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Case of the Month

The U.S. Department of Labor revised FFCRA rules.

This month, the Community College Services Legal Update is highlighting the Families First Coronavirus Response Act (FFCRA). As the COVID-19 pandemic continues to impact Texas community colleges, administrators should be aware of recent revisions to the FFCRA regulations that may affect the administration of the law on their campuses.

The FFCRA includes paid leave for employees affected by COVID-19 through the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family Medical Leave Expansion Act (EFMLEA). Both the EPSLA and EFMLEA apply to public agencies including community colleges. On April 1, 2020, the U.S. Department of Labor (DOL) issued a temporary rule implementing the EPSLA and EFMLEA. The DOL amended and clarified these [rules](#) in response to an August 3, 2020 [federal district court ruling](#) that invalidated portions of the rules. The revised rules went into effect beginning September 16, 2020. In its revised rules, the DOL:

Reaffirmed that an employer must have work available from which an employee can take leave: If a community college is closed for business permanently, or temporarily, or has no work available for an employee to perform, then the employee may not take FFCRA leave.

Reaffirmed that Intermittent FFCRA leave requires employer approval: Community college employees who report to a worksite may take intermittent FFCRA leave for any qualifying reason that correlates to a higher risk of spreading COVID-19. Employees who telework may take intermittent FFCRA leave for any qualifying reason. Both situations require approval from the college.

Clarified that employees taking FFCRA leave must provide notice and documentation to their employers as soon as practicable: Community college employees are not required to provide the required documentation prior to taking FFCRA leave.

Revised the definition of health care provider for purposes of determining an employee's eligibility to use FFCRA leave: The amended definition limits the term's application to *health care providers* as defined under the original FMLA and to those who provide specific health care services.

The DOL updated its [FFCRA FAQ's](#) to address the above revisions. Additional guidance may be found in TASB Community College Services [Families First Coronavirus Response Act Employee Leave Provisions FAQ](#). Representatives of Texas community colleges with questions about the FFCRA or other legal issues may contact Community College Services at 800.580.1488 or colleges@tasb.org.

Highlights

[Update 39](#) is now available.

Join us at the [UNT Texas Higher Education Law Conference](#).

New on eLaw:
[Deadlines for November 3, 2020 Community College Trustee Elections](#)

COVID-19 resources are available on [TASB College eLaw](#) and the [TASB COVID-19 Website](#).

Resources

[Texas Higher Education Coordinating Board](#)
[Texas Legislature](#)
[Texas Statutes](#)
[Texas Attorney General](#)
[U.S. Department of Education](#)



From the Courts and the Attorney General

Personnel

Former employee alleged a defamation lawsuit filed by a college constituted retaliation under [Title VII of the Civil Rights Act of 1964](#) and the federal [Americans with Disabilities Act](#) in response to the employee's previous complaints to the U.S. Equal Employment Opportunity Commission (EEOC) and the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC). The court held that the employee failed to provide evidence of a causal connection between his EEOC complaint and the college's lawsuit, and that complaints made to SACSCOC are not a protected activity under Title VII or the ADA. [Aguillard v. Louisiana Coll.](#), No. 19-30941, 2020 WL 4873207 (5th Cir. Aug. 19, 2020).

Former community college employees lacked standing to sue a county for retaliation because they were not directly injured by the county when the county declined to renew a contract with the college though that action resulted in the employees' termination. [Culbertson v. Harris Cty.](#), No. CV H-12-3644, 2020 WL 5339333 (S.D. Tex. Sept. 4, 2020).

Students and Instruction

Former community college student who lived and participated in student activities on a university campus claimed the university violated [Title IX of the Education Amendments of 1972](#) when it acted with deliberate indifference to her allegation that a university student sexually assaulted her in her on-campus dorm. The court held that although she was not a university student, she had standing to bring her claim because there was a genuine dispute of fact as to whether she was denied the benefit of an educational program or activity of the university and not the college. [Doe v. Univ. of Kentucky](#), 971 F.3d 553 (6th Cir. Aug. 19, 2020).

Former student sued a university under [Title IX](#) alleging it discriminated against him on the basis of sex by permitting media publicity on and investigations into the university's Title IX practices to influence its decision to find him responsible for sexual assault after an initial finding of insufficient evidence. The court stated external pressure on a university to respond to complaints in a certain manner may support an inference of bias and held the facts presented by the student were sufficient to state a plausible Title IX claim. [Doe v. Univ. of Arkansas - Fayetteville](#), No. 19-1842, 2020 WL 5268514 (8th Cir. Sept. 4, 2020).

Community and Governmental Relations

In response to in-person voting concerns during the COVID-19 pandemic, the Texas Democratic Party alleged a provision of the Texas Election Code that required voters under the age of 65 to satisfy certain conditions to vote early by mail was an unconstitutional abridgment of the right to vote under the [U.S. Constitution Twenty-Sixth Amendment](#) because it did not offer the same unrestricted opportunity for mail-in voting to younger voters as those over 65. The court held that providing a privilege to one category of voters does not abridge the right of others to vote. [Texas Democratic Party v. Abbott](#), No. 20-50407, 2020 WL 5422917 (5th Cir. Sept. 10, 2020).

Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings based on requests from Texas community colleges related to:

- Personnel files and information related to former college employees. Tex. Att'y Gen. [OR2020-20852](#) (Aug. 19, 2020);
- Information relating to a request for proposals. Tex. Att'y Gen. [OR2020-21035](#) (Aug. 21, 2020);

- The winning bid and current contract related to a specified request for proposals. Tex. Att'y Gen. [OR2020-21665](#) (Aug. 28, 2020);
- Information related to a specified request for proposals. Tex. Att'y Gen. [OR2020-21833](#) (Aug. 31, 2020);
- Proposals and scoring information related to a specified request for proposals. Tex. Att'y Gen. Op. [OR2020-21986](#) (Sept. 1, 2020); and
- Correspondence from named individuals pertaining to the requestor and specified topics during a specified time period. Tex. Att'y Gen. Op. [OR2020-22137](#) (Sept. 2, 2020).



Recent Regulations and Guidance

The Employees Retirement System of Texas amended [regulations](#) addressing hazardous profession death benefits in response to changes made during the 86th Legislative Session.

The Texas Department of Information Resources repealed [regulations](#) addressing Interagency Contracts for Information Resources Technologies in response to statutory changes made during the 86th Legislative Session.

The Texas Department of Licensing and Regulation (TDLR) amended, adopted, and repealed [regulations](#) addressing the Driver Education and Safety Program.

TDLR adopted [regulations](#) addressing the Motorcycle Operator Training and Safety Program.

The Texas Department of Public Safety amended [regulations](#) addressing motorcycle license requirements in response to a statutory repeal of rulemaking authority made during the 86th Legislative Session.

The U.S. Department of Education (DOE) adopted [rules](#) addressing the equal treatment of religious student organizations at institutions of higher education and implementing [Executive Order 13864](#) requiring institution's to comply with the First Amendment in order to receive grants.

The DOE amended [regulations](#) addressing distance learning in higher education.

The U.S. Office of Management and Budget revised its [Guidance for Grants and Agreements](#).



In the News

The U.S. Equal Employment Opportunity Commission updated its [COVID-19 guidance](#) to address employer administrated COVID-19 tests.

The U.S. Department of Education issued [Questions and Answers Regarding the Department's Final Title IX Rule](#).

The Internal Revenue Service issued Notice [2020-65](#) allowing employers to temporarily defer withholding an employee's portion of Social Security payroll taxes.

The Texas Higher Education Coordinating Board updated its [COVID-19 FAQ's](#).