

FROM THE OFFICE OF THE GENERAL COUNSEL

Navigating the Legal Landscape for Deans, Chairs, and Directors

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Introduction to the legal landscape of Higher Education

A brief overview of the legal framework

Throughout each day, department chairs and deans are faced with several potential legal issues: a contract with a new vendor; an issue with a current employee; a student complaint concerning a professor or department. Quick identification of present and potential issues is the most efficient way to resolve them and ensure that they do not become future problems.

ICON KEY

-  Valuable Information
-  Test Your Knowledge
-  Go to the Web
-  Friendly Advice

The purpose of this manual is to provide a brief overview of many of the issues a department chair or dean may encounter at Kent State University.

Legal Foundations

Kent State University (“University”) is a state institution established through Chapter 3341 of the Ohio Revised Code. As such, the University is a public entity and receives federal funding. As a result, the University is also regulated by several Federal and state laws, including:

- The **Family Education Rights and Privacy Act (FERPA)** (20 U.S.C. § 1232g; 34 CFR Part 99), a Federal law that protects the privacy of student education records. Disclosures are permitted, but only through certain circumstances;
- The **Civil Rights Act of 1964** (Pub.L. 88-352, 78 Stat. 241), Federal legislation outlawing discrimination based on race, color, religion, gender, or national origin;
- The **Digital Millennium Copyright Act of 1998** (Pub.L. 105-304, 112 Stat. 2860), a Federal copyright law which makes it illegal to use technology to circumvent anti-piracy measures present in most commercial software and music CDs, extending several copyright protections into the digital environment; and

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- The **Ohio Public Records Act** (Ohio Rev. Code §149.43), a state law that establishes the public's right to review public records and documents and/or obtain copies at a reasonable cost.

Along with Ohio and Federal law, the University must comply with its own University Policy Register.¹ With all policies originating from members of the University community, the Policy Register covers many aspects of university life – from student conduct to employee sick leave to the handling of hazardous waste on campus. Individual department policies and procedures round out the remainder of the legal landscape of Kent State University.



Test Your Knowledge

Does your department or school have a policies and procedures manual already in place? Do you know the location of it? Are the policies and procedures within it up-to-date and still representative of the current environment? Is it followed by department and school employees? When were your internal policies last updated?

The following information provides an introductory and educational overview of the current legal issues typically faced by deans, directors and chairs. This material offers guidance on possible avenues of resolution or – at the very least – provides an explanation from the perspective of the current legal landscape. This document is not meant to provide advice or a comprehensive legal education, or substitute a call to General Counsel. The goal of this document is to raise awareness and encourage preventative measures to identify and resolve issues before they become problems.

Once an issue arises, try the steps below to determine a resolution or course of action:

- Gather information surrounding a situation or inquiry.
- Identify the key issues involved.
- Use this document to determine the applicable federal, state, local or university laws, policies and/or procedures.
- Apply the relevant law/regulation as determined by a review of the issue.
- Make a decision based upon an unbiased examination of all the facts and applicable laws, policies and/or procedures.
- Consult the Office of the General Counsel throughout this process so both offices can work together to solve the issue.

¹ Available at <http://imagine.kent.edu/policyreg>



The Role of the General Counsel

A valuable legal resource

The process for obtaining a legal opinion from the Office of the General Counsel at Kent State University (“GC”) concerning a manner in a department or school can be summed up in two words: Just call.

As stated on our web site, “The mission of the Office of General Counsel is to assure high quality legal services to Kent State University in a timely, cost effective manner, to reduce litigation, and assure legal compliance. The Office of General Counsel encourages open communication among administrators, trustees, officers, faculty, staff and student leaders in working to reduce legal risks for the university.” Simply stated, the Office of the General Counsel is always available to offer legal advice on University matters – with the best interests of the University at its core.

Roles and Responsibilities

The relationship between the GC and the University is one of Attorney-Client. The University is the GC’s client; the GC operates with the specific intent of ensuring the protection of the University through the course of daily operations. Each GC attorney also has the designation of Assistant Attorney General for the state of Ohio. Some examples of the types of legal services provided to the university include:

- litigation management;
- reviewing, drafting, negotiating, and enforcing legal documents such as contracts, conveyances, internal policies and procedures, licenses, and gift documents;
- working with departments during audits, investigations, and other compliance reviews;
- advising and assisting with property matters, labor relations, personnel and EEO matters, insurance and risk management, tax and business issues, and patent, trademark and copyright issues; and

- participating in student, faculty and staff grievance and disciplinary proceedings.

Subpoenas and Public Records Requests

On occasion, a University employee will receive a subpoena or public records request. The subpoena is usually addressed to the employee. The subpoena is issued because the employee's testimony is needed or certain documents need to be produced. It is important for the employee to immediately notify a supervisor and contact the GC directly because – most often – the University is only given a certain matter of time (usually stated on the subpoena) to respond. The University could be found in contempt if it fails to respond within the time period provided. Thus, to avoid a “contempt of court” charge, it is crucial that the GC is notified by a department or office of this University immediately upon the receipt of a subpoena or public records request.

Subpoena

A document used by the courts to call for the appearance of either a person (witness) or evidence (documents or records).

While the **subpoena** may request the presence of an employee within your college, department or school, the GC must be notified as soon as possible to ensure that the correct procedures are followed and/or the correct and appropriate information is released. This notification also alerts the GC to possible court cases against the University and/or impending issues. It can serve as an early-warning sign for future action. The office will contact the person named in the subpoena or make requests to gather the necessary documents and draft response to the court. The University's options may become limited if the office does not receive the subpoena in a timely manner.

As **public records** requests will be discussed later in this material, it is important to note that the public records requests referred to in this section only apply to those requests covered under the Ohio Public Records Act – Ohio Rev. Code §149.43. Oftentimes, a public records request will be sent to a department or office within the University and not directly to the GC. Similar to the protocol when an employee receives a subpoena, please forward these requests to the GC for further review immediately. Ohio law requires diligence in responding to public records requests, and “we’re busy” is not an excuse accepted by the courts. Once received, the office will work with University employees to gather the requested information to comply with the request and the Ohio Public Records Act. Throughout this process, the GC will be available for any questions or concerns that may arise. As a final note, the public records law does not require the University official to answer any questions; it requires the production of already existing documents.

Release of Public Records

- as included in §149.43 Section (B)(1): Subject to division (B)(4) of this section, all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(4) of this section, upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division.

General Counsel and You: Attorney/Client privilege information

The General Counsel's primary client is the University – the institution itself. Thus, the actions of the GC reflect an interest in the betterment of the institution and not the

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personal interests involved in any one issue. The GC is accountable to the University President and the University Board of Trustees but must be available for consultation to the entire university constituency.

There is a recognized **privilege** that exists between an attorney and his/her client, a relationship that is present between the GC and the faculty, staff and administration of Kent State University. Communications between a GC attorney and a member of the faculty, staff or administration may be privileged – and, thus, confidential in certain circumstances. Communications are protected by this privilege if the communications are: 1) confidential; 2) made between an attorney and the University, i.e., agents of the University or agents necessary to render legal advice; and 3) made for the purpose of seeking, obtaining or providing legal advice. You should always ask the counsel assigned to your case about the privilege and confidentiality issues with your case.



Tips to maintain attorney-client privilege

- 1. Do not disclose attorney-client communications to third parties;**
- 2. Instruct others regarding the confidential nature of these communications when asked to disclose information;**
- 3. Conduct communications in private settings;**
- 4. Mark documents with a “Attorney-Client privilege” label, if appropriate;**
- 5. Limit circulation of documents to those with a legitimate need to know;**
- 6. Be wary of less secure methods of communication; and,**
- 7. Avoid referring to confidential communications in public until and unless the privilege has been waived.**

Contract and Policy Assistance

The GC should always be consulted when a department or school is about to enter into a **contractual agreement** that will become binding upon Kent State University. The GC can provide value, as an uninterested third-party, to review the terms and conditions of the contract to ensure that it complies with state and University contracting requirements. Once contacted, the GC and the contracting authority can review the terms and conditions of the contract, along with the overall scope and objectives. The GC can also be helpful in negotiating contracts and handling any contracting disputes before, during, or after the performance or service is rendered.

