disclosure requirements generally apply only with respect to subcontracts or subgrants in excess of \$100,000. Id. § 82.110(d).

certification and disclosure forms are reproduced in Appendix A and Appendix B of the regulations, respectively.

Recipients or applicants for federal contracts, grants, loans, cooperative agreements, or loan insurance or guarantees must also file disclosure forms "at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person."²⁷⁷ Such events include a "cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action," a change in the persons who will be conducting lobbying activities on the recipient's behalf with respect to a covered federal action, or a change in the federal officials or employees that the recipient will be lobbying with respect to such covered federal action.²⁷⁸

Reporting requirements do not, however, apply to "payments of reasonable compensation" to a recipient's regularly employed officers or employees,²⁷⁹ or with respect to a recipient's use of federal funds to conduct permissible agency and legislative liaison or professional and technical services activities, as described above.

Who administers the law?

The head of each agency administering a federal grant, loan, contract, cooperative agreement, or loan insurance or guarantee is authorized to "take such actions as are necessary to ensure that the provisions" of the Byrd Amendment and its implementing regulations "are vigorously implemented and enforced in that agency."²⁸⁰

What are the consequences of non-compliance?

An individual or organization that makes an expenditure prohibited under the Byrd Amendment and its regulations is subject to a civil penalty of "not less than \$10,000 and not more than

²⁷⁷ Id. § 82.110(c).

²⁷⁸ Id.

²⁷⁹ Id. § 82.210.

²⁸⁰ Id. § 82.410.

\$100,000 for each such expenditure."²⁸¹ Failure to file or amend a required disclosure form likewise subjects an individual or organization to a civil penalty "of not less than \$10,000 and not more than \$100,000 for each such failure."²⁸² Under either of the above scenarios, the regulations provide that the civil penalty for a first offense shall be \$10,000, "absent aggravating circumstances."²⁸³ In general, "[i]n determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate."²⁸⁴ The United States may also seek other remedies available under law.²⁸⁵

Additional resources

Many of the provisions as described here are subject to exceptions or refinements as set forth in the Byrd Amendment and its implementing regulations and to agency and judicial interpretations, which are not addressed in this *Guide*. Grantees or contractors subject to these statutory and regulatory provisions may consult their funding agency or agencies for additional guidance regarding applicable requirements. In addition, a useful general resource is the *Federal Grants Management Handbook* (Thompson Pub., July 2012), available from the Grants Management Advisory Service.²⁸⁶

²⁸¹ 31 U.S.C. § 1352(c)(1); see 34 C.F.R. § 82.400(a).

²⁸² 31 U.S.C. § 1352(c)(2)(A); see 34 C.F.R. § 82.400(b). Filing of a required declaration or declaration amendment after an agency begins "an administrative action for the imposition of a civil penalty . . . does not prevent the imposition of such civil penalty for a failure occurring before that date." 31 U.S.C. § 1352(c)(2)(B); see 34 C.F.R. § 82.400(c). An administrative action "is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure." 31 U.S.C. § 1352(c)(2)(B); see 34 C.F.R. § 82.400(c).

²⁸³ 34 C.F.R. § 82.400(e).

²⁸⁴ Id. § 82.400(d).

²⁸⁵ 31 U.S.C. § 1352(c)(4); 34 C.F.R. § 82.400(f).

²⁸⁶ See, e.g., 2 *Federal Grants Management Handbook* ¶ 516, at 77-80.

OMB Circular A-122

Brief statement of the law

OMB Circular A-122, "Cost Principles for Non-Profit Organizations,"²⁸⁷ establishes principles for federal agencies and recipients to apply in determining which costs incurred by non-profit organizations in connection with federal grants, contracts, or other agreements may be paid with federal funds. OMB Circular A-122 in pertinent part prohibits recipients of federal funds under federal grants, contracts, or other agreements from using federal funds in connection with certain lobbying activities.

To whom does the law apply?

OMB Circular A-122 applies to non-profit organizations, other than colleges and universities subject to OMB Circular A-21,²⁸⁸ that are "operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest" and that use their "net proceeds to maintain, improve, and/or expand [their] operations."²⁸⁹ Accordingly, federal grants, contracts, or other agreements to which an independent elementary or secondary school is a party are governed by OMB Circular A-122, and such schools must comply with rules contained in OMB Circular A-122 related to use of federal funds in connection with lobbying and other activities relating to the federal agreement.

What does the law require?

1. Impermissible use of federal funds

In pertinent part, OMB Circular A-122 prohibits recipients from paying costs associated with

²⁸⁷ OMB Circular A-122, "Cost Principles for Non-Profit Organizations" (revised May 10, 2004), [available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A122/a122_2004.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A122/a122_2004.pdf). In 2005, OMB Circular A-122 was "relocated" to title 2 of the Code of Federal Regulations and can be found at 2 C.F.R. Pt. 230., [available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/federal_register/FR2005/083105_a122.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/federal_register/FR2005/083105_a122.pdf).

²⁸⁸ OMB Circular A-21, "Cost Principles for Educational Institutions" (revised May 10, 2004), [available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A21/a21_2004.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A21/a21_2004.pdf), applies to colleges and universities and, like OMB Circular A-122, establishes principles for federal agencies and recipients to apply in determining which costs incurred by colleges and universities with federal grants, contracts, or other agreements may be paid with federal funds. In 2005, OMB Circular A-21 was "relocated" to title 2 of the Code of Federal Regulations and can be found at 2 C.F.R. Pt. 220, [available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/federal_register/FR2005/083105_a21.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/federal_register/FR2005/083105_a21.pdf).

²⁸⁹ See OMB Circular A-122 ¶ 4.

specified lobbying activities, at the federal, state, or local level, with federal funds. For example, it is impermissible to seek federal reimbursement for costs associated with the following:

- ▶ Attempts "to influence the outcomes of any Federal, State, or local election, referendum, initiative or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity";
- ▶ "Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections";
- ▶ Any attempt to influence the introduction, enactment, or modification of any federal or state legislation through communication with any member or employee of the Congress or state legislature, or through the preparation or distribution of publicity or propaganda "urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter writing or telephone campaign";²⁹⁰ and
- ▶ Any attempt to "improperly influence either directly or indirectly, an employee or officer of the Executive Branch of the Federal Government to give consideration or to act regarding a sponsored agreement or a regulatory matter."²⁹¹

Like the Byrd Amendment, OMB Circular A-122 does not prohibit recipients from engaging in these activities altogether, but merely precludes the use of federal funds in connection with those activities.

2. Permissible use of federal funds

OMB Circular A-122 clarifies that the restriction on use of federal funds for lobbying activities does not apply with respect to certain activities, such as responses to specific agency requests for information "directly related to the performance of a grant, contract or other agreement."²⁹² A recipient may also use federal funds to pay costs for travel, lodging, or meals "incurred to offer testimony at a regularly scheduled Congressional hearing pursuant to a written request for such

²⁹⁰ OMB Circular A-122, Att. B, ¶ 25(a).

²⁹¹ *Id.* Att. B, ¶ 25(d).

²⁹² *Id.* Att. B, ¶ 25(b)(1).

presentation."²⁹³ A recipient may also pay with federal funds costs associated with "[a]ny activity specifically authorized by statute to be undertaken with funds from the grant, contract, or other agreement."²⁹⁴

3. Recordkeeping and reporting requirements

Nonprofit organizations subject to OMB Circular A-122 must "maintain adequate records to demonstrate that the determination of costs as being allowable or unallowable . . . complies with the requirements" of that Circular.²⁹⁵ If a recipient has not materially misstated its lobbying or other costs associated with the federal award for the five prior years, and lobbying activities generally comprise no more than 25% of an employee's compensated time in a given month, the recipient is "not required to establish records to support the allowability of claimed costs in addition to records already required or maintained," and "the absence of time logs, calendars, or similar records will not serve as a basis for disallowing costs by contesting estimates of lobbying time spent by employees during a calendar month."²⁹⁶

OMB Circular A-122 further requires that, when an institution or organization submits a request for reimbursement for indirect costs,²⁹⁷ it must separately identify lobbying costs in its annual indirect cost rate proposal, and must include as part of that annual proposal a certification of compliance with the Circular's applicable requirements and standards.²⁹⁸

Who administers the law?

Each agency that administers programs involving awards subject to OMB Circular A-122 must

²⁹³ Id.

²⁹⁴ Id. Att. B, ¶ 25(b)(3).

²⁹⁵ Id. Att. B, ¶ 25(c).

²⁹⁶ Id.

²⁹⁷ "Indirect costs" generally are "those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective." Id. Att. A, ¶ C. For example, indirect costs include general administration expenses such as director's office expenses. "Direct costs" generally are "those that can be identified specifically with a particular final cost objective," for example, "a particular award, project, service, or other direct activity of an organization." Id. Att. A, ¶ B.

²⁹⁸ Id. Att. B, ¶ 25(c).

implement the provisions of that Circular.

What are the consequences of non-compliance?

Material failure to comply with the requirements²⁹⁹ of OMB Circular A-122 typically results in disallowance of costs of the activity or action not in compliance and an obligation to repay the disallowed costs. Noncompliance could also subject a recipient to additional award conditions;³⁰⁰ to temporary withholding of cash payments "pending correction of the deficiency by the recipient or more severe enforcement action" by the funding agency;³⁰¹ to whole or partial suspension or termination of the current award;³⁰² to withholding of further awards for the applicable project or program;³⁰³ or to other legally available remedies.³⁰⁴ Failure to comply with applicable requirements would also likely prevent agency approval of the indirect cost rate proposals submitted by an institution or organization. Failure to comply with applicable requirements could also lead to initiation of a debarment or suspension action³⁰⁵ by which the recipient could be excluded from participation in Federal assistance programs and activities.³⁰⁶

Additional resources

Many of the provisions as described here are subject to exceptions or refinements as set forth in OMB Circular A-122 and other OMB and agency guidance, which are not addressed in this *Guide*. Non-profit organizations subject to OMB Circular A-122 should consult accountants

299 OMB Circular A-110, discussed in this *Guide* at pages 72-79, requires compliance with OMB Circular A-122. Accordingly, noncompliance with OMB Circular A-122 may trigger enforcement action under OMB Circular A-110.

300 OMB Circular A-110, "Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations" (revised Sept. 30, 1999), [available at https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-110.pdf](https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-110.pdf). Codified for purposes of ED programs at 34 C.F.R. pt. 74; 34 C.F.R. §§ 74.14, 74.62(a).

301 34 C.F.R. § 74.62(a)(1).

302 *Id.* § 74.62(a)(3); *see id.* § 74.61(a)(1). If an award is suspended or terminated, the recipient generally may not recover costs incurred during the period of suspension or after the award's termination. *Id.* § 74.62(c).

303 *Id.* § 74.62(a)(4).

304 *Id.* § 74.62(a)(5).

305 *Id.* § 74.62(d); *see id.* § 74.13. *See generally* 2 C.F.R. § 3485.

306 2 C.F.R. § 3485.12; *see id.* §§ 180.110, 180.125, 180.625

familiar with federal cost accounting for additional guidance regarding the requirements applicable to lobbying activities, as well as regarding the other cost principles delineated in OMB Circular A-122. Other useful general resources are the *Federal Grants Management Handbook* (Thompson Pub., July 2012),³⁰⁷ available from the Grants Management Advisory Service, and *Principles of Federal Appropriations Law*, Chapter 10 (Federal Assistance: Grants and Cooperative Agreements), published by the Government Accountability Office and available from the Government Printing Office.

307 See, e.g., 2 *Federal Grants Management Handbook* ¶ 516, at 77-80.

Accountability requirements

OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations

OMB Circular A-122, Cost Principles for Non-Profit Organizations

OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations

OMB Circular A-110

Brief statement of the law

OMB Circular A-110,³⁰⁸ "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," and its implementing regulations³⁰⁹ set forth uniform administrative requirements applicable to recipients or subrecipients of federal grants and agreements.

To whom does the law apply?

