Legal Issues in the Higher Education Workplace

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I. THE IMPORTANCE OF HAVING EFFECTIVE TENURE POLICIES

Having an effective tenure policy is critical to ensuring that your institution can carry out its educational mission in a manner that satisfies its stated academic goals. In addition, tenure policies bind the institution and must be carefully drafted to ensure that the institution is aware of the implied-contract provisions that it is creating for itself. Moreover, tenure policies must be drafted with clarity to ensure that they can be easily understood by all those who are called upon to interpret them. Thus, when reviewing your institution’s tenure policies and procedures, it is helpful to keep in mind the following overarching principles:

- Is the policy clearly written so that all parties can understand the rights and procedures?
- Are there terms of art or vague terms subject to multiple interpretations that need to be defined?
- Is the faculty member apprised of any action with sufficient notice?
- Do the policies accurately reflect how your tenure system actually operates?

In addition to ensuring that the above principles are incorporated in your institution’s tenure policy, your institution should also ensure that its tenure evaluation and termination policies should contain the basic elements of “due process.” These elements include:

- Notice to all affected parties of proposed actions that affect tenure;
- An opportunity to respond to all proposed actions pertaining to tenure decisions;
- The right to appeal any decisions that affect tenure on the grounds of prejudice, bias or failure to follow the stated procedures.

When implementing your institution’s tenure policies and procedures, you should also keep in mind that the most well-written procedure will not protect your institution from liability if it is not followed correctly. If your institution’s stated procedures are not followed, then the institution faces exposure to legal challenge, in which case breach of contract or due process
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Violations could expose your institution to liability. Random policies or procedures that are too subjective can be direct evidence of discrimination. In general, the more objective elements that are present the better. However, even the most objective process can be undermined if the articulated standards have not been applied, they have been applied inconsistently, or the procedures used differed from the norm in significant ways. Thus, it is also crucial that whatever procedures your institution adopts, they are clearly communicated and consistently and candidly applied.

- Always follow every step in your institution’s stated procedure;
- If a provision in the procedure is vague, document and disclose how you are interpreting and implementing the provision;
- Apply your institution’s policies and procedures consistently to avoid claims of disparate treatment.

Depending upon the circumstances at your institution, tradition, campus culture, or general reluctance to change, amending an existing policy may be difficult if not impossible. Thus your focus might be ensuring that your policy contains the required basics rather than approaching the policy with a wrecking ball. If you are faced with a weak or flawed policy that is not amenable to revision, however, you can overcome many policy flaws by scrupulously following sound administrative practices. Understand the basics of the policy in effect at your institution. There are no “model policies.”

A. General Elements of a Tenure Policy

Unlike public educational institutions where tenure is defined by statute or regulation, private institutions have flexibility to define tenure for themselves. Again, there is no universally “right way” to define tenure. Institutions have used a variety of long- and short-form definitions. Some institutions incorporate AAUP policy statements in their own philosophy statement. However, incorporating AAUP policies can have the unintended consequence of making these policies a binding term of the tenure contract. Thus, your institution should understand the risks before incorporating non-institutional policies.
Your institution’s tenure policy should include the following general elements:

- A statement of philosophy affirming your institution’s commitment to academic freedom and tenure.

- A definition of tenure at your particular institution.

- Clear distinctions between: 1) termination of tenured appointment, 2) non-renewal of a probationary appointment, and 3) termination of a probationary appointment prior to the end of its term.

- A clear statement that distinguishes which policy and procedures apply to which faculty members, depending on their status.

- A reservation of rights that allows your institution the right to change the policy and provide how the policy may be changed (e.g., with or without advanced notice, with or without faculty participation).

B. Policies and Procedures Applicable to Probationary Faculty Members

It is the administration’s job to adequately inform probationary faculty from the outset so that everyone has a realistic understanding of the tenure process at your particular institution. Your communications with probationary faculty should provide adequate notice to candidates, as early as possible, of what is expected in order to realistically temper any preconceived notions.

- Do your employment documents thoroughly spell out terms but maintain flexibility?

- Do your employment documents include disclaimers that the policy may leave out?

- Do your “first contact” employment documents, such as job postings or job advertisements clearly state whether the position is tenure-track or not?
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- During the interview process, do you inform the candidate about tenure policies and practices at your institution?

