



# THE LEGAL ISSUE

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## E-Verify: New Requirements for Federal Contractors

By Erica Weston, Legal Staff Associate/Researcher, Litigation

E-Verify is a federally-operated internet-based program that employers may enroll in to verify their workers' employment eligibility. E-Verify electronically verifies information provided on I-9 Forms against records of the Department of Homeland Security and the Social Security Administration. Starting January 15, 2009,<sup>1</sup> many federal contracts and subcontracts will include a clause requiring federal contractors to use E-Verify. 48 C.F.R. pts. 2, 22, and 52. While some federal contractors will be required to verify several categories of employees, the federal government has imposed less stringent requirements on institutions of higher education in response to comments received during the rulemaking process.

Under the new rule, the E-Verify requirement will apply to prime contracts with a performance period exceeding 120 days and a value exceeding \$100,000. The E-Verify requirement will also apply to some subcontracts if the prime contract contains the clause and the value of services or construction provided by the subcontract exceeds \$3,000. The E-Verify requirement will not apply to contracts providing only commercially available off-the-shelf items and related services. Nor will it apply to employees who perform support work rather than substantial duties on contracts that include the term. Although the E-Verify requirement generally will only apply to new contracts entered after January 15, existing indefinite delivery/indefinite quantity contracts with at least 6 months of substantial performance remaining on the contract are subject to bilateral modification to include the E-Verify clause.

When the University enters its first contract containing the E-Verify clause, it will have 30 days to enroll in E-Verify. Once the University has enrolled in E-Verify, it will have 90 days to verify the employment eligibility of employees assigned to work on the contract. After this initial phase-in period, when a contract contains the E-Verify clause, the University will have to initiate verification of new hires working on the contract within 3 business days of their start date, and the University will have to initiate verification of existing employees assigned to work on the contract within 30 days.

For new hires who will be working on the contract, the University may only check status through E-Verify after the employee has accepted the job and provided the University with an I-9 Form. The University may not use E-Verify to screen employment applicants. For existing employees assigned to work on the contract, the University should only check an employee's status once. Thus, if the University has already checked an employee's status through E-Verify for work completed on another federal contract, the University should not re-verify the employee's status for work on a subsequent federal contract.

Once the University submits information from an employee's I-9 Form to E-Verify, E-Verify will instantly determine whether the information matches information contained in the E-Verify database. If the information does not match, the employee will be tentatively non-confirmed. The University must then provide the employee with notice of the non-confirmation. The notice of non-confirmation provides employees the option to contest the tentative non-confirmation. If an employee does not contest the tentative non-confirmation, it automatically becomes a final non-confirmation and the employee is ineligible for work.

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<sup>1</sup> The new regulation is currently subject to court challenge, which may delay implementation or which may lead to reversal of the regulation. See *Chamber of Commerce v. Chertoff*, No. 08-cv-03444 (D. Md.) (filed Dec. 23, 2008). The Office of University Counsel is actively monitoring that litigation.

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If an employee chooses to contest the tentative non-confirmation, the University should provide the employee with a referral letter that explains how to contact the federal agency (DHS or SSA) identified on the non-confirmation notice. An employee must contact the federal agency within eight federal business days of receiving the referral letter. While an employee is contesting a tentative non-confirmation, the University must not take any adverse action against the employee based on the tentative non-confirmation. For example, the University cannot fire the employee, delay the employee's start date, withhold pay or training, or otherwise limit the employee's employment. However, once a tentative non-confirmation becomes final, the University must terminate the employee's employment.

The University is developing an implementation plan to comply with these new E-Verify requirements. Please contact Maggie Wilensky at 303 860 5684 if you have questions about these requirements.



## **In Brief: The Workplace Accommodations for Nursing Mothers Act**

By Erica Weston, Legal Staff Associate/Researcher, Litigation

On August 5, 2008, the Workplace Accommodations for Nursing Mothers Act went into effect. C.R.S. § 8-13.5-101 et seq. This new Colorado law requires employers to make reasonable efforts to accommodate nursing mothers for up to two years after a child's birth. Specifically, the Act requires employers to provide reasonable time (whether paid or unpaid) for nursing mothers to express milk. Employers also must "make reasonable efforts" to provide nursing mothers a nearby location, other than a toilet stall, to express milk. A reasonable lactation place should include a chair, table, electrical outlet, waste basket, and lock. Employers should also ensure that nursing mothers have access to a refrigerator to store milk. The Act does not explicitly establish penalties for employers who fail to comply, but it does require nonbinding mediation as a prerequisite for litigation. Please contact your University Counsel campus office if you have questions on this new law. The Colorado Department of Labor and Employment also suggests ways to accommodate nursing mothers at <http://www.coworkforce.com/lab/nursingmothers.asp>.

# What You Should Know: The Passing of the Higher Education Opportunity Act

By Michelle Krech, Legal Staff Associate/Researcher, Boulder

Last summer, Congress passed the Higher Education Opportunity Act ("HEOA") and President Bush signed it into law on August 14, 2008. The HEOA is codified in Title 20, Section 1001, et seq. of the United States Code (20 U.S.C. § 1001, et seq.) and is so large that it literally spans over hundreds of pages.