OMB Circular A-110 and its implementing regulations apply to public or private institutions of higher education, hospitals, and other non-profit organizations that are the recipients of federal awards.³¹⁰ A "recipient" is defined as "an organization receiving financial assistance directly from [ED or other relevant federal agency] to carry out a project or program."³¹¹ Although OMB Circular A-110 does not define "financial assistance," it does provide that an "award" is "financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property, in lieu of money, by the Federal Government to an eligible recipient," but the term does not include "[t]echnical assistance, which provides services instead of money"; loans, loan guarantees, interest subsidies, or insurance; "[d]irect payments of any kind to individuals"; or "[c]ontracts which are required to be entered into and administered under procurement laws and regulations."³¹²

OMB Circular A-110 also applies to public or private institutions of higher education, hospitals,

308 OMB Circular A-110, "Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations" (revised Sept. 30, 1999), [available at https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-110.pdf](https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-110.pdf). In 2004, OMB Circular A-110 was "relocated" to title 2 of the Code of Federal Regulations and can be found at 2 C.F.R. pt. 215.

309 OMB Circular A-110 required federal agencies, including ED to adopt common regulations implementing the Circular. *See, e.g.*, 59 Fed. Reg. 34722 (July 6, 1994). Although there may be minor agency-specific differences, the substance of all regulations implementing OMB Circular A-110 is generally the same. This *Guide* will cite ED's implementing regulations by way of example. *See* 34 C.F.R. pt. 74.

310 34 C.F.R. § 74.2 (defining "recipient").

311 *Id.*

312 OMB Circular A-110, App. A, ¶ A.2(e) (defining "award").

and other non-profit organizations that are "subrecipients performing work under awards" that other entities have with the federal government.³¹³ The OMB Circular defines "subaward" as "an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of 'award'" as defined in this section.³¹⁴

What does the law require?

OMB Circular A-110 and its implementing regulations set forth uniform administrative requirements applicable to recipients or subrecipients of federal grants and agreements. Those requirements generally concern the following areas: financial and program management standards,³¹⁵ property standards,³¹⁶ procurement standards,³¹⁷ reporting and recordkeeping requirements,³¹⁸ and closeout requirements applicable following completion of the federal grant or agreement.³¹⁹ Examples of those requirements are summarized below.

1. Financial and program management standards

OMB Circular A-110 generally requires each institutional recipient to establish a financial management system that will help ensure accountability for the recipient's use of federal and other funds and for the federally sponsored project as a whole.³²⁰ Recipients generally are not

³¹³ 34 C.F.R. § 74.5; see id. § 74.2 (defining "subrecipient" as "the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided"). See also OMB Circular A-110, App. A ¶ A.2(oo).

³¹⁴ OMB Circular A-110, App. A, ¶ A.2(ff); see also 34 C.F.R. § 74.2 (defining "subaward").

³¹⁵ 34 C.F.R. §§ 74.20-74.28.

³¹⁶ Id. §§ 74.30-74.37.

³¹⁷ Id. §§ 74.40-74.48.

³¹⁸ Id. §§ 74.50-74.53.

³¹⁹ Id. §§ 74.70-74.73.

³²⁰ Id. § 74.21(b). See generally discussion of OMB Circular A-122 at pages 66-70 of this *Guide*.

required to use separate bank accounts for federal funds, but must be prepared "to account for the receipt, obligation, and expenditure of funds."³²¹ Moreover, wherever possible, advances of federal funds must be deposited and maintained in insured accounts.³²² Except under certain specified circumstances, advances of federal funds must be maintained in interest-bearing accounts.³²³

OMB Circular A-110 also sets forth procedures for determining whether recipients have met any applicable cost-sharing or cost-matching requirements,³²⁴ and requirements for accounting for program income.³²⁵ In addition, recipients are required to establish, and report deviations from, budget and program plans.³²⁶ Recipients of non-construction awards generally must also seek prior approval for certain deviations from established budget and program plans, including deviations related to a change in the scope or objective of the project or program; a change in a key person identified in the application or award document; the absence for more than three months, or a 25% reduction in time devoted to the project, by the approved project director; and the need for additional federal funds.³²⁷ Recipients of either construction or non-construction awards must also notify the funding agency "in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than \$5,000 or five percent of the Federal award, whichever is greater," unless "an application for additional funding is submitted for a continuation award."³²⁸

OMB Circular A-110 requires institutions of higher education and other non-profit recipients to

321 34 C.F.R. § 74.22(i)(1).

322 Id. § 74.22(i)(2).

323 Id. § 74.22(k). Interest in excess of \$250 annually earned on federal advances must generally be submitted to the U.S. Department of Health and Human Services, Payment Management System. Id. § 74.22(l).

324 Id. § 74.23.

325 Id. § 74.24.

326 Id. § 74.25(b).

327 Id. § 74.25(c)(1)-(4). Recipients of construction awards must likewise generally seek prior approval of certain deviations from established budget and program plans, including with respect to changes in the scope or objective of the project or program or the need for additional federal funding. Id. § 74.25(h)(1)-(2).

328 Id. § 74.25(k).

conform to the audit requirements delineated in OMB Circular A-133,³²⁹ and to the cost principles in either OMB Circular A-21 or A-122, as applicable.³³⁰

2. Property standards

OMB Circular A-110 sets forth requirements with respect to minimum insurance coverage for real property and equipment acquired with federal funds,³³¹ as well as procedures governing the use and disposition of real property,³³² equipment,³³³ supplies,³³⁴ and other property³³⁵ acquired in whole or in part with federal funds. For example, title to supplies and other expendable property acquired with federal funds vests in the recipient.³³⁶ The recipient may not use such supplies to provide services to non-federal outside organizations for a fee that is less than private companies charge for equivalent services, unless authorized by law, as long as the federal government retains an interest in the supplies.³³⁷ "If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal government for its share."³³⁸

3. Procurement standards

329 See discussion of OMB Circular A-133 at pages 81-85 of this *Guide*.

330 34 C.F.R. § 74.27(a); see discussion of OMB Circular A-122 above at pages 66-70 of this *Guide*.

331 See 34 C.F.R. § 74.31 (requiring recipients to "provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient").

332 *Id.* § 74.32.

333 *Id.* § 74.34.

334 *Id.* § 74.35.

335 *Id.* §§ 74.33 (federally owned or exempt property), 74.36 (intangible property such as copyrights and patents).

336 *Id.* § 74.35(a).

337 *Id.* § 74.35(b).

338 *Id.* § 74.35(a).

OMB Circular A-110 sets forth standards for recipients to use "in establishing procedures for the procurement of supplies and other expendable property, equipment, real property, and other services with Federal funds."³³⁹ For example, recipients are generally required to "maintain written standards of conduct governing the performance of [their] employees engaged in the award and administration of contracts."³⁴⁰ These standards of conduct must prohibit individual employees or officers from participating in selection, award, or administration of a federally supported contract in cases of a real or apparent conflict of interest,³⁴¹ and must also prohibit officers and employees from soliciting or accepting "gratuities, favors, or anything of monetary value from contractors, or parties to sub agreements."³⁴²

In addition, OMB Circular A-110 requires all procurement transactions to "be conducted in a manner to provide, to the maximum extent practical, open and free competition."³⁴³ Recipients must also establish written procurement procedures that, among other things, "avoid purchasing unnecessary items" and, where appropriate, analyze lease and purchasing alternatives "to determine which would be the most economical and practical procurement for the Federal Government."³⁴⁴ OMB Circular A-110 also requires recipients to make and document cost or price analyses with respect to each procurement action,³⁴⁵ and, for purchases in excess of the small purchase threshold of \$25,000,³⁴⁶ to include documentation regarding the basis for contractor selection, "[j]ustification for lack of competition when competitive bids

339 Id. § 74.40.

340 Id. § 74.42.

341 Id. "A conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award." Id.

342 Id. The standards of conduct may, however, set different "standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value." Id.

343 Id. § 74.43.

344 Id. § 74.44(a)(1)-(2).

345 Id. § 74.45. "Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability, and allowability." Id.

346 Id. § 74.2 (defining "small awards" and noting that the "small purchase threshold" is "currently \$25,000").

or offers are not obtained," and the basis for award cost or price.³⁴⁷ Recipients must also include certain provisions in all contracts relating to the federal project or program.³⁴⁸ For example, all contracts awarded by a recipient in connection with a federal award must contain provisions related to certain applicable federal laws.³⁴⁹ Those provisions and related federal laws are listed in Appendix A of OMB Circular A-110.

4. Recordkeeping and reporting requirements

OMB Circular A-110 imposes certain monitoring and reporting requirements on federal award recipients. For example, recipients must generally provide performance reports at least annually,³⁵⁰ with immediate notification required with respect to developments that significantly affect the federally funded activities or "materially impair the ability to meet the objectives of the award."³⁵¹ Recipients are also required to make financial reports regarding the status of funds generally,³⁵² federal advances received,³⁵³ or other pertinent information as determined by the funding agency.³⁵⁴ Recipients must generally retain financial records, supporting documents, and other records pertaining to an award for three years "from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of submission of the quarterly or annual financial report."³⁵⁵

5. Close out requirements

³⁴⁷ Id. § 74.46.

³⁴⁸ Id. § 74.48; id. App. A to Part 74.

³⁴⁹ Id. § 74.48(e).

³⁵⁰ Id. § 74.51(b). The funding agency may require more frequent reporting, but generally may not require more than four performance reports per year. Id.

³⁵¹ Id. § 74.51(f).

³⁵² Id. § 74.52(a)(1).

³⁵³ Id. § 74.52(a)(2).

³⁵⁴ Id. § 74.52(b).

³⁵⁵ Id. § 74.53(b).

Within 90 calendar days after an award is completed, a recipient must generally submit to the funding agency all financial, performance, and other reports required under the award.³⁵⁶ In addition, OMB Circular A-110 generally requires recipients to "liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in [agency] implementing instructions."³⁵⁷ Recipients must also promptly refund any unused federal advances that the recipient is not authorized to retain for use in other projects.³⁵⁸

Who administers the law?

Each federal agency that administers grants or other agreements with institutions of higher education, hospitals, or other non-profit organizations is responsible for implementing the requirements of OMB Circular A-110 with respect to the organizations and entities that that agency funds.

What are the consequences of non-compliance?

Material failure to comply with the requirements of OMB Circular A-110 could subject a recipient to additional award conditions;³⁵⁹ temporary withholding of cash payments "pending correction of the deficiency by the recipient or more severe enforcement action" by the funding agency;³⁶⁰ disallowance of "all or part of the cost of the activity or action not in compliance";³⁶¹ whole or partial suspension or termination of the current award;³⁶² withholding of further

356 Id. § 74.71(a).

357 Id. § 74.71(b).

358 Id. § 74.71(d).

359 Id. § 74.62(a); see id. § 74.14.

360 Id. § 74.62(a)(1).

361 Id. § 74.62(a)(2).

362 Id. § 74.62(a)(3); see id. § 74.61(a)(1). If an award is suspended or terminated, the recipient generally may not recover costs incurred during the period of suspension or after the award's termination. Id. § 74.62(c).

awards for the applicable project or program;³⁶³ or other legally available remedies.³⁶⁴ Failure to comply with applicable requirements could also lead to initiation of a debarment or suspension action³⁶⁵ by which the recipient could be excluded from Federal financial and non-financial assistance and benefits under Federal programs and activities.³⁶⁶

Additional resources

Many of the provisions as described here are subject to exceptions or refinements as set forth in OMB Circular A-110 or other OMB or agency guidance and to agency and judicial interpretations, which are not addressed in this *Guide*. Independent schools subject to OMB Circular A-110 may consult their funding agency or agencies for additional guidance regarding administrative requirements applicable to their federal grants or agreements.

363 Id. § 74.62(a)(4).

364 Id. § 74.62(a)(5).

365 Id. § 74.62(d); see id. § 74.13. See generally 2 C.F.R. pt. 3485.

366 2 C.F.R. § 3485.12.

OMB Circular A-122

As explained on page 66 of this *Guide*, OMB Circular A-122, "Cost Principles for Non-Profit Organizations," ³⁶⁷ establishes principles for federal agencies and recipients to apply in determining which costs incurred by non-profit organizations in connection with federal grants, contracts, or other agreements may be paid with federal funds. For a discussion of OMB Circular A-122's requirements related to lobbying activities, see pages 66-70 of this *Guide*.

³⁶⁷ OMB Circular A-122, "Cost Principles for Non-Profit Organizations" (revised May 10, 2004), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A122/a122_2004.pdf

OMB Circular A-133

Brief statement of the law

OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations,"³⁶⁸ and its Compliance Supplement³⁶⁹ generally require certain recipients of federal financial assistance to perform annual financial statement and compliance audits and establish requirements related to such audits.