- Does your policy specify who has authority to make offers or negotiate on behalf of the institution?

- Do your employment documents expressly incorporate all sources of tenure rights?

Key employment documents, such as faculty appointment letters are usually short and only state the most basic terms of employment. From a legal standpoint, the challenge is to draft a concise letter while foreclosing the chance for a judge to “fill in the gaps” or dictate that a particular candidate would have been given tenure under the letter’s terms, standing alone. The solution is to craft employment documents which contain all necessary information, either directly or through explicit cross-reference.

All sources of tenure rights should be expressly referenced in employment documents. The following documents may all be construed as sources for faculty tenure rights: faculty handbooks, board of trustee’s bylaws, appointment policies and school or departmental handbooks or policies. At a minimum, the policy should specify that all sources of tenure rights be incorporated by reference in a faculty member’s initial appointment letter. Your employment documents must, at a minimum, incorporate the institution’s tenure policy: “Employment with institution is subject to the terms and conditions of the tenure policy.”

C. Policies and Procedures Pertaining to the Evaluation of Tenure

The probationary period gives your institution time to evaluate tenure candidates and gives candidates time to fulfill their potential. The probationary period also presents key opportunities for managing the progress of probationary faculty toward tenure.

The general qualitative standards used for the evaluation of tenure will depend upon the mission and standards of the particular institution. The “Traditional Triumvirate” for evaluating faculty consists of scholarship, teaching, and service. Determining whether an individual candidate has met these standards involves an analysis of such concepts as excellence, competence, academic performance and academic potential, future promise, and quality or creativity. In addition, the traditional terms are often supplemented by the use of more subjective modifiers, such as “outstanding,” “substantial,” “significant,” “satisfactory,” and “a record of.”
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- Make sure your tenure policy clearly identifies the standards required to obtain tenure.
- Make sure your stated tenure policy is followed by departments who often have their own unwritten standards for tenure.
- Determine whether and to what extent it is appropriate for departments to have their own internal tenure standards and identify those standards in writing.

1. Scholarship

Institutions have looked at the following criteria when analyzing a candidate’s scholarship: attaining requisite degrees, obtaining external research funds, speaking at conferences on subjects related to the candidate’s particular field, establishing a national reputation in his or her field, developing an externally-funded program, the extent of the candidate’s publishing (analyzing the number of publications, whether they were on topics within the candidate’s field, whether they were published in a prestigious journal, and/or whether the article was subject to peer review).

2. Teaching

The following evaluation methods have been used to judge a candidate satisfied the teaching requirement: quantity of teaching assignments, classroom performance as judged by student evaluations and reviews by peers, participation as a student advisor, and the level of courses taught (undergraduate vs. graduate, general education vs. seminar topics).

3. Service

Indicators of service consist primarily of the candidate’s demonstrated commitment of time and energy to the institutional community. For example, time spent on departmental committees or as a faculty mentor and other evidence of cooperation in faculty dealings will impact the determination regarding the candidate’s service. Collegiality, if not provided as a separate and distinct category, can be analyzed as a component of service.
4. Other Factors

Other considerations should be explicitly reserved in the policy. For example, many institutions reserve the right to base tenure decisions on factors external to the candidate, such as financial considerations (e.g., demand for courses/decline in enrollment, financial health of the institution, higher financial priorities elsewhere). Other considerations include the candidate’s success in obtaining external funding, which can be an independent criterion or can be part of a scholarship. Some institutions consider collegiality as a valid evaluation criterion. Courts have viewed personal interactions and the ability to get along with colleagues as an appropriate criterion for evaluating tenure candidates, even in the absence of express language identifying “collegiality” as an evaluation criterion. Courts distinguish decisions based on personal animosity as not illegal because such decisions are not based on unlawful discrimination. This area can be a source of exposure, however, because collegiality can be seen as a pretextual reason, depending upon the circumstances. The evaluation can also be tied to standards of conduct or statements of faculty responsibilities.

- Establish explicit evaluation criteria.

The policy should clearly list all the major criteria used for evaluation. As discussed above, the policy should clearly identify the required standards for service, teaching and scholarship.

- Specify any additional criteria developed by a department, school, division or some other academic unit.

Different policies provide different levels of detail. However, regardless of format, any additional criteria must be consistent with the University-wide general standards, or have exceptions approved by a specific high-level administrator such as the Provost.