The HEOA imposes a substantial number of new reporting and disclosure requirements on higher education institutions that participate in Title IV federal student financial aid programs. However, much remains unanswered and ambiguous about the HEOA because the provisions have not yet been clarified or implemented through Department of Education regulations.

It is highly unlikely that any Department of Education regulations will take effect prior to 2010; in the meanwhile, institutions are required to make a good faith effort to comply with the HEOA. As such, it is important that officers, administrators, and staff familiarize themselves with HEOA requirements.

The purpose of this article is to provide an introduction to the HEOA. The following list highlights only the key areas of which you should be aware. All requirements were effective as of August 14, 2008, unless otherwise stated:

- **Drug and Alcohol Abuse Prevention Reporting:** As a part of its biennial review of their drug and alcohol abuse prevention programs, institutions must determine and report the quantity of drug and alcohol-related violations and fatalities that occur on campus, or as a part the institution's activities, and any resulting sanctions. *See* 20 U.S.C.A. § 1011i.
- **Certification Regarding Use of Certain Federal Funds:** Institutions must certify annually to the ED that federal funds were not used to hire registered lobbyists or to pay any person to attempt to influence federal contracts, grants, or loans. *See* 20 U.S.C.A. § 1011m.
- **Tuition Cost Reporting and Cost Calculator Disclosures:** Beginning July 1, 2011, the Department of Education ("the ED") must publish tuition cost information provided by institutions. Any institution that is on the lists of 5% of institutions with the largest net increase or increase in net cost will be required to: (1) report its reasons for the increases; and (2) report the steps being taken to reduce them. Further, institutions that appear on either list for two or more consecutive years will also be required to report on their progress in the steps identified in the previous year's report. Institutions will be required to post on their websites cost calculators developed by the ED. *See* 20 U.S.C.A. § 1015a.
- **Textbook Disclosures:** Effective July 1, 2010, institutions are required to disclose, to the maximum extent practicable, on any course schedules available on their websites, the International Standards Book Number ("ISBN") and retail price for all required and recommended textbooks and supplemental materials. *See* 20 U.S.C.A. § 1015b.
- **Preferred Lender Disclosures and Reporting:** Institutions participating in preferred lender arrangements must comply with new notification, disclosure, and reporting requirements. *See* 20 U.S.C.A. § 1019a-d.
- **Teacher Quality Enhancement:** Institutions that have teacher preparation programs must provide annual reports of information to the ED. In addition, institutions are required to develop and report goals for increasing the number of teachers prepared in shortage fields and provide annual assurances to the ED. *See* 20 U.S.C.A. § 1022d-e.
- **Disclosures to Students:** Institutions must makes a series of disclosures to students, including those regarding: (1) its plans for improving academic programs; (2) its policies and sanctions concerning copyright; (3) the percentage of men, women, Pell Grant recipients, and self-identified racial and ethnic minorities enrolled at the institution; (4) retention, graduation, and placement data; (5) graduate and professional program information for recent graduates; (6) a fire safety report; (7) transfer of credit policy; (8) vaccination policy; and (9) on-campus crime. *See* 20 U.S.C.A. § 1092a-f.

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## Higher Education Opportunity Act

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- **New Policies/Plans:** If not already in place, institutions are required to develop the following: (1) policy regarding peer-to-peer file sharing and their plans to combat unauthorized distribution of copyrighted material (which must consider technology-based deterrents and offer, to the extent practicable, alternatives to illegal downloading); (2) missing student notification policy and procedure for on-campus residents; (3) a code of conduct that addresses interaction with lenders; (4) student transfer of credit policy; and (5) campus policies regarding immediate emergency response and evacuation procedures. See 20 U.S.C.A. §§ 1092a-j, 1094a.
- **Accreditation:** The ED is prohibited from regulating student achievement or any other accreditation standards. Institutions are required to set their own specific standards and measures consistent with their respective missions and within the larger framework of the accreditation standards. See 20 U.S.C.A. § 1099b.

Due to the enormity and breadth of topics addressed in the HEOA, many entities have offered analysis and guidance on HEOA provisions. Here are some additional resources:

- U.S. Department of Education: <http://www.ed.gov/policy/highered/leg/hea08/index.html>
- <http://ifap.ed.gov/dpcletters/attachments/GEN0812FP0810AttachHEOADCL.pdf>
- National Association of Independent Colleges and Universities (NAICU): [www.HEA101.org](http://www.HEA101.org)
- National Association of College and University Attorneys (NACUA): <http://www.nacua.org/meetings/VirtualSeminars/october2008/resources.html>
- National Association of Student Financial Aid Administrators (NASFAA): <http://www.nasfaa.org/publications/2008/heasummary.html>
- American Council on Education (ACE): [http://www.acenet.edu/e-newsletters/p2p/ACE\\_HEA\\_analysis\\_818.pdf](http://www.acenet.edu/e-newsletters/p2p/ACE_HEA_analysis_818.pdf)
- National Association of College and University Business Officers (NACUBO): <http://www.nacubo.org/x10818.xml>  
<http://www.nacubo.org/x10782.xml>  
<http://www.nacubo.org/x10703.xml>
- Council for Higher Education Accreditation (CHEA): [http://www.chea.org/Government/HEAUpdate/Chea\\_HEA44.html](http://www.chea.org/Government/HEAUpdate/Chea_HEA44.html)
- EDUCAUSE: <http://connect.educause.edu/Library/Abstract/P2PProvisionsintheNewHigh/47607>
- National Association of State Universities and Land-Grant Colleges (NASULGC): <http://www.nasulgc.org/NetCommunity/Page.aspx?pid=1019&srcid=532>
- Association of American Universities (AAU): <http://www.aau.edu/policy/article.aspx?id=7852>