To whom does the law apply?

OMB Circular A-133 and its Compliance Supplement apply to non-profit organizations, states, and local governments "expending Federal awards."³⁷⁰ Non-profit organizations include institutions of higher education, as well as any other corporation or organization that is operated primarily for educational, scientific, or other public interest purposes.³⁷¹ Accordingly, non-profit independent elementary and secondary schools that "expend[] Federal awards" must comply with OMB Circular A-133.

OMB Circular A-133 defines "Federal award" to mean "Federal financial assistance and Federal cost-reimbursement contracts that non-Federal entities receive directly from Federal awarding agencies or indirectly from pass-through entities."³⁷² A "pass-through entity" is a "non-Federal entity that provides a Federal award to a subrecipient to carry out a Federal program."³⁷³ "Federal financial assistance" includes "grants, loans, loan guarantees, property (including donated surplus property), cooperative agreements, interest subsidies, insurance, food commodities, direct appropriations, and other assistance, but does not include amounts

³⁶⁸ OMB Circular A-133, "Audits of States, Local Governments and Non-Profit Organizations" (revised June 26, 2007), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A133/a133_revised_2007.pdf.

³⁶⁹ OMB Circular A-133, "Compliance Supplement" (revised Apr. 2017), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A133/2017/Compliance_Supplement_2017.pdf.

³⁷⁰ OMB Circular A-133 ¶ 1.

³⁷¹ *Id.* § A.105.

³⁷² *Id.*

³⁷³ *Id.*

received as reimbursement for services rendered to individuals."³⁷⁴

As noted in the section of this *Guide* related to OMB Circular A-110,³⁷⁵ entities subject to OMB Circular A-110 generally must comply with OMB Circular A-133.

What does the law require?

1. General requirements

In pertinent part, OMB Circular A-133 requires non-profit organizations "that expend \$500,000 or more in a year in Federal awards [to] have a single or program-specific audit conducted for that year."³⁷⁶ A single audit is one that includes "both the entity's financial statements and the Federal awards" at issue. A program-specific audit is one that relates only to one specific federal program.³⁷⁷

Audits required under OMB Circular A-133 generally must be conducted annually, unless the non-profit organization had biennial audits for all biennial periods ending between July 1, 1992, and January 1, 1995.

OMB Circular A-133 generally requires an auditee³⁷⁸ to do the following:

- ▶ "Identify, in its accounts, all federal awards received and expended and the Federal programs under which they were received";

³⁷⁴ Id.

³⁷⁵ See discussion of OMB Circular A-110 at pages 72-79 of this *Guide*.

³⁷⁶ OMB Circular A-133 § B.200(a). On June 27, 2003, OMB raised the audit threshold from \$300,000 to \$500,000. See 68 Fed. Reg. 38401 (June 27, 2003). If a non-profit organization expends less than \$500,000 in a year in federal awards, it is generally exempt from federal audit requirements for that year unless its particular federal award or awards require a financial or other audit. Such an organization must also make its records available for review or audit by appropriate agency officials; pass-through entity, if any; and the General Accounting Office (now the Government Accountability Office).

³⁷⁷ OMB Circular A-133 § A.105. An entity may choose to have a program-specific, rather than a single, audit when it expends federal funds under only one federal program, excluding research and development, and that federal program's laws, regulations, or grant agreements do not require a financial statement audit.

³⁷⁸ See id. An auditee is "any non-Federal entity that expends Federal awards which must be audited" under OMB Circular A-133. OMB Circular A-133 also sets forth audit requirements applicable to federal agencies and pass-through entities, and to auditors.

- ▶ "Maintain internal control over Federal programs" in a manner that provides "reasonable assurance" that the auditee is managing its federal awards in compliance with applicable laws, regulations, and the provisions of contract or grant agreements;
- ▶ Actually comply with applicable laws, regulations, and contractual or grant provisions;
- ▶ Prepare financial statements, including a schedule of expenditures of federal awards;
- ▶ "Ensure that the audits required by this part are properly performed and submitted when due," and that all organizations, including each relevant pass-through entity, are promptly notified of any extensions granted by the federal awarding agency; and
- ▶ Take appropriate follow-up and corrective action on all audit findings.³⁷⁹

OMB Circular A-133 sets forth detailed requirements related to the above obligations.

2. Procurement of audit services

Non-profit organization auditees must follow procurement standards set forth in OMB Circular A-110³⁸⁰ in procuring audit services. In addition, OMB Circular A-133, like OMB Circular A-110, states that auditees must, whenever possible, "make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises[] in procuring audit services."³⁸¹ In evaluating an auditor's response to a request for audit services, the auditee must consider factors including the following: "the responsiveness to the request for proposals, relevant experience, availability of staff with professional qualifications and technical abilities, the results of external quality control reviews, and price."³⁸²

3. Audit submission and recordkeeping requirements

In general, the audit must be completed and a required data collection form and reporting package submitted "within the earlier of 30 days after receipt of the auditor's report(s), or nine months after the end of the audit period, unless a longer period is agreed to in advance" by the

³⁷⁹ Id. § C.300.

³⁸⁰ See discussion of OMB Circular A-110 at pages 72-79 of this *Guide*.

³⁸¹ OMB Circular A-133 § C.305.

³⁸² Id.

relevant federal agency.³⁸³ The required data collection form must contain information including, but not limited to, the following: the type of report the auditor issued on the financial statements of the auditee and on compliance for major programs (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion); where applicable, a statement that significant deficiencies in internal controls were disclosed by the audit of the financial statements and whether any such conditions were material weaknesses; a statement regarding whether the audit disclosed any noncompliance that is material to the auditee's financial statements; and, where applicable, a statement that significant deficiencies in internal controls over major programs were disclosed by the audit and whether any such deficiencies were material weaknesses.³⁸⁴ The required reporting package must include the auditee's financial statements and schedule of expenditures of Federal awards; the summary schedule of prior audit findings; the auditor's report(s); and the auditee's corrective action plan.³⁸⁵

The auditee must submit the data collection form and one copy of the reporting package, as described above, to a designated federal clearinghouse, and must also submit copies of its reporting package upon request to a federal agency or pass-through entity.³⁸⁶ Auditees must keep "one copy of the data collection form . . . and one copy of the reporting package . . . on file for three years from the date of submission to the Federal clearinghouse designated by OMB."³⁸⁷

Who administers the law?

Each federal agency that administers grants or other agreements with non-profit organizations, states, or local governments is responsible for implementing the audit requirements of OMB Circular A-133 with respect to the organizations and entities that that agency funds.

What are the consequences of non-compliance?

³⁸³ Id. § B.235.

³⁸⁴ Id. § B.320.

³⁸⁵ Id.

³⁸⁶ Id.

³⁸⁷ Id. Similarly, "[p]ass-through entities shall keep subrecipients' submissions on file for three years from date of receipt."

An entity that does not comply with the audit requirements of OMB Circular A-133 may not charge any audit costs to its federal awards.³⁸⁸ Moreover, if the entity demonstrates "continued inability or unwillingness to have an audit conducted" in accordance with OMB Circular A-133, the relevant federal agency or pass-through entity, as appropriate, may impose sanctions including the following: withholding of a percentage of federal awards until the required audit is satisfactorily completed; withholding or disallowance of overhead costs; suspension of federal awards until the audit is conducted; or termination of the federal award.³⁸⁹

Additional resources

Many of the provisions as described here are subject to exceptions or refinements as set forth in OMB Circular A-133 or other OMB or agency guidance and judicial interpretation, which are not addressed in this *Guide*. Non-profit organizations subject to OMB Circular A-133 should consult accountants familiar with federal audit requirements for additional guidance regarding applicable audit requirements. For example, program-specific audit guides are often available to provide specific guidance to the auditor. In addition, OMB's April 2017 Compliance Supplement provides agency- and program-specific requirements that auditors must consider as part of any audit required to be conducted under OMB Circular A-133.³⁹⁰

³⁸⁸ Id. § B.225.

³⁸⁹ Id.

³⁹⁰ OMB Circular A-133, "Compliance Supplement" (revised Apr. 2017), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A133/2017/Compliance_Supplement_2017.pdf.

PART III

Similar federal laws that may apply to an independent school regardless of whether it is a recipient of federal financial assistance

This section of the *Guide* summarizes federal laws that are similar to those that apply to recipients of federal financial assistance, but that may apply to an independent school even if it does not receive federal financial assistance. In assessing the ramifications of receiving federal financial assistance, schools may find it useful to consider those federal laws that apply irrespective of receipt of federal financial assistance in order to determine the extent to which receipt of federal financial assistance will impose new obligations. The federal laws summarized in this section of the *Guide* generally fall into the following categories: (1) Non-discrimination laws (some of which are workplace-related) and (2) student privacy laws. The *Guide* does not address state or local laws that may also apply to independent schools.

Non-discrimination laws

Age Discrimination in Employment Act

Americans with Disabilities Act

Equal Pay Act

42 U.S.C. § 1981

Pregnancy Discrimination Act of 1979

Title VII of the Civil Rights Act of 1964

Uniformed Services Employment and Reemployment Rights Act

Revenue Procedure 75-50

Age Discrimination in Employment Act

Brief statement of the law

The ADEA, as amended,³⁹¹ and its implementing regulations³⁹² generally prohibit discrimination on the basis of age against employees, or applicants for employment, who are 40 years of age or older³⁹³ with respect to the compensation, terms, conditions, or privileges of employment.

To whom does the law apply?

The ADEA and its implementing regulations apply to all employers³⁹⁴ "engaged in an industry affecting commerce who ha[ve] twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" or the agents of such employers.³⁹⁵ An "industry affecting commerce" is broadly defined to include "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce."³⁹⁶ Courts have determined that the scope of the term "affecting commerce" under the ADEA is broad enough to include independent schools.³⁹⁷

What does the law require?

1. General nondiscrimination requirements

Under the ADEA and its implementing regulations, employers generally may not discriminate on the basis of age against employees, or applicants for employment, who are 40 years of age or

³⁹¹ 29 U.S.C. §§ 621-634.

³⁹² 29 C.F.R. pts. 1625-27.

³⁹³ 29 U.S.C. § 631(a); see 29 C.F.R. §§ 1625.2, 1625.5.

³⁹⁴ 29 U.S.C. § 623. The ADEA also applies to labor organizations and employment agencies. See id.

³⁹⁵ Id. § 630(b).

³⁹⁶ See id. § 630(h); see also id. §§ 142(1), (3); 152(6), (7); 402(a), (c).

³⁹⁷ See, e.g., Usery v. Manchester E. Catholic Reg'l Sch. Bd., 430 F. Supp. 188 (D.N.H. 1977).

older³⁹⁸ with respect to the compensation, terms, conditions, or privileges of employment,³⁹⁹ including in the context of hiring or firing decisions,⁴⁰⁰ in notices or advertisements for employment,⁴⁰¹ in employment applications,⁴⁰² and in employee pension benefit plans or seniority systems.⁴⁰³ In accordance with the U.S. Supreme Court’s decision in General Dynamics Land System, Inc. v. Cline, 540 U.S. 581 (2004), the regulations clarify that the ADEA does not prohibit an employer from “[f]avoring an older individual over a younger individual because of age,” even in cases where the younger person is at least 40 years of age.⁴⁰⁴

The regulations provide concrete examples of certain prohibited and permissible employment practices. For instance, it generally violates the ADEA to include terms and phrases such as “age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature” in employment notices or advertisements, because such terms and phrases “deter[] the employment of older persons.”⁴⁰⁵ The regulations provide that employers are permitted to indicate in their help wanted notices or advertisements a “preference for older individuals with terms such as over age 60, retirees, or supplement your pension.”⁴⁰⁶ However, if a practice based on a reasonable factor other than age has an adverse impact on individuals within the protected age group, it may be justified to the extent “the factor is related to the employer’s stated business purpose.”⁴⁰⁷

398 29 U.S.C. § 631(a); see 29 C.F.R. §§ 1625.2, 1625.5.

399 29 U.S.C. § 623(a)(1).

400 Id.

401 Id. § 623(e); see 29 C.F.R. § 1625.4.

402 29 C.F.R. § 1625.5.