D. Ongoing Evaluation of Probationary Faculty Members

Annual review and reappointment is a key opportunity to clarify the institution’s expectations regarding performance required to merit an award of tenure, reiterate tenure requirements, provide meaningful feedback and afford the candidate every opportunity to improve. It is also a golden opportunity to provide those nuances in performance requirements that are department-specific and which, therefore, are not spelled out in the tenure policy. For example, an undisclosed emphasis on publishing articles in referred journals (journals subject to peer review), in specific tiered journals, or which the author does not co-author, or a requirement that publishing consists of more than a book review can result in a breach of contract claim based upon changing performance expectations if the undisclosed emphasis directly contradicts the stated criteria for tenure.
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- Formal tenure evaluation should not be the first time the candidate learns that his/her performance is subpar.

Disconnects lead to litigation. Evaluators should resist the temptation to “sugar coat” valid criticisms and should provide the candidate with candid feedback regarding performance and progress toward tenure, a realistic assessment of performance and any impediments toward tenure. The evaluator should also clarify the specific standards at issue and where the candidate is falling short.

Some institutions also have a mid-probation tenure-track check (commonly known as the “third-year review”). The purpose of the third-year review is to inform the tenure-track faculty member whether s/he is on-track for promotion and to give meaningful guidance as to how the candidate can improve his or her chances for achieving tenure.

- The fourth or fifth year of teaching should not be the first time the candidate learns that his/her performance is subpar.

In many instances, it is clear to the administration before the last year of the probationary period that a candidate does not deserve tenure and will not be able to overcome the deficiencies. If it is clear that candidate will never be granted tenure, you should not be afraid to not renew/issue a terminal contract before the tenure review process begins.

E. The Tenure Decision

As the candidate’s probationary period comes to an end, the candidate is ready for formal evaluation to determine whether the candidate has fulfilled the requirements for an award of tenured status. Most institutions use a tenure review committee to analyze the candidate and make a recommendation concerning tenure. These committees are often comprised of tenured faculty members, and at least one is usually from the candidate’s department. From a litigation standpoint, the use of tenure review committees is encouraged, because the use of multiple decision makers lends a sense of objectivity to this otherwise subjective process.

In addition to having a designated review process, your institution’s tenure policy should also clearly specify the eligibility requirements to be considered for tenure and the basic procedural requirements that will be followed by the designated hearing committee.

- Make sure your policy has a clear statement regarding who is eligible for tenure consideration and who is not.
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Most institutions have categories of faculty and other employees who are not eligible for tenure. Your policy should put all employees on notice which categories of employees will be considered for tenure and which categories will not.

- The policy should clearly state who has decisional authority regarding tenure decisions.

The policy should spell out how the tenure decision is made and who has the power to make it. Clearly state who has the final decision making authority (e.g., only the Board of Trustees has the power to grant tenure) vs. advisory authority (recommendations from academic units and faculty) vs. appellate authority. Disclaim the authority of anyone else to make tenure representations or commitments. Disclaim the authority and enforceability of oral and written communications inconsistent with or in conflict with the tenure policy.

- Disclaim “de facto” tenure.

“De facto” tenure exists when a faculty member, although not formally tenured, is able to show through practice or the circumstances of his service that he has a legitimate claim of entitlement to job tenure. Under this theory, courts have found a property interest in continued employment, even though there is no formal contract guaranteeing that right. (See Perry v. Sindermann, 408 U.S. 593 (1972).) Thus, a finding of de facto tenure can support an employee’s claim that the institution was contractually bound to only terminate the employee for cause. A showing of de facto tenure can also bolster an employee’s claim that his or her termination was motivated by discrimination, or by motivations in violation of the faculty member’s right to free speech. To minimize the risk that a court will impose de facto tenure, ensure that your policies and practices make clear that tenure can only be bestowed by an affirmative act on the part of the institution.

- Have an appeals process.

Your tenure policy should also establish a process of appealing a decision regarding tenure decisions. The tenure appeals committee can be called upon to hear claims of procedural unfairness, determine whether the decision was inconsistent with stated standards for tenure, and determine whether the decision was arbitrary and capricious. Most appeals committees or reviewing bodies are authorized to recommend reconsideration or other proceedings, but not to substitute the committee’s judgment for that of the ultimate decision maker. When reviewing your appeal process, consider the following:
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- Is the timeframe for appeal clearly stated?