The Office of University Counsel has prepared a memo that reviews the HEOA in more detail than this article. If you would like a copy of that memo, or if you have specific questions concerning the HEOA, please contact your campus legal counsel's office, which is equipped to address specific concerns and provide further information. As HEOA mandates are likely to evolve as the ED issues regulations, further guidance from the Office of University Counsel will be forthcoming to assist the departments and units most impacted by HEOA requirements.

The material contained in this newsletter has been prepared by the Office of University Counsel for informational purposes only. This newsletter does not provide legal advice. By providing this information, an attorney/client or other relationship is neither intended nor established. The Office's client is the University and not any particular employee. We urge you to consult with your advising counsel regarding your individual situation.

- ◆ UCB: (303) 492-7481
- ◆ UCCS: (719) 262-3820
- ◆ UCD: (303) 315-6617
- ◆ SYSTEM: (303) 860-5686

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# THE LEGAL ISSUE

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## The Colorado Open Records Act: The public's right to obtain University records

By Jeremy Hueth, Managing Associate University Counsel & Maggie Wilensky, Assistant University Counsel, System

This article describes the scope of the Colorado Open Records Act (CORA) with respect to records in the possession of University employees, and the obligations of employees to produce records when a request is made under the Act.

### A. Scope of CORA

CORA requires the University as a public institution to make most of its records available to the public. However, CORA also contains numerous exceptions and several important protections for custodians of records. CORA seeks to strike a balance between the right of the public to demand transparency of public entities, the privacy rights of persons served and employed by those entities, and the efficiency of the governmental function.

CORA defines "public records" as "all writings made, maintained, or kept by" the University (through its employees) related to the performance of public functions or the receipt or expenditure of public funds.<sup>1</sup> The term "writings" includes all documentary material "regardless of physical form," and specifically includes electronic mail messages.<sup>2</sup> Moreover, this definition may include records created by University employees in the performance of public functions even if they are maintained in a form not controlled by the University, such as a private email account.

### B. The right of inspection under CORA

CORA requires that "[a]ll public records shall be open for inspection by any person at reasonable times."<sup>3</sup> The University has designated official custodians to carry out the functions required by CORA, and a request to inspect University records under CORA must be directed to such custodians pursuant to the process discussed below. When a request involves electronically stored records, the custodian is required to "take such measures as are necessary to assist the public in locating any specific public records sought and to ensure public access to the public records without unreasonable delay or unreasonable cost."<sup>4</sup> The custodian must make the records available within three days after receipt of the request, or inform the requestor if the records are not within the custody or control of the person to whom the application was made.<sup>5</sup> The three-day response period may be extended by seven days upon a finding by the custodian that extenuating circumstances exist.

The University may not deny any person access to public records absent a specific statutory provision permitting the withholding of the information requested.<sup>6</sup> In some cases, where it is unclear whether a CORA requirement or exception applies, the custodian or requestor will then apply to a county district court for a resolution of the unresolved issue.

<sup>1</sup> C.R.S. § 24-72-202(6)(a)(1); see also *Denver Publishing Co. v. Board of County Comm'rs*, 121 P.3d 190, 195 (Colo. 2005).

<sup>2</sup> C.R.S. § 24-72-202(7).

<sup>3</sup> C.R.S. § 24-72-203(1).

<sup>4</sup> C.R.S. § 24-72-203(1)(b)(II).

<sup>5</sup> C.R.S. § 24-72-203(2)-(3).

<sup>6</sup> *Denver Publishing Co. v. Dreyfus*, 520 P.2d 104, 107 (Colo. 1974).

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If the University improperly denies a person access to a public record upon request, the requestor may file an application with the district court. If the applicant prevails, the University may be required to pay costs and attorneys fees.<sup>7</sup> More importantly, a University employee who knowingly fails to comply with the provisions of CORA may be subject to criminal prosecution.<sup>8</sup>

### C. Personal records and the limited expectation of privacy

University employees sometimes create or maintain records that are personal in nature in the course of their public duties. Most notably, University policies allow employees to use email accounts for *de minimus* personal use. When records responsive to a CORA request appear to be entirely personal in nature and not created in the exercise of public duties, the University may be able to assert a privacy protection.<sup>9</sup> However, University employees have a narrower expectation of privacy than do private citizens.<sup>10</sup> Furthermore, information stored on employee email accounts is considered University property. Accordingly, University employees should take care in creating or maintaining personal records in University media.