403 29 U.S.C. § 623(i), (k).

404 29 C.F.R. § 1625.2.

405 Id. § 1625.4(a) (emphasis added).

406 Id.

407 Id. § 1625.7(e)(2)(i).

It is not unlawful for employers to consider employees' or applicants' ages where age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."⁴⁰⁸ Employers have the burden of demonstrating that the age limit in question is reasonably necessary "to the essence of the business" and either "that all or substantially all individuals excluded from the job are in fact disqualified" or that "some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age."⁴⁰⁹ The regulations clarify that the ADEA supersedes any state or local laws and regulations limiting employment opportunities based on age unless those laws and regulations meet the "bona fide occupational qualification" standard.⁴¹⁰

The regulations further clarify that employers will not necessarily violate the ADEA if they request information regarding date of birth or age on employment application forms.⁴¹¹ Because requests that applicants provide age information could deter older applicants "or otherwise indicate discrimination against older individuals," however, employment advertisements and application forms that include such requests "will be closely scrutinized to assure that the request is for a permissible purpose."⁴¹² "That the purpose is not one proscribed by the statute should be made known to the applicant," including through a "reference on the application form to the statutory prohibition."⁴¹³

The ADEA and its regulations also do not prohibit actions in observance of the terms of a bona fide seniority system or certain bona fide employee benefit plans.⁴¹⁴ For example, employers may permissibly set a minimum age as a condition of eligibility for normal or early retirement

⁴⁰⁸ 29 U.S.C. § 623(f)(1).

⁴⁰⁹ 29 C.F.R. § 1625.6(b).

⁴¹⁰ *Id.* § 1625.6(c).

⁴¹¹ *Id.* §§ 1625.4(b), 1625.5.

⁴¹² *Id.* § 1625.5; *see id.* § 1625.4(b).

⁴¹³ *Id.* § 1625.5.

⁴¹⁴ 29 U.S.C. § 623(f)(2); 29 C.F.R. §§ 1625.8, 1625.10. In 2007, the EEOC published regulations related to the coordination of employee-sponsored retiree health plans with Medicare and State health benefits. *See* 72 Fed. Reg. 72938-01 (Dec. 26, 2007).

benefits.⁴¹⁵

2. Recordkeeping requirements

The ADEA also requires employers to keep certain records regarding their employees.⁴¹⁶ Although no particular form of record is required,⁴¹⁷ employers must keep for three years payroll and other records for each employee containing information regarding the employee's name, address, date of birth, occupation, rate of pay, and weekly compensation.⁴¹⁸ In addition, any employer who regularly makes, obtains, or uses personnel or employment records relating to employment inquiries; personnel decisions, such as promotion, termination, demotion, or transfer decisions; job orders submitted to an employment agency or labor union; the results of any employer-administered aptitude or other employment test, or physical examination, used in connection with any personnel action; or employment advertisements to the public or to employees must keep such personnel or employment records for one year following the date of the personnel action to which they relate.⁴¹⁹

Employers must also keep copies of all employee benefit plans, including pension and insurance plans, and any written seniority or merit systems, throughout the duration of the plan or system, and for one year following termination of the plan or system.⁴²⁰ If a plan or system is not written, the employer must keep a memorandum fully outlining its terms and the manner in which it was communicated to employees, along with notations regarding any changes or revisions, throughout the term of the plan or system and for one year after its termination.⁴²¹

All employment records required to be kept under the ADEA must be made available for

⁴¹⁵ 29 U.S.C. § 623(l)(1)(A).

⁴¹⁶ See 29 U.S.C. § 626(a); see generally 29 C.F.R. pt. 1627.

⁴¹⁷ 29 C.F.R. § 1627.2.

⁴¹⁸ *Id.* § 1627.3(a).

⁴¹⁹ *Id.* § 1627.3(b)(1).

⁴²⁰ *Id.* § 1627.3(b)(2).

⁴²¹ *Id.*

authorized inspection and transcription by the EEOC.⁴²² In addition, employers must post an EEOC notice regarding the applicability of the ADEA conspicuously on their premises in locations observable by employees and job applicants.⁴²³

3. Waiver

Employees may, under certain circumstances, waive their rights under the ADEA.⁴²⁴ For such a waiver to be effective, however, it must be “knowing and voluntary.”⁴²⁵ The ADEA sets forth specific criteria by which to determine whether a waiver is “knowing and voluntary.”⁴²⁶ For example, the waiver must be in a written agreement that refers specifically to rights or claims arising under the ADEA and that does not waive rights or claims that may arise after the waiver is executed.⁴²⁷ The employee must be given additional compensation in exchange for the waiver, must be advised in writing to consult an attorney prior to signing the waiver, must be given a period of time to consider signing the waiver, and must be given a period or time following signing to revoke the waiver agreement.⁴²⁸ The minimum requirements for a valid waiver are more extensive with respect to ADEA waivers relating to an exit incentive or other employment termination program.⁴²⁹

Who administers the law?

The EEOC administers the ADEA.⁴³⁰ The EEOC may initiate investigations of employers for suspected ADEA violations, and may also receive information concerning alleged violations,

⁴²² Id. § 1627.6(b).

⁴²³ 29 U.S.C. § 627; 29 C.F.R. § 1627.10.

⁴²⁴ 29 U.S.C. § 626(f); 29 C.F.R. § 1625.22.

⁴²⁵ 29 U.S.C. § 626(f)(1); 29 C.F.R. § 1625.22(a)(2).

⁴²⁶ 29 U.S.C. § 626(f)(1).

⁴²⁷ Id. § 626(f)(1)(A)-(C); 29 C.F.R. § 1625.22(b)(1), (b)(2), (b)(6), (c).

⁴²⁸ 29 U.S.C. § 626(f)(D), (E), (G); 29 C.F.R. § 1625.22(d), (e).

⁴²⁹ 29 U.S.C. § 626(f)(H); 29 C.F.R. § 1625.22(f).

⁴³⁰ 29 C.F.R. § 1626.1.

including charges and complaints, from any other source.⁴³¹ A "charge" is a "statement filed with the [EEOC] by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act."⁴³² A "complaint" is "information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act."⁴³³

An individual aggrieved may also file civil suit to enforce the ADEA,⁴³⁴ but may not do so until 60 days after he or she has filed a charge with the EEOC.⁴³⁵ Charges must generally be filed with the EEOC within 180 days of the alleged discriminatory action.⁴³⁶ If the state in which the alleged discrimination occurred has its own age discrimination law and enforcement authority, however, the charge must be filed within 300 days of the alleged discrimination or 30 days after receipt of notice of termination of the state enforcement proceedings, whichever is earlier.⁴³⁷ If the EEOC decides to commence an action to enforce an individual's rights under the ADEA, the individual may not maintain a separate civil suit.⁴³⁸ If the EEOC dismisses a charge or otherwise terminates its proceedings, it will issue a Notice of Dismissal or Termination advising the aggrieved person that his or her right to file a separate civil suit under the ADEA will expire 90 days after the aggrieved person receives the notice.⁴³⁹

What are the consequences of non-compliance?

If the EEOC has a reasonable basis to conclude that an employer has violated or will violate the

⁴³¹ Id. § 1626.4.

⁴³² Id. § 1626.3.

⁴³³ Id.

⁴³⁴ 29 U.S.C. § 626(c)(1).

⁴³⁵ Id. § 626(d); 29 C.F.R. § 1626.7(a).

⁴³⁶ 29 C.F.R. § 1626.7(a).

⁴³⁷ Id.

⁴³⁸ 29 U.S.C. § 626(c)(1).

⁴³⁹ 29 C.F.R. §§ 1626.17, 1626.18.

ADEA, it may commence a process called "conciliation."⁴⁴⁰ The EEOC generally issues a notice of intent to begin conciliation through a "letter of violation."⁴⁴¹ Conciliation agreements, which must be in writing, typically require the employer to eliminate unlawful practices and provide appropriate relief to affected employees.⁴⁴² If the EEOC is unable to remedy the violation through informal conciliation, conference, and persuasion, it may initiate and conduct litigation.⁴⁴³

In any judicial action brought under the ADEA, whether by the EEOC or by an individual employee, the courts are authorized to award "such legal or equitable relief as may be appropriate to effectuate the purposes" of the ADEA, "including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation."⁴⁴⁴ A court may also award damages in an amount equal to the unpaid wages or benefits, but only for willful violations of the ADEA.⁴⁴⁵

Individuals who resist, impede, or interfere with the EEOC's performance of its duties under the ADEA may be subject to criminal penalties in the form of a fine of up to \$500, or imprisonment for up to one year, or both.⁴⁴⁶ A person will not be subject to imprisonment unless he or she has previously been convicted of interfering with the EEOC's enforcement of the ADEA.⁴⁴⁷

[Additional resources](#)

The provisions described here are subject to exceptions or refinements as set forth in the ADEA

⁴⁴⁰ [Id.](#) § 1626.15(b).

⁴⁴¹ [Id.](#)

⁴⁴² [Id.](#) 1626.15(c).

⁴⁴³ [Id.](#) § 1626.15(d).

⁴⁴⁴ 29 U.S.C. § 626(b).

⁴⁴⁵ [Id.](#)

⁴⁴⁶ [Id.](#) § 629.

⁴⁴⁷ [Id.](#)

and its implementing regulations and have been interpreted in case law and guidance of the EEOC, which are not addressed in this *Guide*. The EEOC website is a good source of additional information (www.eeoc.gov/facts/age.html).

Americans with Disabilities Act

NAIS has a very thorough publication on the Americans with Disabilities Act (ADA). To reach this article, click on this link:

<https://www.nais.org/Articles/Documents/Member/ADA%20December%202016.pdf> or search the NAIS website for this document entitled: *The ADA and Independent Schools*.

Equal Pay Act

Brief statement of the law

The Equal Pay Act ("EPA"), as amended,⁴⁴⁸ and its implementing regulations⁴⁴⁹ generally prohibit employers from discriminating on the basis of sex with respect to compensation.

To whom does the law apply?

The EPA and its implementing regulations apply to all employers with respect to each employee "who in any workweek is engaged in commerce or the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce."⁴⁵⁰ An "enterprise engaged in commerce or in the production of goods for commerce" includes an enterprise that "is engaged in the operation of . . . a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such . . . institution or school is public or private or operated for profit or not for profit)."⁴⁵¹

What does the law require?

The EPA generally prohibits employers from discriminating on the basis of sex by paying wages to employees at a rate less than the rate paid to employees of the opposite sex for "equal work on jobs" requiring "equal skill, effort, and responsibility," performed under similar working conditions.⁴⁵² The EPA does, however, permit employers to make wage distinctions based on a valid seniority system, merit system, system measuring earnings by quantity or quality of production, or factors other than sex.⁴⁵³

⁴⁴⁸ 29 U.S.C. § 206(d).

⁴⁴⁹ 29 C.F.R. pts. 1620-1621.

⁴⁵⁰ 29 U.S.C. § 206(a), (b), (d).

⁴⁵¹ *Id.* § 203(s)(1)(B).

⁴⁵² *Id.* § 206(d)(1).

⁴⁵³ *Id.*

Unlike the Fair Labor Standards Act ("FLSA"), of which the EPA is a part, the EPA also protects executive, administrative, and professional employees.⁴⁵⁴ The EPA protects men as well as women.⁴⁵⁵

The regulations provide examples of employer activities that may violate the EPA. For instance, if an employee of one sex is hired to replace an employee of the opposite sex but is paid a lower rate of pay, the employer will be presumed to have violated the EPA unless it can demonstrate that the wage differential was justified under one or more of the four affirmative defenses noted above, *e.g.*, was not based on sex.⁴⁵⁶ The regulations also clarify that "[a]pplication of the equal pay standard is not dependent upon job classifications or titles but depends rather on actual job requirements and performance."⁴⁵⁷ Moreover, the regulations further clarify that jobs will be considered "equal" even if there are "minor differences in the degree or amount of skill, or effort, or responsibility required" for their performance.⁴⁵⁸ Similarly, "extra duties" cannot justify pay differentials if those extra duties consume only "a minimal amount of time and [are] of peripheral importance."⁴⁵⁹

Employers subject to the EPA are required to comply with recordkeeping requirements under the FLSA.⁴⁶⁰ For example, employers must keep payroll records for three years, and must keep wage rate tables and employee time and earning sheets for two years.⁴⁶¹ The EPA regulations also require employers to retain for two years any records made in the regular course of business that describe or explain the basis for any wage differential to employees of the opposite sex and that may be useful to determining whether that wage differential is based on a factor other than

⁴⁵⁴ 29 C.F.R. § 1620.1(a).