Interpretation of the University Policy Register

As the main digest of rules for Kent State University, the University Policy Register consists of nine chapters that cover a broad range of topics. As provided for in the Kent State University Constitution, the GC is responsible for the upkeep of the University Policy Register.

However, any member of the University community can suggest revisions to current policies or a new policy altogether. Once the policy is drafted, it must be provided to the appropriate administrative authority and ultimately to the appropriate division vice president. Once the proposed policy reaches the final level

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of consideration and revision, the Office of the General Counsel reviews the policy to ensure that it is legally sound and suggest any changes in form, style or content. The policy can then be returned to the appropriate administrative authority that can continue to move it forward in the process and onto final approval. This process is outlined in 2-01(G)(4) of the Kent State University Constitution for those interested in initiating changes to the policy register.

As a note, all policies are divided into three categories:

1. “University” policies – Have university-wide application and must be approved by the Board of Trustees.
2. “Administrative” policies – Provide support to a University policy and described administrative functions or powers, and must be approved by the Vice President with authority over the area of concern.
3. “Operational” policies – Provide pure organizational walk-through for a “dialed down” implementation of an Administrative policy.

Conclusion

The role of the Office of the General Counsel is to work with the University to ensure to proper adherence to federal, state and local laws and regulations, in addition to providing the University with representation and advice in the legal matters that arise during the course of University operations. Should legal issues arise involving University matters, the Office of the General Counsel is a valuable and available resource for department chairs and deans.

Key Points:

- Contact the GC if you receive a subpoena or a request for records.
- The GC is a resource for contract administration, as it is advisable to consult with GC before signing.
- The GC regularly interprets the University Policy Register. Opinions concerning University Policy can be issued upon request.
- The GC can assist in the development of policies/procedures for complying with new federal, state and local laws.
- Issues of confidentiality and privilege should be discussed with legal counsel as soon as available.



Liability, Agency and Indemnification of the Department Chair and Dean

How far does the University's umbrella of protection extend?

While engaged in the performance of their duties, deans, directors and chairs act essentially as agents of the institution. They act on behalf of the University through the authority the University has provided to them. When acting in this capacity, they are subject to certain protections of indemnification and immunity. As follows:

- Unless the employee acts “outside the scope of his/her employment or official responsibilities” (i.e. doing something outside your job description), or unless the employee acts irresponsibly (with malicious purpose) in bad faith, or in a wanton or reckless manner – the department chair or dean will be indemnified in any civil action that arises under the laws of the state of Ohio for injury caused during the performance of the duties of the department chair or dean.² Why is this important? If an employee is found to be working *outside* the scope of employment, the employee can be held personally liable and is not eligible for legal representation by the Ohio Attorney General's office.

Essentially, to secure protection from a lawsuit or damages, a department chair or dean **must ensure** that:

- He/she acts within the power and authority granted to him/her while in performance of the duties required of the position;

² Ohio Rev. Code §9.86.

³ Adapted from Donna Euben, “Legal Primer for New & Not So New Administrators,” AAUP, 2005. See more at www.aaup.org/Legal?info%20outlines/05admin.htm, citing the University of Tulsa Policy statement on Indemnification and Defense, approved June 5, 1996. Reprinted with Permission.

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- He/she acts in good faith and in a manner he or she reasonably believed was consistent with the university's best interests.
- There is no legal coverage for criminal acts.

It is essential to pay special attention to the Rules and Regulations of both the department and of the University Policy Register. Courts tend to agree that a person is acting outside the scope of their employment if they fail to adhere to established policy and procedure. Also, when determining whether a dean, chair or director is indemnified against a lawsuit, the American Council on Education suggests the following inquiry to determine if the action committed by the person is actually within the scope of their employment and entitled to **indemnification**:

- Whether the action is reasonably related to the individual's role within the university;
- Whether the department chair or dean acted responsibly and reasonably under all of the circumstances;
- Whether the individual consulted appropriately with and acted on the advice of supervisors or other administrators;
- Whether the relevant actions likely would be those taken by a reasonable person under the same or similar circumstances;
- Whether the conduct violated university policy or rules of ethical behavior, including conduct such as sexual harassment, research fraud, or unlawful discrimination;
- Whether the conduct was justifiable for reasons relating to the individual's role at the university, even if it violated university policy;
- Whether any other factors should be considered in the specific case.



Test Your Knowledge

You, a department chair, overhear two employees discussing how a member of the faculty may be providing the student newspaper with information accessed from a student's educational record. You've known the faculty member for over 20 years and believe they would never do anything like that so you dismiss it as an unfounded rumor. Two months later, a student sues you and the University for violating his/her rights under the Family Educational Record Protection Act. Are you an agent of the University? Do you fall under the indemnification of the University?

Important partners to indemnification are risk control and avoidance – the elimination of the behaviors, conditions, or programs that is the source of the risk, and

essentially changing from a reactive to proactive management/administrative style.⁴ Even though the dean, chair or director may have acted within the scope of his/her duties and is entitled to indemnification, this does not necessarily indemnify the University against a further action by an aggrieved party.

Indemnification and “hold harmless” agreements. The University provides and is engaged in several programs that provide educational opportunities for our students outside of the classroom, even outside of our country. For these situations where the interaction is outside of the classroom, the administrator may utilize one of the university’s “hold harmless” agreements. These agreements can provide a certain amount of indemnification to the University relative to the particular activity engaged in. However, any “hold harmless” agreement should be first reviewed by the GC before it is used. Deans, chairs and directors interested in the indemnification options available should first fill out the “Hold Harmless Data Sheet” available from the GC’s website at <http://www.kent.edu/universitycounsel/holdharmless.cfm>.

Conclusion

The dean, chair and director should always be vigilant to ensure that their actions do not fall dangerously outside the regular scope of their duties. An administrator who is uncertain as to the potential or impending liability of either themselves or the University should contact the GC as soon as an issue is spotted so that both parties can work together to determine a safe course of action.

Key Points:

- The key phrase in determining liability is “were the actions of the person within the scope of their employment”.
- The GC can assist the dean, director and chair in making this determination.
- Limiting liability starts with an examination of “best practices” for the operation under review.

⁴ William Kaplan and Barbara Lee, The Law of Higher Education, Jossey-Bass pg 136 (3rd ED. 1995). Reprinted with Permission.



Administrative Duties and Evaluations

The duties and boundaries of Deans, Directors, and Chairs

Deans, directors, and chairs are crucial front-line administrators for Kent State University. As such, both the position responsibilities and overall environment can offer an experience rich in various legal issues and these positions must often navigate the legal environment of higher education. This can be difficult, but ultimately very rewarding. Keys to success include:

- Understanding the University policies and how they relate to the department/unit, as well as the responsibilities and duties required to adhere to those policies;
- Understanding and appreciating the responsibilities of the department/unit and of the employees within it;
- Increasing communication between subordinates in order to allow you to catch small issues before they become major problems. Once a situation is identified, it is important to bring all the parties together as quickly as possible.

Performance Evaluations

One of the most important administrative responsibilities of a department chair or dean is the administration of performance evaluations. These evaluations represent both the progress and accomplishments of the employee, and provide invaluable documentation for use in later employment decisions.

Evaluations should be designed and used to provide accurate and fair assessments of employees' strengths and weaknesses, in addition to identifying those employees who consistently surpass or fail to meet department requirements and standards. It is up to those in supervisory positions – including department chairs and college deans – to ensure that every employee is meeting his/her individual performance expectations.

Each dean, chair, and director holds an important responsibility to ensure that each review is factually accurate and that each review adequately addresses any deficiencies or

room for improvement in the employees' performances. It is absolutely essential that each performance evaluation represent the true status of an employee so that each evaluation is effective. The evaluations are often introduced as evidence in later civil actions brought by the employee against the university in an unlawful discharge case.