### D. Other notable exceptions under CORA

CORA contains numerous exceptions and protections in addition to those already discussed. However, employees should take note that many exceptions and protections are technical in their application and may require particular steps to be taken before they may be asserted. In the case of a record which may be protected from disclosure, the officially designated custodian/s of the record is responsible for applying the relevant law, with the assistance of legal counsel.<sup>11</sup> The following list summarizes the most notable of these, but is not an exhaustive list of records that are exempt from disclosure:

- Privileged information. The custodian must deny access to any information that is privileged or otherwise protected by law, including information protected under the attorney-client and attorney work product privileges, as well as trade secrets.<sup>12</sup>
- Student records. Under the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, the custodian must deny access to any "student record" unless the student waives his or her right to non-disclosure.<sup>13</sup>
- Personnel files. CORA exempts "personnel files" from public disclosure. The personnel file exception includes any record that contains "home addresses, telephone numbers, financial information, and other information maintained because of the [employment] relationship."<sup>14</sup> The definition of "personnel files" excludes—and, therefore, makes available for public inspection—applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports, or any record of compensation, including expense allowances and benefits. Records that constitute personnel files must also be analyzed to determine whether the employee has a legitimate expectation of privacy that outweighs the interest in public disclosure.
- Work product prepared for elected officials. The definition of "public record" exempts "work product prepared for elected officials," which includes materials that "express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority."<sup>15</sup>
- Records of candidate searches for an executive position. The custodian must deny the right of inspection of any records submitted by or on behalf of an applicant or candidate for an executive (e.g., non-elective, non-classified)

<sup>7</sup> C.R.S. § 24-72-204(5).

<sup>8</sup> C.R.S. § 24-72-206.

<sup>9</sup> See *Denver Publishing Co.*, 121 P.3d at 199.

<sup>10</sup> See, e.g., *Denver Publishing Co. v. University of Colorado*, 812 P.2d 682, 685 (Colo.App. 1991).

<sup>11</sup> See C.R.S. § 24-72-203.

<sup>12</sup> C.R.S. § 24-72-204(3)(a)(IV).

<sup>13</sup> C.R.S. § 24-72-204(1)(b) (excepting from public disclosure records protected by federal law).

<sup>14</sup> C.R.S. §§ 24-72-204(3)(a)(II)(A), 24-72-202(4.5).

<sup>15</sup> C.R.S. §§ 24-72-202(6)(b)(2), (6.5)(a).

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position.<sup>16</sup> However, most records submitted by or on behalf of a “finalist” for a chief executive officer position must be open for public inspection.

- The deliberative process privilege. In some circumstances, CORA excepts from disclosure “[r]ecords protected under the common law governmental or ‘deliberative process’ privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government . . . .”<sup>17</sup> Assertion of this privilege is subject to quite specific procedures outside the scope of this article.
- Records that would cause injury to the public interest. A custodian may, after application to a district court, withhold records that would otherwise be public if release would cause “substantial injury to the public interest . . . .”<sup>18</sup> The Act does not define what constitutes a “substantial injury to the public interest,” but courts have invoked the exception to protect an employee’s right to privacy<sup>19</sup> and the public’s right to be free from at least some “highly offensive” material.<sup>20</sup>

The Act contains numerous additional exemptions. Those listed above are some of the most frequently implicated by CORA requests to the University, but the list is by no means exhaustive and instead offers a flavor of CORA’s complexity.

### E. Responding to a CORA request

Any request to inspect records under CORA must be directed to the appropriate custodian in accordance with published procedures. A list of current custodians and links to campus and system procedures appear at the end of this article. If you receive a CORA request, you should immediately contact the relevant custodian or the Office of University Counsel.

If a University custodian requests that you produce records, keep in mind that the time for the University to respond to a request is short and that CORA includes penalties for failure to comply with its terms. If a University records custodian seeks record from you and you determine that you do not possess responsive records, you should still make every effort to help identify where responsive records may reside. Custodians may not always be aware when a CORA request involves records held by more than one department or unit.

Some CORA requests are quite straightforward, but many involve difficult questions of interpretation of law, as noted above. Employees should raise any concerns about potentially sensitive records to the custodian or legal counsel, but should not withhold records on their own accord. Finally, in some cases involving voluminous records or particularly time-consuming search requests, the University may have the prerogative to charge the requester the actual cost of responding to the request or seek additional protections.

Information about campus-specific CORA procedures, and contact information for official records custodians, is available at the following weblinks and phone numbers:

#### Boulder:

<http://www.colorado.edu/humres/records/openrecords.html?a=1>

#### Denver:

<http://administration.ucdenver.edu/admin/policies/admin/OpenRecordsRequests.pdf>

#### System:

<https://www.cu.edu/content/openrecordsrequest>

#### Colorado Springs:

Contact campus counsel at 719 255 4324

<sup>16</sup> C.R.S. §§ 24-72-204(3)(XI)(A), 24-72-202(1.3).

<sup>17</sup> C.R.S. § 24-72-204(3)(a)(XIII).

<sup>18</sup> C.R.S. § 24-72-204(6)(a).

<sup>19</sup> *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998).

<sup>20</sup> *Bodelson v. Denver Publishing Co.*, 5 P.3d 373, 378 (Colo. App. 2000) (denying release of autopsy records related to the Columbine tragedy).