⁴⁵⁵ *Id.* § 1620.1(c).

⁴⁵⁶ *Id.* § 1620.13(b)(2).

⁴⁵⁷ *Id.* § 1620.13(e).

⁴⁵⁸ *Id.* § 1620.14(a); *see id.* §§ 1620.15-1620.18.

⁴⁵⁹ *Id.* § 1620.20(d).

⁴⁶⁰ *Id.* § 1620.32(a).

⁴⁶¹ *Id.* §§ 516.5(a), 516.6(a).

sex.⁴⁶²

Who administers the law?

The EEOC administers the EPA.⁴⁶³ The EEOC may conduct investigations of employer practices and make recommendations regarding changes necessary for compliance with the EPA, and may also initiate and conduct litigation to enforce the EPA and its regulations.⁴⁶⁴

Individual employees may also bring suit to enforce their rights under the EPA and need not first file a charge with the EEOC.⁴⁶⁵ An individual employee may not, however, bring suit if the EEOC has already filed an action to recover the wages due to that employee.⁴⁶⁶

What are the consequences of non-compliance?

An employer who has violated the EPA⁴⁶⁷ will be required to pay the aggrieved employee the unpaid wages owed to that employee.⁴⁶⁸ If the EEOC or an individual employee brings suit to recover the unpaid wages, the suit may also seek an additional amount equal to the amount of unpaid wages owed.⁴⁶⁹ An individual employee can also seek attorney's fees and court costs.⁴⁷⁰ The EEOC can also seek a court injunction restraining an employer from violating the EPA,

⁴⁶² Id. § 1620.32(b), (c).

⁴⁶³ Id. § 1620.30(a).

⁴⁶⁴ Id.

⁴⁶⁵ See United States Equal Employment Opportunity Commission, Federal Laws Prohibiting Job Discrimination: Questions and Answers, <http://www.eeoc.gov/facts/qanda.html> (last visited June 20, 2018).

⁴⁶⁶ 29 C.F.R. § 1620.33(b).

⁴⁶⁷ Any violation of the EPA is also a violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, provided that the latter statute also applies to the relevant employer. Id. § 1620.27(a); see discussion of Title VII at pages 110-121 of this *Guide*.

⁴⁶⁸ Id. § 1620.33(a).

⁴⁶⁹ Id. § 1620.33(b).

⁴⁷⁰ Id.

including through the unlawful withholding of proper compensation.⁴⁷¹

Willful violations of the EPA may lead to criminal prosecution and imposition of a fine of up to \$10,000.⁴⁷² A second conviction for a willful violation could also result in imprisonment.⁴⁷³

Additional resources

The provisions described here are subject to exceptions or refinements as set forth in the EPA and its implementing regulations and have been interpreted in case law and guidance of the EEOC, which are not addressed in this *Guide*. The EEOC website is a good source of additional information (<http://www.eeoc.gov/laws/statutes/epa.cfm>). For example, the EEOC has issued a policy guidance interpreting the applicability of the EPA to wage differentials in the salary payments to athletic coaches in educational institutions.⁴⁷⁴

⁴⁷¹ Id.

⁴⁷² Id. § 1620.33(c).

⁴⁷³ Id.

⁴⁷⁴ See EEOC Notice 915.002, available at <http://www.eeoc.gov/policy/docs/coaches.html> (Oct. 29, 1997).

42 U.S.C. § 1981

Brief statement of the law

Section 1981 of Title 42, as amended,⁴⁷⁵ generally prohibits discrimination on the basis of race in connection with making and enforcing contracts.

To whom does the law apply?

Section 1981, as amended, protects "[a]ll persons within the jurisdiction of the United States" from both private and governmental discrimination on the basis of race in various areas including the making and enforcement of contracts.⁴⁷⁶ The United States Supreme Court has specifically held that Section 1981 applies to admission to independent schools,⁴⁷⁷ as well as to contracts of employment generally.⁴⁷⁸

What does the law require?

In pertinent part, Section 1981 entitles each person in the United States to the "same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."⁴⁷⁹ Section 1981 defines "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms,

⁴⁷⁵ 42 U.S.C. § 1981. There are no regulations specifically implementing Section 1981.

⁴⁷⁶ *Id.* § 1981(a), (c).

⁴⁷⁷ See *Runyon v. McCrary*, 427 U.S. 160 (1976).

⁴⁷⁸ See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008) (discussing employment-related retaliation claims).

⁴⁷⁹ 42 U.S.C. § 1981(a). Although Section 1981 was initially enacted to protect the rights of newly freed African American slaves, it has been interpreted to protect other minorities and non-minorities as well. See, e.g., *St. Francis College v. Khazraji*, 481 U.S. 604 (1987) (upholding § 1981 claim of professor who alleged that he was denied tenure because of Arabian ancestry); *Shaare Tefila v. Cobb*, 481 U.S. 615 (1987) (holding that Jewish plaintiffs could state § 1982 claim against white defendants); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that white plaintiffs could state § 1982 claim). The U.S. Supreme Court has held that Section 1981 applies to "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics" even if under modern notions of race such persons are considered Caucasian. *St. Francis College*, 481 U.S. at 613.

and conditions of the contractual relationship."⁴⁸⁰ Thus, Section 1981 prohibits racial discrimination in a variety of contractual settings, including decisions to hire (or not to hire), to promote (or not to promote), and to discharge (or not to discharge) an employee, and on what terms, as well as decisions regarding whether to admit a particular student and the terms of any enrollment agreement.

Who administers the law?

No federal agency has responsibility for administering Section 1981, but private individuals may bring suit to enforce Section 1981 rights.

What are the consequences of non-compliance?

If a school, employer, or other entity is found in violation of Section 1981, that entity may be held liable for equitable relief and monetary damages. For example, a rejected applicant or a student suspended or expelled from school in violation of Section 1981 may be able to obtain an injunction requiring admission or return to school.⁴⁸¹ In addition, such students may be awarded compensatory and even punitive damages, as well as attorney's fees. There is no statutory limit on the amount of damages that may be awarded under Section 1981.⁴⁸²

Additional resources

The provisions of in Section 1981 have been interpreted in case law, although primarily in the employment context. Some of the significant U.S. Supreme Court decisions interpreting Section 1981 include *Runyon v. McCrary*, 427 U.S. 160 (1976), *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). NAIS also has a publication, "Race Considerations and Independent Schools": [https://www.nais.org/media/MemberDocuments/Legal/Affirmative Action NAIS Legal Advisory 2017.pdf](https://www.nais.org/media/MemberDocuments/Legal/Affirmative_Action_NAIS_Legal_Advisory_2017.pdf).

⁴⁸⁰ 42 U.S.C. § 1981(b). This provision, added to Section 1981 through the Civil Rights Act of 1991, overrides the Supreme Court's holding in *Patterson* that Section 1981 applied in the employment context only to hiring and promotion decisions, and did not reach conduct occurring after a contract was formed, including breaches of contract.

⁴⁸¹ See *Fiedler v. Marumscos Christian Sch.*, 631 F.2d 1144 (4th Cir. 1980).

⁴⁸² 42 U.S.C. § 1981a(b)(4) (setting limits on damages awarded under Title VII, but explicitly stating that "[n]othing in this section shall be construed to limit the scope of, or the relief available under, section 1981").

Pregnancy Discrimination Act of 1979

Brief statement of the law

The Pregnancy Discrimination Act ("PDA"), as amended,⁴⁸³ and its implementing regulations⁴⁸⁴ generally prohibit employment discrimination based on pregnancy, childbirth, or related medical conditions.

To whom does the law apply?

The PDA and its implementing regulations apply to employers "engaged in an industry affecting commerce who ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such" an employer.⁴⁸⁵ The term "industry affecting commerce" includes "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce."⁴⁸⁶ Independent schools have been subject to suit under the PDA.⁴⁸⁷

What does the law require?

The PDA revised Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended,⁴⁸⁸ to clarify that Title VII's prohibition of discrimination "because of sex" or "on the basis of sex" includes discrimination based on pregnancy, childbirth, or related medical conditions. Accordingly, under the PDA, women affected by one of those conditions must "be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as

⁴⁸³ 42 U.S.C. § 2000e(k).

⁴⁸⁴ 29 C.F.R. § 1604.10; *id.* App. to Part 1604 ("Questions and Answers on the Pregnancy Discrimination Act").

⁴⁸⁵ 42 U.S.C. § 2000e(b).

⁴⁸⁶ *Id.* § 2000e(h).

⁴⁸⁷ See generally, e.g., *Boyd v. Harding Christian Acad. of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340 (E.D.N.Y. 1998).

⁴⁸⁸ 42 U.S.C. § 2000e *et seq.* See discussion of Title VII at pages 111-122 of this *Guide*.

other persons not so affected but similar in their ability or inability to work."⁴⁸⁹

The regulations provide examples of employment practices prohibited under the PDA. For instance, employers may not have written or unwritten policies excluding from employment applicants or employees who are pregnant or suffering from pregnancy-related medical conditions.⁴⁹⁰ Employers likewise must not treat women suffering from pregnancy-related disabilities differently from individuals with other disabilities with respect to policies relating to "the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal."⁴⁹¹ Employers are also prohibited from limiting disability benefits for pregnancy-related conditions to married women.⁴⁹² In addition, employers may not require pregnant women to take leave during their pregnancy, or prohibit them from returning to work for a predetermined period after childbirth.⁴⁹³ The EEOC has also determined that an employer's failure to provide health insurance coverage for prescription contraceptives, while including coverage for other preventive drugs, violates the PDA.⁴⁹⁴

Compliance with state and local laws regarding pregnancy-related disability benefits will not necessarily satisfy an employer's obligations under the PDA. "If, for example, a State law requires an employer to pay a maximum of 26 weeks benefits for disabilities other than for pregnancy-related ones but only six weeks for pregnancy-related disabilities, the employer must provide benefits for the additional weeks to an employee disabled by pregnancy-related conditions, up to the maximum provided other disabled employees."⁴⁹⁵

Employers also may not discriminate, including in hiring, discharge, and other employment

⁴⁸⁹ 42 U.S.C. § 2000e(k).

⁴⁹⁰ 29 C.F.R. § 1604.10(a).

⁴⁹¹ *Id.* § 1604.10(b).

⁴⁹² 29 C.F.R. App. to Part 1604 (item 13).

⁴⁹³ *Id.* (items 7 and 8).

⁴⁹⁴ See United States Equal Opportunity Commission, *Questions and Answers: Commission Decision on Coverage of Contraception*, <http://www.eeoc.gov/policy/docs/qanda-decision-contraception.html> (last visited June 21, 2018).

⁴⁹⁵ 29 C.F.R. App. to Part 1604 (item 19).

decisions, against women who have had an abortion.⁴⁹⁶ Moreover, with the exception of health insurance, all other fringe benefits, including sick leave, that "are provided for other medical conditions, must be provided for abortions."⁴⁹⁷ Employers are not required to pay health insurance benefits for abortion except where the life of the mother is threatened or medical complications have arisen from an abortion.⁴⁹⁸ Employers are, however, permitted to provide abortion benefits.⁴⁹⁹

The PDA, as part of Title VII, also subjects employers to certain recordkeeping and notice requirements.⁵⁰⁰ For example, an employer with 100 or more employees must file executed copies of a standard form describing the racial and gender composition of its workforce with the EEOC each year on or before September 30th.⁵⁰¹ Employers subject to the PDA also must post EEOC-prepared or -approved notices describing the applicable provisions of that statute, and must ensure that those postings are "in prominent and accessible places" where notices to employees and applicants "are customarily maintained."⁵⁰² In addition, employers generally must keep any personnel or employment records having to do with, among other things, hiring, promotion, demotion, transfer, termination, compensation, and selection for training, for one year from the date the record was made or the personnel action was taken, whichever is later.⁵⁰³

Who administers the law?