Performance Evaluations are most effective when:⁵

- 1. They contain specific information and are task specific;**
- 2. The results relate to specific objective criteria;**
- 3. Department chairs and deans are properly trained in the performance evaluation process, and feel comfortable in this role;**
- 4. Employees have advanced notice of the job standards and are given the opportunity to review their own evaluations;**
- 5. The evaluations are reviewed by a higher level of management.**

Certain factors, in particular, which play an important part in improperly influencing performance evaluations include the use of generic language that leaves the review open to interpretation and could be construed differently by a future reviewer. For example, a supervisor writes, "Employee has tried all year to meet our standards." What the supervisor meant by the comment was that the "employee consistently falls short of our standards all year." What the future reviewer – or even jury – reads is, "Employee always tries to meet the standards of this department." Each evaluation should present an accurate and direct reflection of an employee's performance and avoid vague language.

For more information on University-specific information in administering performance evaluations, go to the Division of Human Resources' website at <http://www.kent.edu/hr/Manager/Performance-Evaluation.cfm>. The Division of Human Resources is also a source to rely upon to gain further education on the institutional mission behind the current performance evaluation system.

Adherence to policy and procedure

While the University administration is responsible for drafting and adopting the many University policies and procedures, it is the chairs and deans that must ensure that policies and procedures are being followed.

The University Policy Register comprises over 200 policies that cover nearly every aspect of University life. Beyond the University Policy Register, almost every department has individual policies and procedures that the administrator is familiar with. That familiarity is crucial to the proper operation of a school or department and will help to avoid common legal pitfalls that come with their inconsistent application.

"Not only must institutional rules and regulations that apply
to students be disseminated and clear, but academic

⁵ Bradd N. Siegal & John M. Stephen, Ohio Employment Practices Law: A Practical Guide for Employers and Their Legal Counsel, Chapter 12 (West Group 2002). Reprinted with Permission.

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administrators must also enforce them consistently and fairly. As a general rule, courts are particularly attuned to situations involving the arbitrary and capricious application of institutional rules and are inclined to decide for students in such situations. ... In short, deans and chairs need to be consistent in applying and enforcing institutional or unit rules and regulations.”⁶

Chairs and deans are often faced with a multitude of issues and are often asked to render on-the-spot decisions. A working understanding of a policy or procedure can help make this decision both easier and consistent with previous decisions concerning the same matter.

When an action is filed against the University, the University is in a stronger position if all the proper policies and procedures have been followed. Difficulties can arise when these policies are not followed and actions are taken on an “ad hoc” basis. These difficulties may be avoided if when deans, chairs and directors have a working knowledge of the policies and procedures relevant to their area, or know where to find such information should the situation arise. Courts are more likely than not to defer to an institution if the actions taken were in accordance with its established policies and internal procedures.

Conclusion

The administrative responsibilities of deans, chairs and directors may often lead to actions which can have legal consequences. It is important for the GC and these administrators to work together to identify those duties and improve upon the actions that result because of them.

Key Points:

In his article, *Managing Legal Issues at the Department Level*, Thomas Wagner presents several good guidelines to use for navigating policies and procedures. While the paper itself was written in 1981, the advice given within it is still useful in today’s academic and legal climate.

- If university policy or your collective-bargaining agreement requires you to do something, **do it!**
- If an agreement or policy requires that you do not do something, **do not do it!**

⁶ *The Academic Administrator and the Law*, at 91. Reprinted with Permission.

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- If the policy is silent, use discretion and common sense.
- Keep copies of the faculty handbook, collective-bargaining agreement, and other university policy documents in a handy place for quick reference.
- Do not work from memory. Consult the policy documents when in doubt.
- Don't be afraid to seek advice on the proper interpretation of a policy. Your academic vice-president's office, the personnel office, and the Office of the University Counsel are among those available to assist you. Seek them out.⁷

⁷ Read more at <http://www.mla.org/ade/bulletin/n071/071025.htm>. Reprinted with Permission.



Employment Issues

Hiring, Promotion and Tenure, and Termination

Every employment relationship encountered by a dean, chair or director is governed by either a University policy, Collective Bargaining Agreements, or state and federal laws. These policies, agreements and laws provide the structure necessary to ensure the stability of the University workforce and the cultivation of an environment of equality. Throughout the course of employment, administrators will encounter numerous employment issues, ranging from common everyday issues to unique and delicate situations.

A key to resolving these issues (before they become problems) is spotting them early and ensuring the daily adherence to the policies and procedures of Kent State University, the Collective Bargaining Agreements in place, and applicable state and federal law and regulatory requirements.

To understand issues related to employment, it's important to have an overview of the general employment concepts. At the University, "employee" is a comprehensive term meaning any individual holding a University position subject to appointment, removal, promotion or reduction by an appointing authority. This term is inclusive of full-time and part-time staff employees (unclassified administrative staff, professional staff members, and classified service employees), as well as faculty. Each employee has an "appointing authority," an individual with the power of appointment to – or removal from – the specific position of University employment. Each vice president of the university is designated as the appointing authority for those unclassified employees serving in their respective division. The appointing authority for all classified employees throughout the University is currently the Associate Vice President for Human Resources. The Provost is the appointing authority for academic appointments such as faculty. While these appointment powers have been delegated to these different areas, the Board of Trustees holds the ultimate power to the appointment, compensation, and removal of all University personnel.

Each department of the University is assigned a specific representative from the Division of Human Resources to aid in answering University-specific process issues. All of the employment policies of the University are contained in Chapter 6 of the University Policy Register.

Hiring

The main guidelines for the procedures currently in place can be found in Chapter 6 of the University Policy Register.⁸ Hiring language can also be found in both the AAUP and AFSCME Collective Bargaining Agreements. It is important that every dean, chair and director is familiar with these and other related documents to ensure that every hiring decision is made according to - and compliant with - established practices in the University.⁹ The Division of Human Resources and Department of Academic Personnel should also be consulted before the hiring of a new employee.

Some **practical suggestions** for ensuring a comprehensive and conscientious hiring process include:¹⁰

- Advertise every available positions and make sure each advertisement is consistent with the actual position descriptions on file in the Human Resources.
- Develop plans to ensure that positions are widely advertised internally and externally.
- Advertise in journals and periodicals that make special efforts to reach minority applicants.
- Post available/vacant positions on disciplinary electronic discussion lists.
- Draft the position description so that it realistically reflects the full range of skills and knowledge needed. Creating a well-thought-out and focused position description avoids problems later on.
- Avoid overly rigid criteria as this can affect the response to the posted position.
- Actively support search committees when necessary throughout the process.
- Do not make promises of employment or guarantees of any terms or conditions of employment when interviewing candidates – or until all approvals have been received.

⁸ Read more at <http://www.kent.edu/policyreg>

⁹ For those administrators interested in an extensive overview of hiring practices, try the Uniform Guidelines on Employee Selection Procedures at <http://www.kent.edu/hr/Manager/Performance-Evaluation.cfm>

¹⁰ As stated in Euben, “Legal Primer for New & Not So New Administrators.” Reprinted with Permission.



Go to the Web

Here are some resources for learning more about safe employment practices:

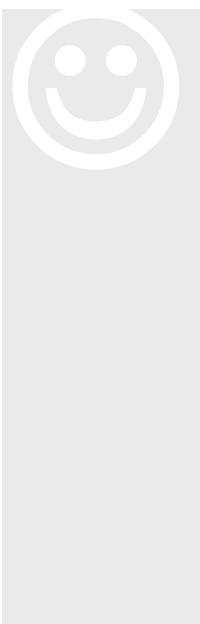
<http://counsel.cua.edu/employment/questions>

http://www.eeoc.gov/foia/letters/2006/titlevii_adea_preemployment_inquiries.html

http://www.eeoc.gov/foia/letters/2005/ada_inquiries_examinations_2.html

<http://www.kent.edu/Administration/hr/AffirmativeAction/index.cfm>

These points enforce a common goal that should be at the forefront of every employment decision – a fair and equally-accessible process. Moreover, each process should ensure the absence of unlawful discrimination based upon race, national origin, gender, disability, age, religion, veteran status, military status, genetic information, or sexual orientation (as stated in policy 6-02 of the University Policy Register).