# Export Control Laws –Do They Really Apply To Me?

By Catherine Shea, Associate University Counsel for Technology Transfer and Research Compliance

For decades, the university world has operated under the generally accepted notion that export control laws apply only to commercial exporters and that universities could ignore this area of the law. To continue to ignore export control laws today puts a university, its employees, and its federal grants and contracts in peril.

This article gives a brief overview of the law, current U.S. Government export control activities, and the University of Colorado export control program. At the end of this article, you will also find a short export analysis useful for any university employee who may be involved in activities subject to export controls.

## U.S. Export Control Regime

Because universities aren't engaged in the business of selling nuclear, biological, or chemical weapons or other military technology to foreign entities -- activities regulated by the U.S. Department of State -- the export control rules once did not seem to apply. Nor have universities engaged in the business of selling other "dual-use" items such as encryption software, high-performance computers, and other goods or technologies which can have military and commercial uses. The U.S. Department of Commerce regulates transactions for these items and related technology. The U.S. Department of Treasury regulates transactions with foreign individuals, entities, and countries when those countries are subjected to economic sanctions. Most famously, Treasury is responsible for implementing the embargo on financial transactions with Cuba.

In the past, if an export issue did arise on campus, the issue typically arose in the context of sponsored research. An export analysis of the research would often show that the university work fell within the "fundamental research exception." Fundamental research means "basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which are ordinarily restricted for proprietary or national security reasons." See Chapter 22 Code of Federal Regulations Section 120.11(a)(8). This definition describes the essence of university work and until recently, university researchers and administrators believed this definition served as the university's de facto export analysis.

## When Export Issues May Arise

Today, universities are increasingly engaged with foreign partners at the student and researcher level and up to the presidential and board levels. Universities seek foreign students, faculty members, and employees. At an institutional level, universities are developing joint academic programs and opening academic facilities in foreign countries. Any university pursuing cutting-edge research is by definition involved in collaborations with foreign academics. All of these activities raise some form of an export control question. Export issues arise every day in these examples:

- Sending an email with satellite design information to a foreign collaborator, whether in the U.S. or abroad.
- Shipping biological agents pursuant to a material transfer agreement to a foreign company.
- Employing a foreign worker on a research agreement for the U.S. military.
- Presenting unpublished research results at a conference with foreign nationals in the audience.
- Traveling out of the U.S. with a laptop which has encryption technology on it.
- Purchasing goods from a foreign company when the U.S. Government has prohibited any financial transactions with the country.

### U.S. Government Export Control Agencies

#### **State Department –International Traffic in Arms Regulations (ITAR, 22 C.F.R. §§ 120-130)**

Controls export of defense articles and services associated with nuclear, chemical, and biological weapons; military equipment; satellite technology, etc.

#### **Commerce Department –Export Administration Regulations (EAR, 15 C.F.R. §§ 730-774)**

Controls export of commercial items which also have military applications, such as software, encryption technology, sensors, lasers, communications equipment, laptops, PDAs, etc.

#### **Treasury Department - Office of Foreign Assets Control Regulations (OFAC, 31 C.F.R. § 500)**

Identifies and restricts transactions with sanctioned individuals, entities, and countries, e.g., Osama Bin Laden, Al Qaeda, Cuba, Iran, Sudan.



## **Export Controls**

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As American and foreign academic institutions continue to strengthen ties, export issues must be addressed to protect the parties involved on both sides and to protect U.S. national security.

### **U.S. Government Enforcement Efforts**

Both the U.S. Government and universities now recognize that universities engage in a variety of activities which are subject to export controls. The U.S. Government has stepped up its outreach and enforcement efforts to highlight the applicability of these regulations to universities. In September 2008, the U.S. Government successfully prosecuted a professor from the University of Tennessee for exporting controlled information to two Chinese graduate students working in his lab and for taking the controlled information with him to China. The professor was working on a U.S. Air Force contract on unmanned aircraft pursuant to a subcontract from his own start-up company. The U.S. Department of Justice press release on the case is available at: <http://www.usdoj.gov/opa/pr/2008/September/08-nsd-774.html> This case certainly caught the attention of university administrators responsible for export controls on their campuses: researchers engage in foreign collaborations every day. So when is a foreign collaboration a cause for export analysis? What technologies are subject to export controls? And, if a collaboration or technology is subject to export control, can the research proceed?

The University of Tennessee was able to avoid implication; while the press makes much of the fact that the defendant professor was a university employee, the conviction was actually for work completed at his start-up company. Still, the university had to endure the resulting press attention, some of it negative. In the event a university violates the law, it is subject to significant penalties and could face debarment from federal contracts if the violation is found to compromise the university's ability to perform the contract. See Federal Acquisition Regulation 9.406-2 Causes for Debarment.

### **University Response**

Understandably, universities are looking for ways to mitigate the risk associated with export controls by giving their employees more staff, technology resources, and training to build an export compliance program.

At the University of Colorado, each campus has dedicated resources for export control compliance in the research compliance offices. Each campus has an export control policy and has at least one export official known as the "Empowered Official." Each campus also has a license for a software tool called Visual Compliance, which can quickly compare a university activity against the current export control laws and regulations. You can locate these individuals on the campus office of research compliance websites. Periodically, campuses offer trainings and one-on-one meetings with faculty with export control questions.