As part of its general Title VII responsibility, the EEOC administers the PDA and its implementing regulations.⁵⁰⁴ The EEOC may receive information concerning alleged PDA

⁴⁹⁶ Id. (item 34).

⁴⁹⁷ Id. (item 35).

⁴⁹⁸ 42 U.S.C. § 2000e(k); see 29 C.F.R. § 1604.10(b).

⁴⁹⁹ 42 U.S.C. § 2000e(k); see 29 C.F.R. § 1604.10(b).

⁵⁰⁰ See generally, e.g., 29 C.F.R. pt. 1602.

⁵⁰¹ 29 C.F.R. § 1602.7.

⁵⁰² Id. § 1601.30(a).

⁵⁰³ Id. § 1602.14.

⁵⁰⁴ Id. § 1601.1; see generally 29 C.F.R. pt. 1601.

violations "from any person."⁵⁰⁵ Moreover, any person, agency, or organization may file a charge with the EEOC on behalf of him- or herself, or on behalf of another person claiming to be aggrieved by a PDA violation.⁵⁰⁶ All charges must be in writing and must be verified.⁵⁰⁷

If a charge is timely and properly filed, the EEOC will undertake an investigation of its allegations.⁵⁰⁸ The EEOC may encourage the relevant parties to settle the charge on mutually agreeable terms, or "may facilitate a settlement . . . by permitting withdrawal of the charge."⁵⁰⁹ Individuals may also bring suit alleging PDA violations after receipt of an EEOC notice of right to sue, whether or not the EEOC has found reasonable cause to believe a violation has occurred.⁵¹⁰ An individual employee who receives a notice of right to sue must file suit within 90 days after receiving that notice.⁵¹¹

What are the consequences of non-compliance?

If the EEOC finds reasonable cause to believe that an employer has violated the PDA, it will first attempt to achieve compliance through informal methods of conference, conciliation, and persuasion.⁵¹² Written conciliation agreements "attempt to achieve a just resolution of all violations found" by obtaining "agreement that the [employer] will eliminate the unlawful employment practice and provide appropriate affirmative relief."⁵¹³ If a conciliation agreement acceptable to the EEOC cannot be reached, the EEOC may file a civil suit against the employer,

505 29 C.F.R. § 1601.6.

506 Id. § 1601.7(a). Members of the EEOC may also file charges with the Commission. Id. § 1601.11(a).

507 Id. § 1601.9; see id. § 1601.11(a) (requiring charges filed by members of the EEOC to be in writing and verified).

508 Id. § 1601.15(a).

509 Id. § 1601.20.

510 Id. § 1601.28.

511 Id. § 1601.28(e)(1).

512 Id. § 1601.24(a).

513 Id.

or the aggrieved individual may sue.⁵¹⁴

In any judicial action, whether brought by the EEOC or by an individual employee, in which an employer is found to have intentionally violated the PDA, the court is authorized to enjoin the employer from engaging in the unlawful employment practice and to order appropriate affirmative relief, including, but not limited to, "reinstatement or hiring of employees, with or without back pay," accruing for up to two years "prior to the filing of a charge" with the EEOC.⁵¹⁵ Any back pay awarded will be reduced by the amount of "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against."⁵¹⁶ Prevailing employees may also receive a reasonable attorney's fee, including expert fees, as part of the costs of the action.⁵¹⁷ Moreover, if an employer is found to engage in unlawful intentional pregnancy-based discrimination, the employer may be liable for compensatory damages and, if the employer engaged in the unlawful practices "with malice or with reckless indifference" to the rights of the aggrieved employee,⁵¹⁸ punitive damages.⁵¹⁹ Compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded . . . shall not exceed" \$50,000 if the employer had more than 14 but less than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year; \$100,000 if the employer had more than 100 and fewer than 201 such employees; \$200,000 if the employer had more than 200 and fewer than 501 such employees; or \$300,000 if the employer had more than 500 such employees.⁵²⁰

If the challenged employment action was motivated by several factors, and the employer can

514 Id. § 1601.27. The EEOC may not file civil suit until 30 days from the date of the filing of the charge, see id., but may at any time file for preliminary or temporary relief if, "upon the basis of a preliminary investigation," it makes "the initial determination . . . that prompt judicial action is necessary to carry out the purposes" of the PDA, see id. § 1601.23(a).

515 42 U.S.C. § 2000e-5(g)(1).

516 Id.

517 Id. § 2000e-5(k).

518 Id. § 1981a(b)(1).

519 Id. § 1981a(a)(1). Compensatory and punitive damages are not available where the challenged employment action is unlawful only because of its disparate impact.

520 Id. § 1981a(b)(3).

demonstrate that it would have taken the same action even if the employee had not been pregnant, the employee may obtain only limited relief, including attorney's fees and costs, but will not be entitled to damages or an injunction requiring reinstatement, hiring, promotion, or payment of backpay.⁵²¹

The PDA and its implementing regulations, as part of Title VII, also impose penalties for violations of applicable notice and recordkeeping requirements. For example, the regulations specify that an employer who fails to post required notices is subject to a fine of not more than \$545 for each separate offense.⁵²²

Additional resources

The provisions described here are subject to exceptions or refinements as set forth in the PDA and its implementing regulations and have been interpreted in case law and EEOC guidance, which are not addressed in this *Guide*. The appendix to 29 C.F.R. Part 1604, which lists questions and answers regarding PDA requirements, is a useful starting point. The EEOC website is another good source of additional information (www.eeoc.gov/).

⁵²¹ Id. § 2000e-5(g)(2)(B).

⁵²² 29 C.F.R. § 1601.30(b). The statute, however, indicates that the maximum fine is \$100 per separate offense. 42 U.S.C. § 2000e-10(b).

Title VII of the Civil Rights Act of 1964

Brief statement of the law

Title VII, as amended,⁵²³ and its implementing regulations⁵²⁴ generally prohibit employment discrimination on the basis of race, color, sex, religion, and national origin.

To whom does the law apply?

Title VII and its implementing regulations apply to employers "engaged in an industry affecting commerce who ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such" an employer.⁵²⁵ The term "industry affecting commerce" includes "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce."⁵²⁶ Independent schools generally are subject to Title VII.⁵²⁷

What does the law require?

Under Title VII and its implementing regulations, employers generally may not discriminate against employees, or applicants for employment, on the basis of race, color, sex, religion, or national origin.⁵²⁸ This *Guide* first describes general principles under Title VII, derived primarily from case law, and then describes particular Title VII matters addressed in EEOC regulations and guidance.

1. General principles

Under Title VII, a plaintiff may assert disparate treatment or disparate impact based on race,

⁵²³ 42 U.S.C. §§ 2000e to 2000e-17.

⁵²⁴ 29 C.F.R. pts. 1601-1602, 1604-1608.

⁵²⁵ 42 U.S.C. § 2000e(b).

⁵²⁶ *Id.* § 2000e(h).

⁵²⁷ See generally, e.g., *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1992).

⁵²⁸ 42 U.S.C. § 2000e-2(a).

color, sex, national origin, or religion. A disparate treatment case involves a claim that the plaintiff was treated differently with respect to a term or condition of employment on the basis of a protected status. A disparate impact case generally involves a claim that a facially neutral selection criteria disproportionately affects members of a protected group.

a. Disparate treatment

In *McDonnell Douglas Corp. v. Green*, the U.S. Supreme Court set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging disparate treatment. First, a plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination.⁵²⁹ Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the employment action.⁵³⁰ Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were pretext for discrimination.⁵³¹

The *McDonnell Douglas* Court indicated that the four elements of a prima facie case under Title VII are as follows: (1) plaintiff belongs to a racial minority; (2) plaintiff applied and was qualified for the position; (3) plaintiff was rejected; and (4) the position remained open and the employer continued to seek applicants.⁵³² The plaintiff in *McDonnell Douglas* claimed race discrimination in connection with discharge and failure to rehire. The Court explained that the prima facie elements are flexible depending on the factual situation, such as the protected status and employment decision at issue.⁵³³

The burden of persuading the trier of fact that the defendant intentionally discriminated against

⁵²⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁵³⁰ Id. at 802-804

⁵³¹ Id.

⁵³² Id. at 802.

⁵³³ Id. at 802 n.13.

the plaintiff remains at all times with the plaintiff.⁵³⁴ For example, the defendant need not prove that it was actually motivated by its proffered legitimate, nondiscriminatory reason for the employment action. Rather, the defendant need only produce evidence to support its reasons.⁵³⁵ Even if the trier of fact rejects the defendant's proffered reason, the plaintiff must still prove discrimination.⁵³⁶

b. Disparate impact

In 1991, Congress codified the three-step order and allocation of proof applicable to disparate impact cases.⁵³⁷ First, a plaintiff must demonstrate that the particular employment practice caused a disparate impact on the basis of race, color, religion, sex, or national origin.⁵³⁸ Plaintiffs typically attempt to make this showing on the basis of statistical evidence. The defendant may challenge the plaintiff's evidence and/or demonstrate that the employment practice does not cause a disparate impact.⁵³⁹ Second, once a plaintiff demonstrates disparate impact, an unlawful employment practice is established if the employer fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.⁵⁴⁰ Third, if the employer demonstrates that the challenged practice is job-related and consistent with business necessity, the plaintiff may still prevail by demonstrating that an alternative practice without similar disparate impact is available that would also serve the employer's needs and that the employer refused to adopt such practice.⁵⁴¹

2. EEOC regulations

⁵³⁴ Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

⁵³⁵ Id. at 254-255.

⁵³⁶ St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

⁵³⁷ Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1074, 1074 (1991).

⁵³⁸ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

⁵³⁹ Id. § 2000e-2(k)(1)(B)(ii).

⁵⁴⁰ Id. § 2000e-2(k)(1)(A)(i).

⁵⁴¹ Id. § 2000e-2(k)(1)(A)(ii), (C).

As explained below, EEOC implementing regulations and guidelines address select issues under Title VII.

a. Sexual harassment

Title VII prohibits sexual harassment. "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment" in violation of Title VII "when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."⁵⁴² An employer is liable for harassing conduct by its supervisory employees in certain circumstances.⁵⁴³ If the harassment at issue resulted in a "tangible employment action," an employer has strict liability. If the harassment did not culminate in a "tangible employment action", an employer may defend against liability by showing that it exercised reasonable care to prevent and correct harassment, and the employee unreasonably failed to use the employer's complaint procedures.⁵⁴⁴ An employer may also be liable for sexual harassment between non-supervisory employees, or even by non-employees in the workplace, if the employer, its agents, or supervisory employees knew or should have known of the harassing conduct, but failed to take "immediate and appropriate corrective action."⁵⁴⁵

b. Religious discrimination

Title VII requires employers to provide reasonable accommodations for employee religious practices where those accommodations would not constitute an undue hardship on the

⁵⁴² 29 C.F.R. § 1604.11(a).

⁵⁴³ See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

⁵⁴⁴ See United States Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, <http://www.eeoc.gov/policy/docs/harassment.html> (last visited June 20, 2018).

⁵⁴⁵ 29 C.F.R. § 1604.11(d), (e).

employer's business.⁵⁴⁶ As the Title VII regulations clarify, if there is an issue regarding whether a particular practice or belief is "religious," the EEOC will "define religious practices to include moral or ethical beliefs as to what is right and wrong which are held with the strength of traditional religious views,"⁵⁴⁷ regardless of whether any religious group – including the one in which the relevant employee claims membership – in fact espouses such beliefs.⁵⁴⁸ The regulations provide examples of reasonable accommodations that generally would not cause undue hardship to the employer. For instance, reasonable accommodations could include the creation of a flexible work schedule, lateral transfer of the employee, or a change of job assignment.⁵⁴⁹ The regulations also provide examples of factors that may make a requested religious accommodation an "undue hardship" on the employer. For example, employers may demonstrate an undue hardship where a requested accommodation would require deviation from a bona fide seniority system.⁵⁵⁰ In addition, according to the EEOC, employers may refuse "to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require 'more than a *de minimis* cost.'"⁵⁵¹

c. National origin discrimination

The Title VII regulations define national origin discrimination "broadly as including, but not [being] limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."⁵⁵² The regulations also clarify that citizenship requirements that "have the purpose or effect of discriminating against an individual on the

⁵⁴⁶ 42 U.S.C. § 2000e(j); see generally 29 C.F.R. pt. 1605.