It is important to set a reasonable timeframe for the appeal process. For some institutions, this may be controlled by state law. The policy should contain, at a minimum, a reasonable deadline for bringing the appeal.

- Does your procedure specify what issues are appealable?

In the absence of state law or regulation regarding appeals, the appeal should not be a de novo review of the entire matter. Issues for appeal should be carefully delineated in the policy, e.g., bias, new evidence that was not previously available or considered, and substantial failure to follow procedures. When determining if an appeal has merit, institutions should ask: “Had it been considered before, would it have likely affected the outcome?” If the answer is “no,” then the appeal should be denied. However, the appeals procedure must be consistent with applicable state and federal law.

- Is the appeals procedure consistent with your institution’s peer review mechanism, if any?

- Does the policy designate who will decide the appeal or describe a process for determining who will decide?

- A method should be established for determining who will hear the appeal. It may be a designated individual, individuals or a committee. Almost any approach is acceptable as long as it is fair. A procedure may also have more than one level of appeal. However, avoid implementing an appeal process that will be too lengthy and cumbersome to implement.

- Has the issue of who will be permitted to testify, if anyone, been decided and the decision clearly set forth in the procedure?

Unless required by state law, an appeal need not be an evidentiary hearing. An appeals process that allows the aggrieved faculty member to address the individual(s) hearing the appeal, however, has the greatest likelihood of acceptance. Moreover, unless required by applicable state law, institution policy and/or collective bargaining agreements, the parties have no right to legal or other representation at appeals.
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- Is there a provision for written findings of the appeal?

The results and findings of the appeals process should be made in writing. The findings should be clearly stated and substantiated by the evidence.

F. Checklist of Standards and Procedures for Tenure Evaluation

1. Clarity

- Make sure your stated criteria match criteria applied in practice.

- Clearly communicate all criteria in writing to everyone (don’t forget departmental standards).

- Ensure evaluators at all stages know and apply the same criteria.

- Clarify whether information that comes to light after the candidate has completed his or her application will be considered.

It is up to the institution whether the tenure review committee is obligated to review subsequently revealed information. The policy should clarify whether such information will be considered, and under what circumstances. For example, how much weight will the information get, who is responsible for communicating the information and when is it “too late” to submit additional information? If negative information comes to light after the candidate has completed his or her application, the evaluators may need to seek legal counsel before completing the review process. The procedure should reserve the institution’s right to suspend the proceedings pending the outcome of any disciplinary or dispute resolution process.

2. Consistency

- Be consistent in operation of the process (all candidates, all the time).

- Be consistent when evaluating a particular candidate.
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- Have valid justifications for any unavoidable deviations.

- Annual evaluations should faithfully reflect the candidate’s performance over the entire review period.

- Departmental counseling should be consistent with institutional and departmental requirements.

3. Candor

- Communicate with the candidate. Give a clear explanation of the requirements for tenure from the outset, use subsequent reviews as a key opportunity to review the requirements, and notify candidates promptly of any changes in the requirements.

- If a serious situation arises, ask the candidate to respond in writing.

- If the deficiencies are not correctable, do not be afraid to terminate or non-renew now before tenure is considered.

- Provide clear guidance regarding the candidate’s progress in meeting tenure requirements:
  - Be specific.
  - Cover the entire review period.
  - Resist sugar-coated reviews.
  - Give constructive criticism. Point out what the candidate is doing right and clarify areas of improvement.
  - Provide guidance regarding ways to improve (but do not promise that tenure will be granted).
G. Policies and Procedures Pertaining to Post-Tenure Review

While not mandated by a state legislature or state governing body, many private educational institutions have adopted post-tenure review policies since the mid-1990s. The most common, but often unspoken justification for adopting post-tenure review is that the process helps institutions deal with professors who are perceived to have lost their motivation to teach. Other institutions adopt post-tenure review in response to fiscal constraints, or a need for institutional flexibility. Post-tenure review can provide a framework for selecting which faculty members might be eliminated in a financial exigency situation. Post-tenure review may help avoid issues of age discrimination.