Friendly Advice

A story in the Fall 2006 edition of “The Laboring Oar” from the Federal Bar Association’s Law and Employment Law section, offers steps to help ensure that hiring decisions are made in a practical and objective manner and are less likely to be influenced by unconscious bias:

- **Set up a “blind applicant” review system where the names and addresses of applicants are removed before circulating a resume to determine whether an applicant should be interviewed.**
- **Use multiple interviewers with diverse backgrounds and different perspectives to ensure that individual decisions are more legally defensible and the impact of any biases held by individuals or group is minimized; and**
- **Implement “structured” interviews by which all candidates are asked the same questions regardless of demographic characteristics or appearance. A more structured interview process lessens the likelihood of snap judgments based on superficial criteria.¹¹**

Promotion and Tenure

Decisions regarding promotion and tenure are among the most charged issues a dean, chair or director will have to face in the regular course of administrative duties. The careers of faculty and staff alike can be advanced or seriously altered as a direct result of a decision made at this level. Courts typically give a large amount of deference to universities in regard to the personnel and academic decisions that are made. However, because these decisions represent a benchmark moment in a person’s career, the department chair or dean must fully attend to these matters and ensure that the processes of promotion and/or tenure remain fair and unfettered by outside interests or intentions.

¹¹ Federal Bar Association, *The Laboring Oar*, Fall 2006, www.fedbar.org. Reprinted with Permission.

EMPLOYMENT ISSUES

Kent State University has several policies regarding promotion and tenure:

- 6-02.1 - Administrative policy and plan regarding affirmative action
- 6-02.102 - Operational procedures and regulations regarding waivers of posting for job vacancies
- 6-05 - University policy regarding employment of classified administrative officers and staff personnel.
- 6-14 - University policy regarding faculty tenure
- 6-15 - University policy regarding promotion
- 6-16 - University policy and procedures regarding faculty reappointment

Reappointment, promotion, and tenure of faculty are also guided by the Collective Bargaining Agreement between KSU and AAUP. In making a tenure decision, the University—through the work of the dean, chair and director - must have a legitimate reason to support the decision to grant or deny promotion, reappointment, or tenure. The decision cannot be based upon the person's status in a protected group, nor can it be based up an arbitrary reason.¹² The department chair or dean must follow the established procedures of the University. Failure to follow these procedures may leave the University in an exposed position in the event of a later inquiry.

Internally, if a faculty or staff member believes they have been the victim of unlawful discrimination in violation of policies 3342-6-03 and 3342-6-03.1 (or any other civil rights law), the employee must contact the Office of Affirmative Action. Externally, if a faculty or staff member files a complaint or grievance against a dean, chair or director based upon an inference of unlawful discrimination during this process, he/she would file this complaint with the Equal Employment Opportunity Commission ("EEOC") for federal law violations and with the Ohio Civil Rights Commission ("OCRC") for state law violations. The EEOC or OCRC will investigate the claim and request access to all the documents previous to, leading up to, and after the decision to deny tenure or employment ("called the adverse action") was made. The EEOC and OCRC will have full access to the personnel and files involved in the action. The faculty or staff member may also file an internal grievance through the University's Office of Equal Employment and Affirmative Action.

For deans, chairs and directors, the best strategy for reappointment, promotion and tenure action is to ensure that as much information as possible is collected and the decision is based upon fair, reasonable, and objective criteria, with an opportunity for the

¹² As stated in Euben, "Legal Primer for New & Not so New Administrators."

candidate to respond to the decision.¹³ As tenure, reappointment, and promotion is a complicated process, specific questions should be directed to the Associate Provost for Faculty Affairs in the Office of the Provost.



Friendly Advice

- 1. Follow Kent State University policies and procedures, as well as the policies and procedures of the State of Ohio and apply them consistently;**
- 2. Do not unlawfully discriminate against members of a protected class;**
- 3. Do not retaliate or act with malice;**
- 4. Be careful of what you say, who you say it to, and what you write down;**
- 5. Utilize performance evaluations, course reviews, etc. (established channels and university processes for performance indicators and review tools).**
- 6. When faced with a difficult situation and are uncertain of the proper course of action, ask for advice from the next level of administration.**

Leave

The University has several policies regulating the types of leaves available to its employees and the specific procedures to be followed. These leaves include, but are not limited to: sick leave, disability leave, court leave, military leave, research leave, professional improvement leave, and so on. It is crucial that the same uniform standards be applied to every employee when leave is taken and that the proper documentation is obtained where required. For example, if the policy requires a written explanation from a physician, it is important that this is required for every employee in every instance.

FMLA leave. The Family Medical Leave Act is a federal law that provides a benefit that allows eligible employees to take up to 12 weeks of unpaid “job-protected” leave in a twelve-month period for the following circumstances: birth of a child; adoption of a child or the arrival of a foster child; or the “serious health condition” of the employee, employee’s spouse, child (under 18) or parent. The determination of whether a situation constitutes a “serious health condition” is a legal determination that should involve consultation with the GC.

To be eligible to take leave under the federal FMLA, the employee must:

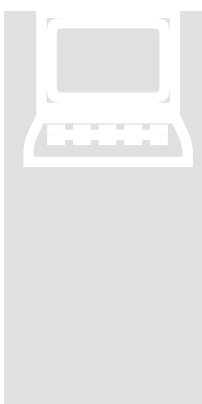
1. Have worked for the University at least the previous 12 months;
2. Have worked at least 1,250 hours during the previous 12-month period;
3. Qualify for one of the appropriate reasons for invoking FMLA;
4. Provide the University with timely notice;
5. Provide the University with timely medical certification.

¹³ Based in part as stated in Euben, “Legal Primer for New & Not so New Administrators.” Reprinted with Permission.

The University Policy for FMLA can also be found in Chapter 6 of the University Policy Register (6-11.11). Depending upon the situation, leave can be taken for a “serious health condition” intermittently or based upon a reduced schedule. This means, where appropriate, taking leave in blocks of time, or by reducing the normal weekly or daily work schedule, so long as FMLA leave does not exceed a total of 12 weeks during a rolling 12-month period. However, the policy offers more specific guidance as to the procedures that are required in situations involving leave qualifying under the FMLA. The Division of Human Resources, Academic Personnel and the GC can all provide further resources and assistance in this area. HR should be contacted before any decision is made or response provided to the employee in regards to an FMLA request to ensure adherence to the policies and law associated with this type of leave.

Termination

Obviously the non-continuation of employment is a sensitive matter that should be addressed in a delicate and respectful manner. Whether addressing the termination of a faculty or staff employee, the administrator must work carefully to ensure that proper University policies and procedures for removal are followed, and that the employee is given the appropriate amount of due process required by their position.



Go to the Web

Tenure-Track Collective Bargaining Agreement:

<http://www.aaupksu.org/AAUP-KSU%20TT%20Folder/Content/2005%20TT%20CBA.pdf>

Full-Time Non-Tenure Track Collective Bargaining Agreement:

<http://www.aaupksu.org/AAUP-KSU%20NTT%20Folder/Content/2005%20NTT%20CBA.pdf>

KSU Employees Local 153, American Federation of State, County and Municipal Employees

<http://www.kent.edu/hr/upload/AFSCME%20CBA%202005.pdf>

Classified employment under the Ohio Revised Code

<http://onlinedocs.andersonpublishing.com/oh/>

Removal procedures for administrative staff and/or faculty not holding rank and tenure are provided for in policy 3342-6-05 of the University Policy Register. Removal procedures for classified employees that are not part of a recognized bargaining unit are provided for in policy 3342-6-07.3 of the University Policy Register. The Collective Bargaining Agreements for tenure-track faculty and non-tenure track faculty, and for employees in AFSCME cover the removal process for those members of the bargaining unit.