At the system level, the Office of the Vice President for Academic Affairs and Research is responsible for maintaining the university's DTrade license, issued by the Department of State and necessary for any ITAR –controlled activity. The Office of University Counsel has also invested legal resources in this area and offers legal advice and training to campus export officials.

### **Your Own Export Analysis - Foreign Travel, Foreign Collaborations, Foreign Transactions**

Three simple questions can get you started on your export analysis:

1. Am I traveling to a foreign country?
2. Am I collaborating with a foreign national?
3. Am I sending (or emailing) an export controlled item or information to someone in a foreign country?

If you answer "yes" to any of these questions, you should contact your campus export control manager. In every case, it's important to ask yourself these questions, as individuals are responsible for their own activities. While the majority of university activity is not subject to export controls, some activities will require a license and your export manager can help you secure the necessary licenses. It is the rare case where the activity will be entirely prohibited.

## Introductions

*John Sleeman*  
*Managing Senior Associate University Counsel, UCB*

John R. Sleeman, Jr. is the Managing Senior Associate University Counsel for the University of Colorado at Boulder. Mr. Sleeman received his B.A. in American History, magna cum laude, from the University of Massachusetts. He received his J.D. from the University of Denver, College of Law. Mr. Sleeman worked for ten years in private practice, focusing on defense of medical malpractice actions, general tort litigation, insurance claims and coverage issues. He then worked in the State Services Section of the Colorado Department of Law from February 1998 to March 2009, initially as Assistant Attorney General, then as First Assistant Attorney General and finally as Deputy Attorney General, serving as a member of the Attorney General's senior management team, and coordinating legal services to all Colorado state institutions of higher education. Mr. Sleeman's professional affiliations include the American Inns of Court, Minor Yasui Chapter and the National Association of College and University Attorneys. He joined the University's Office of University Counsel in March of 2009.

## Congratulations, Jessica & Erica!

The Office of the Attorney General recently hired Erica Weston and Jessica Chavez-Salazar to serve as Assistant Attorneys General. Jessica served as Research Associate in the Boulder Office of University Counsel; she joined the University in 2006. Erica was a Research Associate in the Litigation office and has been with the University since 2005. We wish them both every success as they assume their new positions.

## Farewell, Rosemary!

Rosemary Augustine has announced her retirement after serving as Associate University Counsel for the University of Colorado at Colorado Springs for over 23 years. Rosemary received her B.A. in History from Chico State University, summa cum laude, and her J.D. from the University of Colorado Law School. We extend a warm farewell and wish her a happy retirement.



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*Edited by Emilia Negrini, System Counsel Office*



# THE LEGAL ISSUE

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## The Attorney-Client Privilege and the University Employee

By Patrick O'Rourke, Managing Associate University Counsel, Litigation

The University of Colorado is an interesting place to work. Concepts like shared governance and academic freedom make the University different from most workplaces. The University is also a public entity, which makes it subject to many state and federal laws. Consequently, it's no surprise that legal questions often arise that require University administrators, faculty, and staff to interact with legal counsel. In this article, I will discuss the attorney-client privilege and how it might apply to your interactions with the University's attorneys. Please remember that this article is a general overview and not intended to govern a particular situation.

Let's start with a hypothetical: Professor John Doe is a scientist working on the CU Boulder campus. He has received a \$1 million grant from the National Institutes of Health to study the effects of antioxidants upon blood chemistry. Professor Doe has been notified that the NIH will be arriving on campus next week to investigate whether there have been financial improprieties in the grant expenditures. The Office of University Counsel has called Professor Doe and wishes to meet with him in advance of the investigation. What privileges apply to the interactions between Professor Doe and the University's attorneys?

As a starting point, let's define a "privilege." Colorado law recognizes that there are "particular relations in which it is the policy of the law to encourage confidence and preserve it inviolate."<sup>1</sup> Those relationships include, for example, physician/patient; clergy/congregant; husband/wife; and attorney/client. When such a relationship exists, the "privilege" attaches and the discussions that occur during the course of the relationship normally cannot be disclosed in the course of a legal proceeding. While there are exceptions to this general rule, the courts are generally hesitant to invade the privacy of these relationships because they recognize that people might not seek legal or medical advice if they believe that their private issues could be the subject of forced disclosure.

So, let's look at how the attorney-client privilege might apply to Professor Doe's case.

The law states, "An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment."<sup>2</sup> When a court is trying to determine whether a conversation is privileged, it will look at the language of this statute.

The first thing you notice is that the statute creates a privilege between the attorney and the attorney's client. The Office of University Counsel represents the University, so the University is our client. As an employee is normally considered an agent of the University, so the attorney-client privilege normally extends to the communications that we have with University employees. In our hypothetical case, the attorney-client privilege will likely exist between the University's attorneys and Professor Doe. But it is important to remember that the University's lawyers represent the University, not any individual employee. While attorney-client conversations are privileged and shielded from people outside the University, as the University's attorneys we may need to discuss the information we receive with others in the University system.

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<sup>1</sup> C.R.S.A. § 13-90-107(a).