These policies are generally characterized as either “remedial” or “punitive.” The first is aimed at helping the professor improve. The latter is focused on holding the individual responsible for his or her deficiencies, including the possibility of terminating the relationship. The “punitive” method is objectionable to professors because it opens the door for a professor to be dismissed for deficiencies in any of three traditional areas – research, teaching, or service. Other institutions offer “post-tenure renewal” policies, which are very popular with faculty. Participation is strictly voluntary and participants receive a raise in base salary. The policy adopts no uniform standards and focuses on issues of teaching and learning rather than promoting research. The policy provides for a peer-mentor style improvement plan, whereby the professor being reviewed is paired with a sponsor, and both the professor and the sponsor set goals and hold each other accountable when the goals are not met.

- Ensure that participation in your post-tenure review system is periodically required of all tenured faculty.

Legal issues may arise if the post-tenure review is triggered only upon occurrence of an unforeseeable event, such as an elderly faculty member’s inability to hear his or her students, which in turn affects his or her ability to teach. As with any system of performance review that is not conducted until a concern arises, an institution may be exposed to discrimination issues.

Your institution should consider the following minimum standards when designing a formal system of post-tenure review:

- The review should protect academic freedom.
- The review cannot be a re-evaluation or revalidation of tenured status -- cannot shift the burden from the institution (to show cause) to the faculty member (to justify retention).
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• Written standards and criteria should be developed and periodically reviewed by the faculty.

• Faculty should conduct the review process and make a recommendation to the President or other high-level administrator who has the final decision.

• Outcome of evaluations should be confidential and released only with the faculty member’s permission.

• Any formal development program should be the product of mutual negotiation.

• The faculty member should have the right to respond to challenge and appeal.

• Termination should not be an available sanction. The standard for dismissal should remain “just cause,” with all of its protections.

H. Policies and Procedures Regarding the Termination of Tenure

There is no contractual right to tenure. Indeed, non-tenured faculty members’ contracts generally provide them with nothing more than the opportunity to receive consideration for tenure. However, once tenure has been bestowed, it may not be removed without following any procedures for removal as set forth in the institution’s tenure policy. Most tenure policies will include a detailed set of procedures that the institution must follow before the employment of a tenured faculty member can be terminated.

In general, tenure can be terminated for the following reasons:

• Financial exigency;

• Program discontinuation; and

• For cause.

Each of these grounds for termination of tenure has specific definitions and is generally governed by a specific procedure, as discussed below.
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1. Termination Due to Financial Exigency

A dismissal due to financial exigency requires more than a temporary budget deficit or short-term cash crunch. The AAUP defines financial exigency as an “imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means.”¹ Courts have applied this “survival of the institution” standard where the institution expressly incorporated AAUP provisions into the tenure policy. Policy statements and guidelines promulgated by the AAUP will often be the “industry standard” that the faculty and some courts will look to when analyzing issues concerning tenure. However, institutions can adopt their own standards which, if clearly drafted and communicated (and legal), the courts will generally honor.

- Be aware of the impact of incorporating the AAUP’s standards in your tenure policy.

- Draft explicit policies that either adopt the AAUP’s standard or do not. Do not leave room for courts to fill in blanks with “industry standards.”

When determining whether a dismissal for financial reasons was bona fide, courts have considered the following factors: the existence of ongoing budget deficits, revenue cutbacks (but not if student enrollments are rising), reasonable efforts to find placement for displaced faculty in the same institution, and evidence of other cost-cutting measures such as a reduction in non-tenured faculty and staff, elimination of nonessential perks, programs and travel. If these factors do not support the existence of a financial exigency, a dismissed employee may be able to argue that the dismissal was not for the neutral, financially based reasons given; rather, it is a pretext for discrimination or retaliation.

a. Does your policy specify who will determine whether a financial exigency exists?

The AAUP advocates faculty participation in making the determination that a financial exigency exists and ensuring that all feasible alternatives to termination of appointments have been fully explored. The extent to which faculty participation is desirable depends on a variety of factors,

unique to each institution, but is not generally recommended. However, regardless of the level of faculty involvement, the governing board should reserve the right to make the final determination as to whether a financial exigency exists.

b. Does your policy specify who has authority to determine how termination decisions will be made and communicated?

Your institution’s policies should explicitly set forth the criteria that will be used in the event of terminations due to financial exigency.

- Who has decision-making authority?

- What criteria will be used?