Generally speaking, University policy provides that unclassified employees are usually provided with 90 days of notice before receiving a notice of non-continuation, i.e. that their appointment is no longer being continued. Classified employees that have worked more than 90 days (the standard probationary period) have a property interest in their employment under Ohio Rev. Code §124, as amended. With such right, classified

employees are entitled to notice of any predisciplinary actions taken against them, as well as an opportunity and hearing to respond to any charges against them. Most of these rights can be found either through Chapter 6 of the University Policy Register, the Collective Bargaining Agreement between KSU and AFSCME (for Union employees), and Chapter 124 of the Ohio Revised Code.

After review of the appropriate materials, the administrator should gather the necessary supporting material (performance evaluations, manager/supervisor/subordinate comments, complaints, past disciplinary measures, etc.). It is important to properly document the events of the termination, including when the decision was made and the steps taken before and thereafter. It is also important to follow the established University policies and procedures that control the process. A chair and/or dean should prepare very carefully prior to making the ultimate decision to remove an employee and consider the following questions¹⁴:

- Is there sufficient documentation of performance problems to support the termination decision?
- Have all relevant policies and procedures been followed, and can this be demonstrated?
- Have other individuals who have had similar performance problems also been terminated? If not, why not?
- Was there an opportunity for progressive disciplinary measures?
- Has the termination decision been discussed with the Office of the University Counsel? With the supervisor's manager?
- Is this employee capable of performing adequately in another position at the University that is available? If so, why has this not been considered?
- Has some event that could be viewed as a reason for unlawful termination happened recently (for example, the employee filed a workers' compensation claim, or announced that she was pregnant, or took a family or medical leave?).

After examining all the collected supporting documentation, the administrator must notify the Provost (if an academic position), the Associate Vice President of Human Resources (if a classified position), or the Director of Talent Management in Human Resources to determine the next steps that must be taken. Eventually, the decision to determine must be approved by the Provost (Faculty), Associate Vice President of Human Resources (Classified), or the Appointing Authority (Unclassified).

¹⁴ Kaplin & Lee, "The Law of Higher Education", 4th Edition (2006 Volume 1) at 363. Reprinted with Permission.

Conclusion

The decision to “not continue” an employee’s appointment must be carefully considered and documented to ensure that the process itself is fair. The employee should have an opportunity to correct behaviors that may lead to their termination and the supervisor should have an opportunity to discipline the employee before the final decision is made to remove them. The administrator may want to initiate an internal investigation into the action at issue or consider a pretermination hearing to provide the employee an opportunity to present an argument. The dean, director or chair should always follow the established University procedures for any employment action taken and should be ever-vigilant to ensure that the employee’s rights are protected at all times.

Key Points:

- Determining the type of employee is the first step to determining the applicable policies and regulations (classified, unclassified, faculty, etc.);
- Every employee is entitled to certain rights. Consult University procedures to ensure proper adherence to the rights provided to the employee (unclassified, classified, union, faculty, student, etc.);
- Consult with Human Resources, Academic Personnel and the GC before finalizing the decision to terminate the employee;



Discrimination and Harassment Charges

Protection in University employment and other opportunities

A dean, chair, or director will be exposed to and have to resolve a wide range of employment decisions. In those decisions, it is important for the administrator to be ever-vigilant of possible issues of discrimination that may arise, and work together with their staff to provide for a nondiscriminatory environment. As a public university, the University is subject to many Federal and State laws that ensure that members of the “protected” groups can engage in hiring opportunities, as well as continue in the terms and conditions of their employment, without fear of discrimination. The University addresses the issue of discrimination specifically in the policies listed on the right.

3342-6-02

Kent State University policy regarding equal opportunity.

3342-6-03

University policy regarding unlawful discrimination and harassment.

3342-6-02.1

Administrative policy and plan regarding affirmative action.

3342-6-03.1

Administrative policy and procedures regarding employee complaints of discrimination.

Applicable Laws and Protected Classes

What is a protected class? Federal and State laws provide protection from discrimination for a specific group of people, i.e. members of “protected classes”. Current statutory measures provide protection against discrimination based upon a person’s race, gender, disability, national origin, age, religion, military status, sexual orientation, genetic information or veteran status.

DISCRIMINATION CHARGES

What practices are prohibited

Under Title VII of the Civil Rights Act of 1964, the ADA, ADEA, and Ohio Revised Code 4112 it is illegal to discriminate in any aspect of employment, including: hiring and firing; compensation, assignment, or classification of employees; transfer, promotion, layoff or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plan, and disability leave; or other terms and conditions of employment. It is also illegal to deny employment opportunities to a person because of marriage to, or association with a member of a protected class. - EEOC website. www.eeoc.gov.

What is discrimination? Generally, a person can be unlawfully discriminated against in either one of two ways – through disparate impact or disparate treatment. “Disparate impact”, as it is called by the courts, may be found where a certain policy/practice looks neutral when you read it but when put into operation serves to discriminate against members of a protected group at a significantly higher rate than others. If this result is not justified by business necessity or a *bona fide* position requirement, it may be unlawful. “Disparate impact” is usually used to analyze selection

standards for a position of employment such as position requirements or types of questions. “Disparate treatment” occurs when an employer treats an individual or group differently because of their membership in a protected class. Chairs and deans will typically encounter more claims based upon disparate treatment, as this claim is more popularly used by plaintiffs¹⁵.

What is harassment? Conduct rises to the level of unlawful harassment and discrimination only when a “reasonable person” would regard it as hostile or abusive. Courts have determined that an action may constitute unlawful harassment if the person can prove that the conduct: 1) has the purpose or effect of creating an intimidating, hostile, or offensive environment; 2) has the purpose or effect of unreasonably interfering with an individual’s performance; or 3) otherwise adversely affects an individual’s employment opportunities.¹⁶ Courts consistently have decided that the harassing conduct must be “sufficiently severe or pervasive” as to alter the terms and conditions of the employment/educational relationship and create the hostile environment. Simply put, the courts have ruled that single random instances or comments rarely constitute unlawful harassment. The restrictions against unlawful harassment are further guided by University Policy 3342-6-03.

What laws work to protect the class members from discrimination?

- Federal
 - *The Civil Rights Act of 1964* prohibits discrimination based on race, color, religion, gender or national origin;
 - Racial discrimination is also prohibited by *42 U.S.C. §1981*;
 - Gender discrimination is prohibited by *Title VII, and by Title IX of the Education Amendments of 1972*;
 - Discrimination against veterans is covered in part by *38 U.S.C. §4301*;

¹⁵ Kaplan and Lee at 376. Reprinted with Permission.

¹⁶ Adapted from EEOC’s Fact Sheet on Proposed Guidelines on Harassment Based on Race, Color, Religion, Sex, National Origin, Age or Disability. January 2000. www.eeoc.gov.

DISCRIMINATION CHARGES

- *The Americans with Disabilities Act of 1990* (ADA), and as amended in 2010, prohibits discrimination against individual with disabilities;
- *The Rehabilitation Act of 1973* prohibits discrimination against qualified individuals with disabilities;
- *The Equal Pay Act of 1963* (EPA) protects men and women who perform substantially equal work in the same establishment from gender-based wage discrimination;
- *The Civil Rights Act of 1991* provides monetary damages in cases of intentional discrimination.
- *The Age Discrimination in Employment Act (ADEA) of 1967* protects anyone over the age of 40 from unlawful discrimination.
- State
 - *Chapter 4112 of the Ohio Revised Code*, as amended. This section enacts the state laws against discrimination that are more commonly brought under complaints filed through the Ohio Civil Rights Commission.

How does a person typically try to prove unlawful discrimination? Though the legal theories behind discrimination law are evolving everyday, the basic premise and strategy for how discrimination is demonstrated remains relatively the same. Unlawful discrimination can be demonstrated in one of two ways: using direct evidence (such as slurs written on a wall or a discriminatory email) or indirect evidence (circumstantial evidence used to demonstrate the motivation behind the alleged discriminatory action). Evidence can be almost anything: a job evaluation, an email, an inter-office memo, even a message on a voicemail.