⁵⁴⁷ 29 C.F.R. § 1605.1 (setting forth the standard developed in United States v. Seeger, 380 U.S. 163 (1965), and Welsh v. United States, 398 U.S. 333 (1970)).

⁵⁴⁸ Id.

⁵⁴⁹ Id. § 1605.2(d)(1)(ii)-(iii).

⁵⁵⁰ Id. § 1605.2(e)(2).

⁵⁵¹ Id. § 1605.2(e)(1).

⁵⁵² Id. § 1606.1.

basis of national origin" are generally prohibited under Title VII.⁵⁵³ In addition, the regulations explain that height and weight requirements for employment "tend to exclude individuals on the basis of national origin," and that "these selection procedures" will be evaluated "for adverse impact, regardless of whether the total selection process has an adverse impact based on national origin."⁵⁵⁴ The EEOC will also "carefully investigate charges" involving English-fluency requirements, as well as training or education requirements that "deny employment opportunities to an individual because of his or her foreign training or education, or [that] require an individual to be foreign trained or educated," because those procedures may constitute either disparate treatment or adverse impact on the basis of national origin.⁵⁵⁵

Under the regulations, an employer policy requiring employees to speak English at all times at work "is a burdensome term and condition of employment"; the EEOC "will presume that such a rule violates [T]itle VII and will closely scrutinize it."⁵⁵⁶ An employer may, however, permissibly require employees to speak only in English at certain times "where the employer can show that the rule is justified by business necessity," and has notified its employees of the rule and of the consequences for violating it.⁵⁵⁷ "If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the [EEOC] will consider the employer's application of the rule as evidence of discrimination on the basis of national origin."⁵⁵⁸

The regulations further specify that Title VII prohibits harassment on the basis of national origin.⁵⁵⁹ National origin harassment includes "[e]thnic slurs and other verbal or physical conduct relating to an individual's national origin . . . when this conduct: (1) [h]as the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) [h]as the

553 Id. § 1606.5(a).

554 Id. § 1606.6(a)(2).

555 Id. § 1606.6(b).

556 Id. § 1606.7(a).

557 Id. § 1606.7(b), (c).

558 Id. § 1606.7(c).

559 Id. § 1606.8(a).

purpose or effect of unreasonably interfering with an individual's work performance; or (3) [o]therwise adversely affects an individual's employment opportunities."⁵⁶⁰ An employer will be liable for national origin harassment by its supervisory employees, between employees, and by non-employees in the workplace under the same standards set forth above in the discussion of employer liability for sexual harassment of its employees.⁵⁶¹

d. Employee selection procedures

The EEOC has set forth detailed guidelines for employers to use in setting employee selection procedures.⁵⁶² These uniform guidelines are intended to assist employers "to comply with requirements of Federal law prohibiting employment practices [that] discriminate on grounds of race, color, religion, sex, and national origin."⁵⁶³ The guidelines do not apply to employer obligations with respect to age discrimination or disability discrimination,⁵⁶⁴ nor do they limit employer recruiting activities "designed to attract members of a particular race, sex, or ethnic group which were previously denied employment opportunities or which are currently underutilized."⁵⁶⁵ Under the uniform guidelines, any selection procedure that adversely effects the hiring, promotion, or other employment opportunities of members of any race, sex, or ethnic group "will be considered discriminatory . . . unless the procedure has been validated" through a validity study in accordance with the guidelines,⁵⁶⁶ or is otherwise permissible under the relevant regulations.⁵⁶⁷ Even a validated employment selection test or procedure may not, however, be used with respect to members of a race, sex, or ethnic group if that test or procedure

⁵⁶⁰ Id. § 1606.8(b).

⁵⁶¹ Id. § 1606.8(d), (e); App. A to 29 C.F.R. § 1606.8.

⁵⁶² See generally 29 C.F.R. pt. 1607.

⁵⁶³ 29 C.F.R. § 1607.1(B).

⁵⁶⁴ Id. § 1607.2(D).

⁵⁶⁵ Id. § 1607.2(C).

⁵⁶⁶ Id. § 1607.3(A); see id. § 1607.5 (general standards for validity studies).

⁵⁶⁷ Id. § 1607.3(A); see id. § 1607.6 (permissible use of selection procedures that have not been validated).

has not been imposed upon other employees or applicants for employment.⁵⁶⁸

e. Permissible consideration of race, color, religion, sex, and national origin

Title VII and its implementing regulations do not prohibit all consideration of race, color, religion, sex, and national origin in employment decisions. For example, employers can make decisions on the basis of religion, sex, and national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification" ("BFOQ") "reasonably necessary to the normal operation of that particular business or enterprise."⁵⁶⁹ The BFOQ exception does not apply to race, and will be interpreted narrowly in those circumstances where an employer seeks to assert it.⁵⁷⁰ For example, refusal to hire an individual based on stereotyped characteristics of the sexes, including the stereotype "that men are less capable of assembling intricate equipment" or "that women are less capable of aggressive salesmanship" does not constitute a valid BFOQ defense.⁵⁷¹ Sex may be a BFOQ where "necessary for the purpose of authenticity or genuineness," however, as when a director decides to consider only actresses when casting the role of a woman.⁵⁷²

Title VII also permits employers to refuse to hire, employ, or discharge any individual where the employment position at issue, "or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States" and the particular individual "has not fulfilled or has ceased to fulfill that requirement."⁵⁷³ It is also permissible under Title VII to apply different standards of compensation or conditions of employment in observance of the terms of bona fide seniority or merit systems, provided that those "differences are not the result

⁵⁶⁸ Id. § 1607.11.

⁵⁶⁹ 42 U.S.C. § 2000e-2(e); see 29 C.F.R. §§ 1604.2 (sex), 1606.4 (national origin).

⁵⁷⁰ 29 C.F.R. §§ 1604.2 (a), 1606.4.

⁵⁷¹ Id. § 1604.2(a)(1)(ii).

⁵⁷² Id. § 1604.2(a)(2).

⁵⁷³ 42 U.S.C. § 2000e-2(g); see 29 C.F.R. § 1606.3.

of an intention to discriminate because of race, color, religion, sex, or national origin."⁵⁷⁴

Title VII contains two other statutory provisions allowing employment of persons of a particular religion. A "religious corporation, association, educational institution, or society" is exempt with respect to its "employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities."⁵⁷⁵ In addition, an educational institution may "hire and employ employees of a particular religion" if (1) the institution "is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society" or (2) the institution's curriculum "is directed toward the propagation of a particular religion."⁵⁷⁶

In certain limited circumstances, the U.S. Supreme Court has upheld certain affirmative action measures under Title VII.⁵⁷⁷

3. Recordkeeping and notice requirements

In addition to generally prohibiting race, sex, religious, and national origin discrimination in employment, Title VII also subjects employers to certain recordkeeping and notice requirements.⁵⁷⁸ For example, an employer with 100 or more employees must file executed copies of a standard form describing the racial and gender composition of its workforce with the EEOC each year on or before September 30th.⁵⁷⁹ Employers subject to Title VII also must post EEOC-prepared or -approved notices describing the applicable provisions of that statute, and must ensure that those postings are "in prominent and accessible places" where notices to employees and applicants "are cus[t]omarily maintained."⁵⁸⁰ In addition, employers generally

⁵⁷⁴ 42 U.S.C. § 2000e-2(h).

⁵⁷⁵ 42 U.S.C. § 2000e-1(a).

⁵⁷⁶ *Id.* § 2000e-2(e)(2).

⁵⁷⁷ See, e.g., *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616 (1987); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

⁵⁷⁸ See generally, e.g., 29 C.F.R. pt. 1602.

⁵⁷⁹ *Id.* § 1602.7.

⁵⁸⁰ *Id.* § 1601.30(a).

must keep any personnel or employment records having to do with, among other things, hiring, promotion, demotion, transfer, termination, compensation, and selection for training, for one year from the date the record was made or the personnel action was taken, whichever is later.⁵⁸¹

Who administers the law?

The EEOC administers Title VII and its implementing regulations.⁵⁸² The EEOC may receive information concerning alleged Title VII violations "from any person."⁵⁸³ Moreover, any person, agency, or organization may file a charge with the EEOC on behalf of him- or herself, or on behalf another person claiming to be aggrieved by a violation of Title VII.⁵⁸⁴ All charges must be in writing and must be verified.⁵⁸⁵

If a charge is timely and properly filed, the EEOC will undertake an investigation of its allegations.⁵⁸⁶ The EEOC may encourage the relevant parties to settle the charge on mutually agreeable terms, or "may facilitate a settlement . . . by permitting withdrawal of the charge."⁵⁸⁷ In the absence of a settlement, individuals may also bring suit alleging Title VII violations after receipt of an EEOC notice of right to sue, whether or not the EEOC has found reasonable cause to believe a violation occurred.⁵⁸⁸ An individual employee who receives a notice of right to sue must file suit within 90 days after receiving that notice.⁵⁸⁹

What are the consequences of non-compliance?

⁵⁸¹ Id. § 1602.14.

⁵⁸² Id. § 1601.1; see generally id. pt. 1601.

⁵⁸³ Id. § 1601.6.

⁵⁸⁴ Id. § 1601.7(a). Members of the EEOC may also file charges with the Commission. Id. § 1601.11(a).

⁵⁸⁵ Id. § 1601.9; see id. § 1601.11(a) (requiring charges filed by members of the EEOC to be in writing and verified).

⁵⁸⁶ Id. § 1601.15(a).

⁵⁸⁷ Id. § 1601.20.

⁵⁸⁸ Id. § 1601.28.

⁵⁸⁹ Id. § 1601.28(e)(1).

If the EEOC finds reasonable cause to believe that an employer has violated Title VII, it will first attempt to achieve compliance through informal methods of conference, conciliation, and persuasion.⁵⁹⁰ Written conciliation agreements "attempt to achieve a just resolution of all violations found" by obtaining "agreement that the [employer] will eliminate the unlawful employment practice and provide appropriate affirmative relief."⁵⁹¹ If a conciliation agreement acceptable to the EEOC cannot be reached, the EEOC may file a civil suit against the employer, or the aggrieved individual may sue.⁵⁹²

In any judicial action, whether brought by the EEOC or by an individual employee, in which an employer is found to have violated intentionally Title VII, the court is authorized to enjoin the employer from engaging in the unlawful employment practice and to order appropriate affirmative relief, including, but not limited to, "reinstatement or hiring of employees, with or without back pay," for up to two years "prior to the filing of a charge" with the EEOC.⁵⁹³ Any back pay awarded will be reduced by the amount of "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against."⁵⁹⁴ Prevailing employees may also receive a reasonable attorney's fee, including expert fees, as part of the costs of the action.⁵⁹⁵ Moreover, if an employer is found to engage in unlawful intentional discrimination in violation of Title VII, the employer may be liable for compensatory damages and, if the employer engaged in the unlawful practices "with malice or with reckless indifference" to the rights of the aggrieved employee,⁵⁹⁶ punitive damages.⁵⁹⁷ Compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish,

⁵⁹⁰ Id. § 1601.24(a).

⁵⁹¹ Id.

⁵⁹² Id. § 1601.27. The EEOC may not file civil suit until 30 days from the date of the filing of the charge, see id., but may at any time file for preliminary or temporary relief if, "upon the basis of a preliminary investigation," it makes "the initial determination . . . that prompt judicial action is necessary to carry out the purposes" of Title VII, see id. § 1601.23(a).

⁵⁹³ 42 U.S.C. § 2000e-5(g)(1).

⁵⁹⁴ Id.

⁵⁹⁵ Id. § 2000e-5(k).

⁵⁹⁶ Id. § 1981a(b)(1).