- What procedures will be followed?

Do not leave room for a court to fill in procedural holes with the AAUP’s standards. An institution in the midst of a bona fide financial exigency may not be able to abide by the AAUP’s suggestions, such as providing such lengthy notice or severance pay.2

- Expressly disclaim the notice requirements that may be provided for elsewhere in the policy (e.g., no terminal one (1) year contract in the event of financial exigency);

- Dismissing non-tenured faculty before tenured faculty;

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2 According to the AAUP, a faculty body should have primary responsibility in determining in which academic units the terminations shall occur, should choose the criteria under which a faculty appointment will be terminated, and should approve the person(s) who will identify the particular individuals slated for termination. Further, the AAUP advocates an opportunity for pre-termination hearing, in which the institution bears the burden of proving financial exigency. The AAUP also advises that the institution faced with a bona fide financial exigency should make no new appointments and should dismiss non-tenured faculty before dismissing any tenured faculty. Further, the institution should not hire replacements for at least three years, unless the displaced faculty member is first offered reinstatement and has a reasonable time to respond. Other features of an AAUP-approved process include mandatory internal placement assistance, giving the affected faculty members proper notice (a minimum of one (1) year for tenured faculty) and severance pay.
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• Provide internal placement assistance; and

• Do not hire replacements without first offering the positions to previously displaced faculty.

2. Termination Due to Program Discontinuance

Another acceptable reason for terminating a tenured appointment is when an institution formally discontinues a program or department. The decision to discontinue a program or department should be based on educational considerations. For example, if your institution has made a programmatic decision to focus on science, technology, engineering and math, it may concurrently determine that it can no longer support extensive humanities offerings. As such, a humanities department or program may need to be eliminated to ensure that the institution’s resources are being deployed effectively and in accordance with its overall programming goals.

As with financial exigency, your policy should specify who will determine whether a program should be discontinued and should also set forth who has authority to make decisions in this area.

3. Policy on Termination of Tenure For Cause

Often institutions do not realize the complex, byzantine procedures that have been enacted that protect a faculty member charged with termination for cause. Many policies contain numerous substantive rights and multiple levels of appeals. Moreover, many provisions, ostensibly enacted to protect faculty members, serve no purpose other than to turn a faculty hearing into a quasi-judicial hearing without the benefit of the full rules of a judicial hearing. Too often, these unnecessarily complex and repetitive procedures prolong the process and contribute to the overall disruption of your institution.

For example, institutions often run into such roadblocks as:

• A limited definition of “for cause” that severely limits the instances in which a faculty member can be terminated such as “morally reprehensible behavior that would shock the conscience”;

• Policies that allow the faculty member the right to assistance of counsel during all of the proceedings;
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- Terms that can be interpreted in multiple ways resulting in confusion over the application of the policy;

- Policies that incorporate the civil court rules of evidence, thereby requiring the Faculty Committee Chair to make evidentiary rulings;

- Vaguely specified rights, such as “the right to a transcript of the proceedings,” without specifying the method of preparing the transcript (tape-recorded, court reporter), who bears the cost of the transcript and when the transcript must be completed (e.g. prior to the deadline for appealing the hearing?);

- Numerous appeal rights or multiple hearings before the Faculty Committee, the Appeals Committee and the Board of Trustees?; and

- Actions that require immediate review by a Board of Trustees that only convenes once or twice a year.

When reviewing your tenure policy as it pertains to dismissal for cause, think about how the procedure would be implemented if necessary. Consider the following:

a. Does the policy set forth the bases for termination of tenure?

The policy should set forth the bases for termination of tenure. The cornerstone of tenure is the notion that termination is only justified for specific reasons, as clearly delineated in the tenure policy. Recognized justifications include “for cause” and limited circumstances outside the candidate’s control, such as financial exigency and discontinuation of an academic program or department.

b. Does your policy describe the circumstances under which tenure may be terminated?

Recognized justifications for termination/revocation include “cause” as well as certain circumstances distinguishable from cause. Litigation arises over the precise parameters of the reason(s) given for the institution’s decision to dismiss a tenured faculty member. Courts will scrutinize the motives underlying a dismissal when there is a suggestion that the dismissal was based on illegal grounds (such as discrimination or retaliation). In addition, displaced
employees may attempt to attack the validity of termination criteria or the application of same in the particular case. To reduce the risk of a successful retaliation claim, your policy should include language prohibiting retaliation against any individual who in good faith: reports impermissible activity, an incident of abuse, or other warning signs; cooperates with an investigation at the institution; or engages in other protected activity.

c. Does your policy define cause?