If someone alleging discrimination does not have direct evidence, the person must present indirect evidence of discrimination using an established legal framework. The person must then convince the court that the indirect evidence as provided is sufficient for the court to rule that the person was discriminated against, while at the same time showing that the University's reason for the action is unsupported by the evidence. If the person cannot meet any one of these requirements, the claim of discrimination will most likely fail in court. The University's success throughout these proceedings depends directly upon the ability of the GC to communicate clearly, effectively and often with deans, chairs and directors, and any other University personnel involved with the complaint.

Guidelines for addressing complaints alleging discrimination

Complaints of unlawful discrimination or harassment should be dealt with as soon as they arise, approached with non-bias and objectively with attention to University policies and procedures:

- Always treat all parties involved in the complaint with respect;
- Provide appropriate notice to the parties as provided by University policy;

DISCRIMINATION CHARGES

- Gather as much information as possible, whether through the gathering of physical support such as letters, email or recording the spoken comments of those involved in the investigation;
- Remain consistent and adhere to the timelines established by University policy to ensure that each complaint is afforded full consideration;
- If you have questions during the course of the investigation into the complaint, consult the Office of the General Counsel or the Office of Equal Employment and Affirmative Action;
- Keep a detailed log of the activities of the investigation as it is conducted and the result of each action;
- Using what you've learned in the investigation, be vigilant of your own surroundings and possible discriminatory actions.

What to do in the event a complaint is filed against your department or office by the Equal Employment Opportunity Commission (EEOC) or the Ohio Civil Rights Commission (OCRC). An employee can file with either the EEOC or OCRC, depending upon whether the alleged discriminatory action is a violation of state or federal law. Regardless of what venue it is filed in, all complaints from the EEOC or OCRC should be forwarded to the GC immediately. The GC will review the complaint and included content and contact the chair or dean's area if further information is necessary to respond.

University EEO/AA Office

The University is committed to ensuring a culturally diverse and tolerant workplace. The Office of Equal Opportunity and Affirmative Action provides several services in furtherance of this goal including: training and workshops for students, faculty, and staff on several issues; confidential counseling on harassment and discrimination issues and concerns; and perhaps most important is the oversight of and support for the University's compliance with equal opportunity and affirmative action laws and regulations. The Office of Affirmative Action is located in the Terrace Hall Annex and can be contacted by calling 330-672-2038 or emailing aa_eeo@kent.edu.

The Office investigates reports of unlawful discrimination/harassment as submitted by employees through the process provided for in Administrative Policy 6-03.1 of the University Policy Register, "Administrative policy and procedures regarding complaints of unlawful discrimination and harassment." It is important that the investigator assigned by the Office of Equal Opportunity and Affirmative Action receive whatever assistance from the department/area is necessary to ensure a full investigation of the issues raised in the complaint. The success of the investigation, and of the Affirmative Action Plan as set out in Administrative Policy 3342-6-02.1, hinges upon the timely disclosure of all materials

DISCRIMINATION CHARGES

relevant in a particular matter. Departments are also encouraged to contact the Office of Equal Opportunity and Affirmative Action to ensure that they are following the University's policies and receive additional guidance on issues of compliance.

Conclusion

University administrators should always be vigilant and sensitive to matters alleging harassment and/or discrimination and should consult with the Office of the General Counsel or Office of Equal Employment and Affirmative Action when possible. The issues provided within this chapter are meant to provide a basic understanding and quick reference guide to matters concerning unlawful discrimination and harassment, but in no way represents an all-inclusive view of the landscape of civil rights laws.

Key Points:

- As established in University Policy 6-03, the policy of the University regarding unlawful discrimination is to:
 - Apply the federal and state definitions of unlawful discrimination and harassment;
 - Communicate that unlawful discrimination and harassment are unacceptable and will not be tolerated;
 - Educate the university community regarding individual rights with regard to unlawful discrimination and harassment;
 - Investigate alleged incidents that are reported in the appropriate manner.
- Contact the EEO/AA to discover what materials may be available to further assist you in meeting these objectives in your unit/department.



Student and Employee Privacy

FERPA, HIPAA and other privacy protections

Privacy at the University means more than the preservation and unauthorized dissemination of sensitive information protected by law. The term “privacy” focuses on the rights of the student and employee when on University property and the responsibilities that may come to protect it. This chapter provides a brief overview of the state and federal regulations regarding the privacy of individual student and employee information, and gives a summary of the personal privacy rights of students and employee while on University property.

Alphabet soup: FERPA, HIPAA, OPRA

What is FERPA? “FERPA” stands for the Family Educational Rights & Privacy Act of 1974. This law is designed with three main objectives: 1) to protect the privacy of student educational records; 2) to establish the right of students to inspect and review their educational records; and 3) to provide guidelines for the correction of inaccurate and misleading data through informal and formal hearings. This law applies to Kent State University because it receives federal funds under a U.S. Department of Education applicable program.¹⁷ The University’s compliance with FERPA is enforced by another Department of Education office, the Family Policy Compliance Office. While FERPA rights and privileges are constantly being defined, there are a few established guidelines for FERPA compliance¹⁸. The core rights of FERPA are:

- At the university level, parents or “eligible students” can inspect and review the student’s education records maintained by the school. Parents have the right to inspect these records until the student reaches the age of 18 *or attends a school beyond the high school level* (such as a university). Parents can also view the student’s file if they can prove through IRS statements that the students is a “dependent” for tax

¹⁷ Read more at www.ed.gov/policy/gen/guid/fpco/ferpa/index.html

¹⁸ As provided by the Family Policy Compliance Office.

purposes. Contact the Office of the University Registrar when confronted with a FERPA or request to release a student's information.

- Parents of a minor child or an “eligible student” has the right to request that the University correct records that the person believes to be inaccurate or misleading. The parent or eligible student is entitled to a hearing.
- The University must have written permission from the parent of a minor child or eligible student in order to release any information from a student's education record, with some exceptions. One exception is if the student's record is subpoenaed under a lawful court order or by certain federal agencies. In that instance, the University is generally obligated by FERPA to notify the student. The GC will handle the notification while processing a subpoena.



Go to the Web

The Office of the University Registrar keeps an updated web site to provide further guidance on FERPA-related issues and some frequently asked questions.

<http://www.registrars.kent.edu/KSUCatalog/ferpa/ferpainfo.html>

There is also more information on the Student Records Policy at

<http://www.registrars.kent.edu/home/Info/StudRecd.HTM>

The Department of Education has a page of FAQs on FERPA at

<http://www.ed.gov/policy/gen/guid/fpco/faq.html>

Any office that receives a request - or what the office or employee perceives as a request - for information which may be a part of a student's educational record should contact the Office of the University Registrar at 330-672-3131. The inadvertent or unauthorized disclosure of information from a student's education record in violation of FERPA should be reported as soon as it occurs or is discovered. If you have a question about the release of student education record information and require legal guidance, contact the Office of the General Counsel at 330-672-2982.

What is HIPAA? “HIPAA” refers to the health information protected by the Health Insurance Portability and Accountability Act of 1996. Through this law, “The Privacy Rule” was created as a means to provide standards to protect “individually identifiable health information.”¹⁹ This rule covers ALL of the information held by or transmitted by the University (as a “covered entity”) in any form or media, whether electronic, paper, or oral. This information is called “protected health information (PHI).”²⁰ The Department of Health and Human Services oversees the enforcement of HIPAA provisions.