⁵⁹⁷ Id. § 1981a(a)(1). Compensatory and punitive damages are not available where the challenged employment action is unlawful only because of its disparate impact. Id.

loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded . . . shall not exceed" \$50,000 if the employer had more than 14 but less than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year; \$100,000 if the employer had more than 100 and fewer than 201 such employees; \$200,000 if the employer had more than 200 and fewer than 501 such employees; or \$300,000 if the employer had more than 500 such employees.⁵⁹⁸

If the challenged employment action was motivated by several factors, and the employer can demonstrate that it would have taken the same action even in the absence of the impermissible discriminatory motivation, however, the employee may obtain only limited relief, including attorney's fees and costs, but will not be entitled to damages or an injunction requiring reinstatement, hiring, promotion, or payment.⁵⁹⁹

Title VII and its implementing regulations also impose penalties for violations of applicable notice and recordkeeping requirements. For example, an employer who fails to post required notices is subject to a fine of not more than \$545 for each separate offense.⁶⁰⁰

Additional resources

The provisions described here are subject to exceptions or refinements as set forth in Title VII and its implementing regulations and have been interpreted in case law and EEOC guidance, which are not addressed in this *Guide*. The EEOC website is a good source of information on Title VII generally (<http://www.eeoc.gov/>), including the differing interpretations of Title VII's inclusion of protections for LGBT workers (https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

⁵⁹⁸ *Id.* § 1981a(b)(3).

⁵⁹⁹ *Id.* § 2000e-5(g)(2)(B).

⁶⁰⁰ 29 C.F.R. § 1601.30(b). Title VII itself, however, indicates that the maximum fine is \$100 per separate offense. 42 U.S.C. § 2000e-10(b).

Uniformed Services Employment and Reemployment Rights Act

Brief statement of the law

The Uniformed Services Employment and Reemployment Rights Act ("USERRA"), as amended,⁶⁰¹ and its implementing regulations,⁶⁰² generally prohibit employment discrimination on the basis of military service.

To whom does the law apply?

USERRA generally applies to any employer "that pays salary or wages for work performed or that has control over employment opportunities."⁶⁰³ Accordingly, USERRA "applies to virtually all employers."⁶⁰⁴

What does the law require?

USERRA generally prohibits employers from denying any individual "who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service . . . initial employment, reemployment, retention in employment, promotion, or any benefit of employment . . . on the basis of that membership, application for membership, performance of service, application for service, or obligation."⁶⁰⁵ It also protects employer retaliation for actions brought to enforce USERRA rights.⁶⁰⁶ The term

⁶⁰¹ 38 U.S.C. §§ 4301-4333. The U.S. Department of Defense has issued regulations informing service members and applicants for uniformed service positions of their rights and obligations under USERRA. See generally 32 C.F.R. pt. 104.

⁶⁰² 20 C.F.R. pt. 1002.

⁶⁰³ 38 U.S.C. § 4303(4)(A).

⁶⁰⁴ See Veterans' Employment and Training Service, U.S. Dep't of Labor, *A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)* (Mar. 2003), <http://www.dol.gov/vets/whatsnew/uguide.pdf> (last visited June 21, 2018).

⁶⁰⁵ 38 U.S.C. § 4311(a).

⁶⁰⁶ 20 C.F.R. § 1002.19.

"uniformed service" covers "all categories of military training and service"⁶⁰⁷ and includes the Armed Forces, including the reserves for each branch of the Armed Forces, the Army and Air National Guards "when engaged in active duty for training, inactive duty training, or full-time National Guard duty," the Public Health Service's commissioned corps, and "any other category of persons designated by the President in time of war or national emergency."⁶⁰⁸

USERRA sets forth specific employment rights applicable to those who serve in the uniformed services. For example, an employer generally must reemploy a service member returning from a period of service if the service member, or an appropriate officer on the service member's behalf, gave the employer written or verbal advance⁶⁰⁹ notice of service; the cumulative length of the absence from employment and all previous absences from employment for periods of service is five years or less; the service member reports or submits an application for reemployment to that employer in accordance with USERRA's timing requirements;⁶¹⁰ and the service member was not separated from service with a disqualifying discharge or under other than honorable conditions.⁶¹¹ Subject to limited exceptions,⁶¹² an employer is not required to reemploy a service member if these conditions are not met, or if, for example, the employer can demonstrate that "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable," or the pre-service employment was "for a brief, nonrecurrent period and there [was] no expectation that such employment [would] continue indefinitely or for a significant period."⁶¹³

A service member who is reemployed under USERRA is entitled to the seniority, as well as other rights and benefits determined by seniority, that the service member had when the period of

⁶⁰⁷ Id. § 1002.6.

⁶⁰⁸ 38 U.S.C. § 4303(16).

⁶⁰⁹ Advance notice is not required if it is precluded by "military necessity" or "is otherwise impossible or unreasonable" under all the circumstances. Id. § 4312(b).

⁶¹⁰ Id. § 4312(a). The time period required for timely notification generally depends on the length of the service-member's period of service, id. § 4312(e)(1), but may be extended for up to two years or longer if the service-member is recovering from injuries received or exacerbated during the period of service, id. § 4312(e)(2).

⁶¹¹ 20 C.F.R. § 1002.32.

⁶¹² Id. §§ 1002.73-1002.138.

⁶¹³ 38 U.S.C. § 4312(d)(1)(A), (C); see id. § 4312(d)(2) (placing burden of proof on employer).

service began, "plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed."⁶¹⁴ This includes job status and rate of pay.⁶¹⁵ During the period of service, the service member must be treated as if on furlough or leave of absence, and must generally receive "such other rights and benefits not determined by seniority as are generally provided by the employer . . . to employees having similar seniority, status, and pay who are on furlough or leave of absence."⁶¹⁶ For example, an employee who will be absent from work for a period of service may choose to continue, for up to 24 months, personal and family health care coverage under the employer's health plan, and generally may not be required to pay more than 102% of the plan's full premium for such continued coverage.⁶¹⁷ Similarly, a service member reemployed under USERRA must be treated as having been in the employer's employ during the period of service for purposes of determining the nonforfeitability of the service member's accrued benefits and of determining the accrual of benefits under the plan.⁶¹⁸ Factors including the length of the employee's most recent service, the employee's qualifications, and whether the employee incurred or aggravated a disability during uniformed service "may allow, or require, the employer to reemploy the employee in a position other than" the one the service member would have attained without the absence.⁶¹⁹ Nonetheless, the employer must make reasonable efforts to help the returning service member become qualified for reemployment at the position the employee would have obtained without the absence.⁶²⁰

USERRA also prohibits employers from terminating a reemployed service member within one year from the date of reemployment if the period of service was more than 180 days, or within 180 days from the date of reemployment if the period of service was more than 30 but less than

⁶¹⁴ *Id.* § 4316(a).

⁶¹⁵ 20 C.F.R. § 1002.193.

⁶¹⁶ 38 U.S.C. § 4316(b)(1).

⁶¹⁷ *Id.* § 4317(a)(1), (2).

⁶¹⁸ *Id.* § 4318(a)(2).

⁶¹⁹ 20 C.F.R. § 1002.195.

⁶²⁰ *Id.* § 1002.198.

181 days.⁶²¹

Who administers the law?

The United States Department of Labor's ("DOL's") Veterans' Employment and Training Service ("VETS") enforces USERRA.⁶²² In addition to providing technical assistance to employers, service members, and others regarding USERRA requirements,⁶²³ VETS also investigates written complaints alleging that an employer has failed or refused, or is about to fail or refuse, to comply with its obligations under USERRA.⁶²⁴

Rather than filing a written complaint with VETS, an individual service member alleging a violation of USERRA may file suit against the employer in federal court.⁶²⁵ If the employee had filed a complaint with VETS, but VETS was unable to reach successful resolution of the complaint, the employee may request that the U.S. Attorney General pursue the employee's claim in federal court.⁶²⁶ If the U.S. Attorney General refuses, or if the employee chooses not to seek referral to the U.S. Attorney General at all, the employee may still file suit in federal court to pursue the USERRA claims.⁶²⁷

What are the consequences of non-compliance?

If VETS determines, upon investigation of a written complaint, that the employer violated USERRA, it will "attempt to resolve the complaint by making reasonable efforts to ensure that

621 38 U.S.C. § 4316(c).

622 Id. § 4321.

623 Id.

624 Id. § 4322(a), (b), (d).

625 Id. § 4323(a)(2)(A), (b)(3); 20 C.F.R. § 1002.288.

626 38 U.S.C. § 4323(a)(1), (b)(1).

627 Id. § 4323(a)(2)(B), (C).

the [employer] complies with the provisions" of the law.⁶²⁸

In the case of any judicial action to enforce USERRA, the court may "require the employer to comply" with the law, and may also require the employer "to compensate the [employee] for any loss of wages or benefits suffered by reason of such employer's failure to comply" with USERRA's requirements.⁶²⁹ In addition, if the court determines that the employer's non-compliance was willful, it may require the employer to pay an additional amount equal to the amount of lost wages or benefits.⁶³⁰ A prevailing employee may also be awarded reasonable attorney's fees, expert witness fees, and other litigation expenses, but no fees or court costs may be charged against the employee under any circumstances.⁶³¹

Additional resources

The provisions described here are subject to exceptions or refinements as set forth in USERRA and have been interpreted in case law and VETS and DOL guidance, which are not discussed in this *Guide*. Useful resources include VETS' *A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)* (Mar. 2003), which is available at www.dol.gov/vets/whatsnew/uguide.pdf, as well as DOL's *Employment Law Guide* chapter on USERRA, available at <http://www.dol.gov/vets/programs/userra/>. DOL has also created an online USERRA Advisor that allows employers to determine their obligations in specific factual circumstances by answering a series of questions (www.dol.gov/elaws/vets/userra/userra.asp). The VETS website generally is a good source of additional information (www.dol.gov/vets/).

628 Id. § 4322(d).

629 Id. § 4323(d)(1)(A), (B).

630 Id. § 4323(d)(1)(C). USERRA does not define "willful," but VETS has indicated that a violation will be deemed willful "if the employer's conduct was knowingly or recklessly in disregard of the law." See Veterans' Employment and Training Service, U.S. Dep't of Labor, *A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)* (Mar. 2003), <http://www.dol.gov/vets/whatsnew/uguide.pdf> (last visited June 21, 2018).

631 38 U.S.C. § 4323(h).

Revenue Procedure 75-50

NAIS has a publication focusing on Revenue Procedure 75-50 entitled: *Nondiscrimination and Private Schools: the Publicity Requirements of Revenue Procedure 75-50*. Revenue Procedure 75-50 requires independent schools to not discriminate on the basis of race in any programs or financial assistance. Additionally, this provision has certain notice and posting provisions all independent schools must follow. To view this document, click the following link: <https://www.nais.org/articles/pages/member/nondiscrimination-and-private-schools-publicity-requirements-of-revenue-procedure-75-50/> or search the NAIS web site for the document.

Health Privacy & Financial Security laws

Gramm-Leach-Bliley Act

Health Information Portability and Accountability Act

Gramm-Leach-Bliley Act

NAIS has two publications relating to the Gramm-Leach-Bliley Act: Does Federal Law Require Notice of Your School's Financial Privacy Policy and Mandatory Financial Information Safeguarding Provisions. This act requires certain notices to be sent to parents or certain security steps to be taken if a school engages in various kinds of financial activities. These publications, "Does Federal Law Require Notice of Your School's Financial Privacy Policy" and "Mandatory Financial Information Safeguarding Provisions" can be found by searching the NAIS website or by clicking on the following links:

<https://www.nais.org/articles/pages/member/does-federal-law-require-notice-of-your-school-s-financial-privacy-policy/>; <https://www.nais.org/articles/pages/member/mandatory-financial-information-safeguarding-provi/>.

Health Insurance Portability and Accountability Act

NAIS has a publication relating to the Health Insurance Portability and Accountability Act (HIPAA) on its web site. Please click on the following link to view this document:

https://www.nais.org/Articles/Documents/Member/NAIS_HIPAA_Privacy_Article05.pdf

Glossary

Act	Age Discrimination Act of 1975
ADEA	Age Discrimination in Employment Act of 1964
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
DWA	Drug-Free Workplace Act of 1988
ED	U.S. Department of Education
EEOC	Equal Employment Opportunity Commission
EPA	Equal Pay Act
FLSA	Fair Labor Standards Act
FPCO	Family Policy Compliance Office
OCR	Office for Civil Rights
OMB	U.S. Office of Management and Budget
PDA	Pregnancy Discrimination Act
Section 504	Section 504 of the Rehabilitation Act of 1974
Title IX	Title IX of the Education Amendments of 1972
Title VII	Title VII of the Civil Rights Act of 1964

Title VI	Title VI of the Civil Rights Act of 1964
USERRA	Uniformed Services Employment and Reemployment Rights Act
VETS	Veterans' Employment and Training Service