Use a short-form or long-form definition, but include a caveat that the list is not exhaustive. The policy can contain a simple statement that termination of tenure shall only be for “cause,” “just cause,” “adequate cause” or “good cause.” Or the definition can specify a long list of what constitutes cause.

- **Serious misconduct.** In general, courts are reluctant to superimpose a different standard of discipline on a tenured faculty member found to have engaged in serious misconduct. Examples of serious misconduct include violating the institution’s sexual harassment policy, falsifying any scholarly work or falsifying any information in the faculty member’s application materials.

- **Professional incompetence/failure to discharge academic duties.** For example, courts have upheld dismissal of tenured faculty members who have refused to comply with their department head’s directive.

- Conviction of crimes of moral turpitude or felonies.

4. Dismissing a Tenured Faculty Member for Cause

The following are discussion points for use when crafting or reviewing procedures for terminating a tenured faculty member for cause:

- Notice to the affected faculty member is critical to basic fairness. The affected faculty member should be informed in writing of the reason tenure is in jeopardy, a proposed timeframe for the removal of tenure and the date, time and place of any hearing. The notice may also communicate how the hearing will be conducted.
The affected faculty member should also be given a meaningful chance to be heard and to respond to the proposed reasons for removing tenure. Although not required (and not appropriate for every institution), the following procedures have appeared in various institutional policies: giving the affected faculty member the right to have an attorney present during hearings, to cross-examine witnesses, to receive advance notice of testimony and evidence, and to have a tape-recording or other verbatim transcript of the proceedings versus a sufficiently-detailed summary.

A review body should issue formal findings, conclusions and recommendations, in writing. You are not required to give the affected faculty member a copy of the Appeals Committee Report.

The procedure should clearly state who has final authority to determine whether tenure will be terminated.

The policy should provide the affected faculty member with a right to appeal any adverse decision. (See discussion infra regarding the essential elements of an appeals process.)

II. CONCLUSION

Although auditing your institution’s tenure policies is a time-consuming and potentially political undertaking, it is imperative that your institution has policies and procedures in place that do not hinder its ability to fulfill its educational mission.

Following the recommendations set forth in this article will help ensure that your institution has workable policies and procedures in place in the event that it is necessary to terminate a tenured faculty member or declare financial exigency.
I. CAMPUS HARASSMENT & BULLYING

A. The Current Landscape

For many years now, institutions have been defending themselves against claims of discriminatory harassment, particularly of the sexual and racial variety. But what about professors or administrators who harass subordinates – not in a discriminatory way – but simply by taunting or bullying? How about a boss who yells and screams? Criticizes employees in front of colleagues? Or engages in behavior designed to embarrass or demean others? Increasingly there are signs that this form of oppressive or abusive behavior might be triggering a wave of new laws followed by a mountain of employment litigation.

Neither state nor federal law provides protection for victims of non-discriminatory workplace abuse. Many states, however, have common law claims for “intentional infliction of emotional distress” or “the tort of outrage.” But to make out such a cause of action, the threshold is a very high one, normally requiring extreme and outrageous behavior. And courts are often very reluctant to allow these claims to go forward unless the conduct in question is truly severe and pervasive. In light of this, several state legislatures have recently been considering the enactment of statutes allowing victims of abusive bosses to sue for damages. Those states include: Connecticut, Hawaii, Kansas, Massachusetts, Missouri, Montana, New Jersey, New York, Oklahoma, Oregon and Washington. California considered but did not enact legislation in 2003.