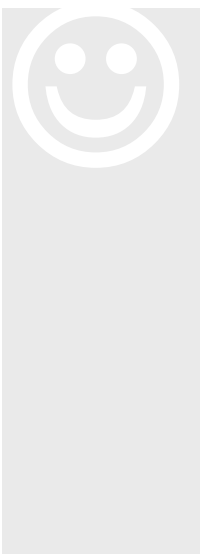
Individuals who may have HIPAA-protected information include patients in University clinics and in-patients in the University Health Center. HIPAA also covers the

¹⁹ HIPAA information and more-specific FAQs can be found at <http://www.hhs.gov/ocr/hipaa>

²⁰ A comprehensive summary of HIPAA can be found at <http://www.hhs.gov/ocr/privacysummary.pdf>

individually identifiable health information received by Student Accessibility Services. Individuals involved in clinical trials or other research studies may also be protected.²¹ Any person with a question about HIPAA compliance or whether certain information is protected should contact the University's HIPAA officer by emailing hipaa-privacy@uhs.kent.edu. The University's Office of Security and Compliance officer can also be contacted by calling 330-672-4704.

What is OPRA? "OPRA" is short for the Ohio Public Records Act, codified as Ohio Rev. Code §149.43. As a public institution, Kent State University must respond to requests made by the public to inspect records that qualify under this statute. While this information was discussed in Chapter 2 of this guide, it is important to remember that each public records request must be examined to ensure that the release of such records does not violate FERPA, HIPAA and other laws providing for the protection of University-held information. According to Ohio Rev. Code §149.43, a public record is any record that serves to document the organization, function, policies, decision, procedures, operations or other activities of the university.



Friendly Advice

When your department or office receives a call or a formal request for information, you should direct the matter to the Office of the University Counsel.

You can also ask yourself the following questions:

- **What information is being requested? Is it related to a particular student or employee, or is it a request for University-held information or records?**
- **Is there a record that is currently available or maintained that may contain information in a manner that is responsive to the request?**
- **Could the record contain any protected information, the distribution of which could put the University in violation of a federal or state law?**
- **Does your department/office have the authority to release those records or permission to do so?**

Record Retention: Who keeps what? The general rule of thumb is that if your department is responsible for the subject of the record, then your office is responsible for its retention. For instance, employment files and records are kept in two places: 1) Human Resources, because of the division's responsibility for the hiring of University classified and unclassified staff; and 2) Academic Personnel in the Provost's Office, because of the Provost's responsibility for the hiring of academic personnel including faculty.

The Registrar is responsible for the retention of student records. As the University continues to move toward a digital filing system, much of the information in

²¹ This an more information is available from the University at <http://www.hipaa.kent.edu/FAQ.html>

these records is already in a digital format on the recently-installed ERP system. While even in electronic format, the information is still considered a record and must be kept according to the University's record retention schedule in accordance with the University timetable as found at <http://www.kent.edu/universitycounsel/records/index.cfm>. The retention schedules ensures that the University preserves the privacy of its employee and student information by providing for the systematic destruction of records that are no longer needed or required to be accessible under law.

Please contact the Office of the General Counsel or go to the records retention website at the address listed above for more information. You can also find out more about the University's record retention practices by contacting the University Archivist at 330-672-1639.

Conclusion

University administrators, especially department chairs and deans, have an extraordinary responsibility to ensure the protection of the University-held information of their students and employees and remain in full compliance with FERPA, HIPAA and the Ohio Public Records Act. If there is ever a question as to whether certain information is covered by one of these laws or whether the information should be released when provided with a request, please consult with the Office of the University Counsel for review as stated previously in Chapter 2.

Key Points:

- The Office of the University Registrar is a resource for all FERPA-related issues. As the official custodian of student records, the Registrar also has the authority to establish the University procedures for student record production.
- There are several penalties, enforced by both state and federal law, to the premature destruction of public records at the University. The University relies on the administrators of each department to ensure that the records kept by the office are consistent with the retention policies applicable to the entire University.
- The best way to ensure that your office engages in the best practices regarding "records retention" and records security is to keep up to date through attending workshops and training opportunities as they are scheduled.



Miscellaneous Issues

Extended guidance on emerging issues at our University

The legal landscape of the University changes often so it is important for each member of the University community to remain vigilant in addressing these concerns. As we enter into the 21st century, higher education has seen the emergence of additional areas of legal concerns and involvement, including:

- Contracting authority and administration.
- Immigration Services.
- Research misconduct and plagiarism issues.
- Study abroad and MOUs with foreign universities.

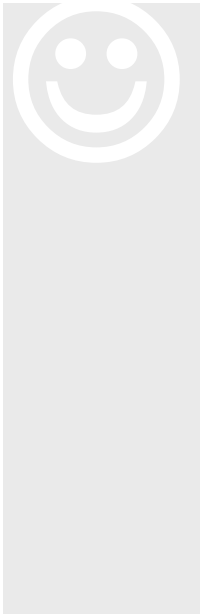
Contracting authority and administration

In any given year, the University engages in over 100 contracts with independent contractors and third-party service providers, as well as some of the largest firms in the country such as Microsoft and Google. For a new administrator, it is easy to get lost in the shuffle of paperwork approvals and agreements. However, contracting with another party should not be taken lightly. By signing a contract, a person is obligating the University, a state institution, to perform a certain responsibilities in exchange for something else.

As much as the person is promising the University's performance, the person is also obligating the University to be responsible for any penalties that may come along with non-performance of the agreement. Because this burden is so great, only certain individuals at the University have been given the appropriate delegation of authority to engage (sign) contracts on behalf of the University. A University employee who engages in contracting without such authority to do so may incur personal liability for the terms of the contract in the event of a dispute.

As provided by the University's Constitution, state law, and the University's Policy Register, the president of the University and vice president for finance and administration

are the sole contracting authorities at Kent State University. Through other undocumented, but inherent delegations, each vice president has been provided with the express authority to contract on behalf of the University as necessary to the business of their area. Other University personnel should not enter into a contract for the purchase of goods or services or otherwise obligate the University to pay any sum of money without a written delegation of authority from the president, provost, or vice presidents.



Friendly Advice

The Office of General Counsel should review all contracts for legal form and sufficiency prior to their execution. In reviewing contracts, the GC looks for several key clauses that the University is either prohibited from engaging in or does not usually do so through practice.

- **Indemnify/Hold Harmless: The University cannot indemnify or “hold harmless” the other party of a contract. Such provisions are contrary to state law and previous decisions from the Ohio Attorney General.**
- **Choice of Law: The University cannot submit to another jurisdiction other than the state of Ohio. Such provisions must be deleted or “Ohio” inserted as a replacement for the restricted jurisdiction.**
- **Arbitration/binding-mediation: The University cannot submit to binding dispute resolution by arbitration or mediation.**
- **Confidentiality: As a public institution, the contract itself is a public record and can be disclosed upon request under the provisions of Ohio Rev. Code 149.43.**

Failure to follow the correct contract administration procedures and/or failure to ensure the appropriate contracting authority as obtained during the execution of an agreement with a third-party can have the adverse effect of voiding any legal coverage afforded to the University employee – leaving the contracting party personally responsible for any damages and without the benefit of university representation. Therefore, it is imperative to keep two questions in mind whenever an administrator is about to engage in a contractual relationship that obligates the university: 1) Do I have the authority to contract on behalf of the University (singing authority); and 2) Do I have the authority to agree to the terms of this contract (legal review)?

Immigration Services

The University employs several hundred international faculty and several hundred international students currently attend the University. The University has increased its role in providing service to faculty/professional employees and students for immigration matters. The Office of the General Counsel provides visa assistance for all incoming international faculty and staff. It is important for department chairs and deans to be aware of those individuals within their departments who have an immigration status (as designated by their Visa) and contact the appropriate office for any questions.

- *Office of International Students and Scholars.* This office coordinates all student immigration issues and international student admissions. For assistance, call the office at 330-672-7980.
- *Office of the General Counsel.* This office handles faculty immigration issues (in relation to employment-based immigration and the “green card” application). For assistance, call the office at 330-672-2982.

For a more comprehensive explanation of the University’s international students and scholars programs, please visit <http://www.dept.kent.edu/oia>. More general information about immigration and its application to students and faculty/professional employees can be found at the Department of Homeland Security, United States Citizenship and Immigration Services at www.uscis.gov.