<sup>2</sup> C.R.S.A. § 13-90-107(b).

## **Attorney-Client Privilege**

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The second thing you see is that the privilege applies to “any communication made by the client to [the attorney] or [the attorney’s] advice” to the client. What this means is that the privilege should apply to the conversations between Dr. Doe and an attorney, for legal purposes, including telephone calls and e-mails. It would not apply, however, to a non-legal document that Professor Doe created while working on the grant, even if Professor Doe gave those documents to an attorney during their meeting. It’s also critically important to remember that the attorney-client privilege may not apply if you subsequently disclose the substance of your conversations with an attorney to a third person. That’s the reason why lawyers normally ask you to refrain from sharing your legal conversations with others.

The third thing you see is that the communication has to occur in “the course of [the lawyer’s] professional employment.” In other words, you have to be seeking, and the lawyer needs to be providing, professional legal advice. Conversations that occur outside of this professional relationship are normally not privileged, which is one of the reasons a lawyer often will not provide any legal information or advice to someone until they form a professional relationship. Once that relationship exists, however, it is not limited to the attorney, but also applies to conversations with the attorney’s secretary, paralegal, or legal assistant. It would also apply to any documents that the lawyer asks you to create as part of the attorney/client relationship because those communications occurred during the course of the lawyer’s professional employment. As the communication between Professor Doe and an attorney are occurring as part of a professional relationship, the privilege will attach.

Finally, it’s important for me to note that an attorney has some paramount ethical obligations that may supersede confidentiality. A lawyer may reveal communications for limited purposes, such as to prevent someone’s death or substantial bodily harm, to prevent a client from committing a crime in the future, to prevent a client from committing a fraud in the future, to help rectify a crime or fraud that the client has committed with the lawyer’s assistance, or to comply with a court order. If the NIH was seeking information about whether Professor Doe had fraudulently used grant money in the past, his conversations with University attorneys likely would not be subject to mandatory disclosure to third parties.

Because these conversations between Professor Doe and an attorney are likely privileged, they may be candid. Obviously, one of the things that we hope to do in any communications is to fully understand the facts and make sure that University employees are making the right legal decisions. If we don’t get complete information, it’s tough to render the best advice, and we might provide the wrong advice if there’s a significant piece of missing information. At the same time, you have a right to expect us to be candid with you about the nature of our representation and our assessment of the situation. You may not remember all of the legal requirements for the attorney-client privilege to attach. And we haven’t discussed all of the possible exceptions where a conversation might lose its privilege. If you’re unsure, there’s nothing that prevents you from asking a lawyer, “Is this a privileged conversation?”

## **Recent Changes and Updates to the Family and Medical Leave Act Regulations**

By Melissa Martin, Research Associate Attorney, Litigation

The Family and Medical Leave Act (“FMLA”) is a federal statute that provides covered employees with job-protected, unpaid leave for certain medical and family reasons. The basic FMLA leave entitlement allows an employee to take up to 12 weeks of unpaid leave in a one-year period for the birth and care of a newborn child, for the care of a newly-adopted child or foster child, for the care for an immediate family member with a serious health condition, and for medical leave for an employee’s serious health condition.

In 2008, the FMLA celebrated its 15<sup>th</sup> anniversary. Corresponding with this milestone, the Department of Labor issued new regulations to address amendments to the act and clarify employer and employee rights and responsibilities. The regulations specifically incorporate new military family leave benefits that were enacted as part of the National Defense Authorization Act for FY 2008 and resolve some of the ambiguities that have arisen in the administration of FMLA leave under the regulations over the past fifteen years. These new regulations became effective January 16, 2009.

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## FMLA

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### **Military Leave Benefits**

Prior to 2008, the FMLA allowed eligible employees to take unpaid leave for the care of a new child, the care of a family member with a serious health condition, or the employee's own serious health condition. As part of the National Defense Authorization Act for FY 2008, the FMLA was amended to provide for two additional types of leave for military families: military caregiver leave and qualifying exigency leave.

*Military Caregiver Leave.* The military caregiver leave allows qualifying employees to take up to 26 workweeks of leave in a 12-month period to care for a family member who is a covered servicemember with a serious, duty-related illness or injury. The military caregiver leave benefit extends to additional family members beyond those entitled to regular FMLA leave so that a spouse, son, daughter, parent, or next of kin can care for an injured member of the armed forces, including members of the National Guard or Reserves.

The regulations make clear that an eligible employee is only entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the 12-month period. For example, if an employee used 10 weeks of leave because of the employee's serious health condition, the employee would not be eligible for an additional 26 weeks of military caregiver leave but would be eligible for an additional 16 weeks of military caregiver leave to care for the injured servicemember.

*Qualifying Exigency Leave.* The qualifying exigency leave allows qualifying employees to take up to 12 workweeks of FMLA leave in a 12-month period to help National Guard and Reserve family members address issues arising out of active duty. The regulations define the qualifying exigencies as (1) short notice deployments; (2) military-related events and activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities agreed upon between the employer and the employee.

### **Updates and Changes**

In addition to incorporating the new military family leave benefits, the final regulations also included several changes to clarify and reorganize the existing regulations. The final regulations totaled 199 pages of updates, comments, explanations, and forms. Below is a summary of some of the more significant changes.

*Definition of serious health condition.* One way a serious health condition qualifies for FMLA leave is if an employee is incapacitated for more than three days and makes two visits to a health care provider. The new regulations clarify that the two visits to the health care provider must occur within thirty days starting from the first day of incapacity and the first visit to the health care provider must occur within seven days from the first day of incapacity. This clarification specifically rejects *Jones v. Denver Public Schools*, 427 F. 3d 1315 (10th Cir. 2005), which held that the two visits to the health care provider must take place within the period of incapacity. Another way a serious health condition qualifies for FMLA leave is if the employee is incapacitated for more than three days and is under a regimen of continuing treatment. The new regulations clarify that the employee's first visit to the health care provider must also occur within seven days from the first day of incapacity. An employee may also qualify for FMLA leave for a chronic condition which requires periodic visits to a health care provider. The new regulations clarify that "periodic visits" means at least two visits to a health care provider per year.

*Employer Notice.* The new regulations consolidate all the employer notice obligations into one section, including the provisions for general notice, eligibility notice, rights and responsibilities notice, and designation notice. The new regulations also extend the time period for an employer to provide certain required notices from two days to five days.

*Employee Notice.* To minimize the disruption in the workplace because of unscheduled absences, the new regulations require an employee needing unforeseeable FMLA leave to follow an employer's usual and customary call-in procedures for reporting an absence.

*Medical Certifications.* Under the new regulations, employers are now allowed to directly contact an employee's health care provider to clarify or authenticate a medical certification. In the interest of employee privacy, the employer representative contacting the health care provider may be a health care provider, human resource professional, leave administrator, or management official, but in no case can it be the employee's direct

## FMLA

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supervisor. The employer representative may not ask the health care provider for any additional information other than what is required by the certification form. Before the employer representative can contact the employee's health care provider, the employer must give the employee an opportunity to cure any identified deficiencies in the medical certification.

*Fitness-for -Duty Certifications.* Instead of a simple statement that an employee is fit for duty, an employer can now require that the fitness-for-duty certification specifically address the employee's ability to perform the essential functions of the employee's job. Additionally, if there are safety concerns, an employer may require a fitness-for-duty certification for an employee taking intermittent leave.

*Waivers.* The new regulations make clear that the settlement or release of claims based on past employer conduct is allowed. Prospective waivers are still prohibited.

*Light Duty.* The new regulations provide that the time an employee spends voluntarily performing light duty does not count as FMLA leave.

*Substitution of Paid Leave.* Because FMLA leave is unpaid, the regulations allow for the substitution of paid leave to run concurrently with FMLA leave. The new regulations eliminate any distinctions between different types of paid leave (e.g., vacation, sick) and treat all forms of paid leave the same. The new regulations further provide that if an employee uses paid leave concurrently with FMLA leave, the employee must follow the employer ' s policies regarding the use of the paid leave.

These are just some of the changes to the FMLA regulations that became effective on January 16, 2009. If you have any questions or need additional information regarding the FMLA or the new regulations, please contact the Office of University Counsel or your campus human resources office.



## OUC News

### Congratulations, Jenny!

Jennifer "Jenny" Watson was recently appointed to serve as campus advising counsel for Colorado Springs. Prior to her current position, Ms. Watson was Assistant Counsel and Chief Privacy Officer with the System Office. Ms. Watson joined the University in 2004 as a Legal Research Associate in the Denver Office of University Counsel. Ms. Watson holds a B.S. from Saint Louis University and a J.D. from the University of Iowa, where she was an Associate Editor on the Law Review and a member of the National Moot Court team. She is admitted to the Colorado Bar and is a member of the Denver and Colorado Bar Associations. We wish her every success as she assumes her new position.

### Farewell, Manuel!

Manuel R. Rupe has left his role as Senior Assistant University Counsel for the University of Colorado at Denver to serve as General Counsel for Central Michigan University. Manuel joined the University of Colorado in August of 2006. Previously, Dr. Rupe served as Assistant General Counsel at Ferris State University in Big Rapids, Michigan (2001-2006), and as an Associate Attorney with Kreis, Enderle, Callander & Hudgins, P.C., in Kalamazoo, Michigan (1998-2001). Dr. Rupe has a Ph.D. in Educational Leadership, with a concentration in higher education leadership, from Western Michigan University, a J.D. from DePaul University College of Law, and a B.A. from Kalamazoo College. Dr. Rupe is admitted to practice law in Michigan (1998) and Colorado (2006). Here's wishing him good luck in his new adventures.

### Welcome, Chris!

Chris Puckett will join the Denver office on August 3 as Assistant University Counsel. He comes to us from the Attorney General's Office, where he served as Assistant Attorney General in the Employment Personnel and Civil Rights units of the office. Currently, he is serving an appointment by the Colorado Supreme Court to its Board of Law Examiners. Chris received his undergraduate degree from the University of Denver, where he was an honors graduate and a member of the varsity swim team. In 2004, he received his juris doctorate from Georgetown University Law Center in Washington, D.C., where he served as Senior Editor of the *Georgetown Journal on Poverty Law & Policy*.



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