Immigration considerations during the hiring process. Several federal laws (Patriot Act, Homeland Security Act, etc.) regulate the hiring and employment provisions of those with immigrant/non-immigrant status. These laws are constantly changing. As recent as the Fall 2010 session, Congress sought an overhaul of the immigration system in the United States altogether (however the effort was put on hold again). When the University is looking to advertise a position, and the possibility exists that an international professional or faculty member will apply for that position, there are some considerations which may help future employment issues, including:

- *Prevailing wage considerations.* The most common “visa” for the professional or faculty member is the H-1B visa. However, for the professional or faculty member to be approved for the Labor Certification (or LCA) for this visa, the position must pay the prevailing wage according to either the U.S. Department of Labor OES wage source or another secondary study. To use:
 - Go to <http://www.flcdatcenter.com>, select “FLC Wage Search Wizard”, select “Ohio”;
 - Select the most recent “ACIWA” survey from the Data Source menu, select “Portage” or applicable county, and scroll through the list of the occupations to find what seems like a comparable position (most faculty positions begin with 25-XXXX).
- *National advertising.* For positions where international applicants may apply, it is an important step to ensure that the position is advertised in a national publication. While an actual printed ad is preferable, the United States Citizenship and Immigration Services (USCIS) are beginning to loosen its regulations to include

online advertising.²² Advertising requirements vary depending upon the position recruited so it is advisable to contact the GC for more specific direction.

- *Adherence to the search procedures.* One of the last, but certainly not least, steps in the process is evaluating the candidates. It is very important to follow University procedures during the final consideration of multiple candidates. This documentation is crucial to the international applicant should they later seek to initiate permanent residency procedures.
 - The Hiring Manager, Human Resources, Office of the General Counsel can provide you with further information regarding all these issues and should be consulted if you are about to post a position where an international professional or faculty member may apply.

Immigration is a time-sensitive issues – meaning that deadlines are very important and can mean the difference between the ability to employ and the impossibility of employment. Also, the timing of a visa determines when the person can start – not the other way around. Most foreign nationals who require the University’s assistance to petition for employment authorization through a visa are not currently in the correct status to obtain such employment authorization on their own. Except in special circumstances, a new employee cannot begin working until their visa has been approved. Without such approval, the employee cannot properly fill out the Form I-9, the Employment Eligibility Form required for all new employees.

Research Misconduct and Plagiarism

With the exchange of information in today’s Internet environment rapidly growing in both speed and content, the incidents of research misconduct and/or plagiarism are more common on university departments and classrooms.

“*Research Misconduct*” is defined as the “fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.” Research misconduct does not include “honest errors” or differences of opinions, but becomes an issue when a person at the University makes up research data or manipulates research materials or results in order to reach a certain outcome. In a university setting, concerns of research misconduct should be addressed with expedience as the consequences of such misconduct can have reverberating effects upon an entire department or the university.

According to the United States Office of Science and Technology Policy, a finding of research misconduct requires: 1) a significant departure from accepted practices of the relevant research community; 2) the misconduct be committed intentionally, or

²² For more information on the latest immigration news or to familiarize yourself with the process, go to www.uscis.gov

knowingly, or recklessly; and 3) the allegation be proven by a preponderance of evidence.²³

Research misconduct standards are still being developed by both federal agencies and research institutions. In the event such misconduct takes place, consult University policy 3342-3-05, “University Policy regarding misconduct in research and scholarship”.



Go to the Web

Library and Media Services has a comprehensive site on plagiarism

<http://www.library.kent.edu/page/11299>

Division of Research & Sponsored Programs' list of research misconduct policies:

<http://www.kent.edu/research/sponsoredprograms/university-policies-relevant-to-sponsored-programs.cfm>

University's policy on student plagiarism:

http://www.kent.edu/policyreg/policydetails.cfm?customel_datapageid_1976529=2037779

“*Plagiarism*” is the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit. Plagiarism can occur in any number of settings at all levels of an institution of higher education: an undergraduate final paper, a doctoral thesis, or a research report. However, several organizations and websites offer services and tips on how to catch plagiarism using the internet. For example, www.plagiarism.org, offers tips, guidelines and suggestions on how to stop internet-based and conventional plagiarism, as well as handouts on how to avoid plagiarism through proper citation. The University’s Library and Media Services website provides several tips and guidelines to detect plagiarism, as well as offering links to sites that provide the plagiarized content itself!

When evidence of plagiarism is uncovered, the department chair or college dean should follow the procedures set forth in university policy 3342-3-01.8, “Administrative policy regarding student cheating and plagiarism,” which includes notification of the Office of Student Conduct (formerly “Judicial Affairs”) and engaging in the consideration of sanctions for the student.

Study Abroad and MOUs with Foreign Universities

“*Study Abroad*.” As the University continues to transform its educational mission into a more global model, several departments will have the opportunity to adopt international programs and educational experiences into the current curriculum. While these opportunities can prove invaluable for increasing the worth of the degree program to the student, every department should take great care in ensuring that any program involving international travel or interaction is well-researched and meets the minimum standards for such a program as established by policy and the Office of International Affairs.

²³ Read more about the Federal Policy on Research Misconduct at <http://www.ostp.gov>

Study Abroad programming can range from a faculty member taking a few students overseas for a weekend, to a semester-long stay in the middle of Beijing, China. Whatever the destination and however long the program, faculty and administrators alike should observe the minimum requirements for study abroad opportunities as required by policy:

- All programs must be approved by the university and registered with the Office of International Affairs no earlier than one semester before the program participants are scheduled to depart.
- All university-approved programs or university-operated programs must be reviewed for compliance.
- All programs must complete the preliminary registration packet provided by the Office of International Affairs. The packet ensures that the program meets the minimum standards designed to limit the University's liabilities as well as to ensure the proper protections are in place for the student.

Any program that is not registered with the Office of International Affairs will be considered noncompliant with current University procedures and may negate the qualified immunity provided to the faculty and administrator under the Ohio Revised Code. Without the qualified immunity protection of the state, the faculty and/or administrator would be personally liable for any damages resulting from a victory for the complaining party.

Furthermore, it is important to register every program to ensure that the appropriate emergency response measures are in place to provide the maximum amount of preventive protection over the program participants. When possible, students, staff and faculty participants will be notified prior to their departure of any issues, alerts, or warnings that may affect their destination. Severe security and safety concerns may result in the suspension of the program and measures may be taken to remove all participants from the country immediately. A well-organized study abroad program is essential to providing the best educational experience with efforts in place to minimize the level of risk to the student and the faculty.

If you or your faculty member is about to establish a study abroad program, please contact the Office of International Affairs at 330-672-7980 for more assistance.

MOUs with Foreign Universities. It has become a common practice for faculty at the University to engage in relationships with faculty not only in the United States, but faculty from international institutions of higher education. In order to ensure that the University does not enter into dual agreements (or does not run afoul of the agreements already in place), the Office of International Affairs ("OIA") is the central administrating agent for the University and each MOU must be processed through such office.

While grants or projects administered by sponsored programs are exempted from this requirements, all other MOUs must be brought to the attention of OIA for review prior to forwarding along for signatures. OIA and General Counsel will work together to

ensure that the MOU includes all of the required clauses while examining closely any additional terms unique to the expected relationship. Each MOU with a foreign entity or institution must be approved by the Dean of the College (or highest ranking academic officer) before being sent to the Office of the Provost for review. In rare instances, the MOU may require the signature of the President of the University.

It is very important to ensure that this policy and process are followed. Any MOU not conforming to the minimum specifications as established by the University, or that does not follow the approval process outlined by policy, will be immediately suspended while the appropriate parties examine the relationship and take all measures necessary to bring it into compliance with the University standard practices.

Additional comments and questions

Should you encounter a situation not reviewed in this guide, please call the Office of the General Counsel as soon as possible:

- The general office number is 330-672-2982.
- The general fax number is 330-672-7821.
- The general email address is legal@kent.edu
- Find us on the web at www.kent.edu/universitycounsel
- Find university policies at www.kent.edu/policyreg

An online version of this manual may be found online at:
<http://www.kent.edu/universitycounsel/university-outreach.cfm>