Very few jurisdictions outside of the United States provide legal protection for workplace harassment. Quebec is one such jurisdiction. According to Quebec’s Anti-Psychological Harassment Law, an employee has the right to recover damages for “any vexatious behavior” that affects an employee’s dignity or psychological or physical integrity. In a recent Quebec case still under review, an employer was ordered to pay $5,000 as moral damages for inflicting psychological abuse. Similar laws exist in European countries including England, France, Germany, Sweden and Switzerland. While recent reports indicate that very few lawsuits have resulted from these laws, institutions are justifiably nervous. For example, under these statutes, can an employee sue his or her boss if that person is perceived as tough and inflexible and holds his or her employees strictly accountable for high performance standards? Is rudeness a form of harassment? How about a Department Chair who makes sarcastic or teasing remarks? It is easy to see why institutions are holding their collective breath in the midst of all the recent notoriety surrounding abusive employees.
LEGAL ISSUES IN THE HIGHER EDUCATION WORKPLACE

Campus Harassment & Bullying

B. The Trend

Many commentators assert that this type of behavior is rampant and must be stopped. A new best seller, The No Asshole Rule: Building a Civilized Workplace and Surviving One That Isn’t, by Stanford University professor Robert Sutton, has brought this issue front and center. He makes a convincing argument that the supervisor-jerk can undermine an organization, alienate valuable employees, and stifle productivity. And numerous websites promoting workplace victims’ rights have been getting much attention. There is even a Workplace Bullying Institute whose website – www.bullybusters.org – has become an authoritative resource on legislative efforts in this area and shares information, research and education with its online audience.

The most recent sign that this is not just the subject of idle water cooler chatter is the recently released national poll conducted by the Employment Law Alliance. The poll is based on a scientifically-sound sample and found that nearly 45% of American workers say that they have worked for an abusive boss at some point in their careers. The types of behavior included in the survey ranged from physical threats (identified by 11% of the respondents) to inappropriate physical contact (identified by 17% of the respondents) all the way to a manager raising his or her voice (55%), criticizing co-workers in front of their colleagues (59%), interrupting in a rude manner (58%), giving dirty looks (56%), issuing personal insults (50%) or spreading rumors or sharing confidential information with others (40%) and making sarcastic jokes or teasing remarks (60%). Perhaps most telling is the fact that 64% of the respondents favor the implementation of a law allowing a victim to sue his or her manager and employer for damages.

C. Preventing Bullying & Harassment

Your institution should proactively address this issue in the following ways:

1. Review Personnel Policies

First, your institution’s personnel policies need to be rewritten to broaden the definition of harassment to go beyond sexual, racial and other discriminatory harassment and include other forms of abusive behavior. Your institution’s policy should provide detailed examples so that Department Chairs, administrators and employees will all understand the types of behavior that will be considered unacceptable.

2. Make Sure Human Resources Has Received Appropriate Training

Second, your institution’s policies should encourage victims to go to Human Resources when issues arise. Human Resources professionals need to take these complaints seriously and be properly trained so that they are capable of conducting an independent and objective investigation. Where misconduct is uncovered, the wrongdoer must be held accountable.

3. Create a Community that Does Not Tolerate Retaliation
Third, your institution must ensure that it has a no retaliation policy and that it holds supervisors responsible when they mistreat employees who come forth with claims. Otherwise, the policy will not be worth the paper it is written on. A victim will be too reluctant to come forward if he or she thinks that to do so would put his or her job at risk. The policy should include language that specifically prohibits retaliation against any individual who in good faith reports an incident of bullying and harassment, or the warning signs thereof, or who cooperates with an investigation regarding any suspected or alleged bullying and harassment. A strong no retaliation policy must be championed by the highest levels of your institution’s Administration.

4. **Have a Zero Tolerance Policy for Abusive or Bullying Behavior**

Next, your institution needs to have a zero tolerance policy for true workplace abuse. Many institutions are willing to overlook a bully’s behavior when that individual is perceived as a superstar – the top researcher or the revered professor. This behavior should be measured by a simple standard: as important as this abusive employee is to your institution, would you be comfortable having your wife, husband, son or daughter working for him or her? If the answer is no, the behavior must stop or the employee must be terminated.

5. **Train Any Employees Who Have Managerial/Supervisory Authority**

Finally, your institution must recognize that training needs to be expanded beyond sexual harassment. Administrators, Department Chairs and other managers and supervisors need to understand that there are other forms of workplace harassment and they should be educated as to what is acceptable and what is unacceptable in the workplace.

By following these practical steps, your institution should be able to resolve most, if not all, of these conflicts without the need for costly litigation.
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Transgender Issues

I. INTRODUCTION TO TRANSGENDER INDIVIDUALS ON CAMPUS

Your institution should be aware of an emerging area of law pertaining to transgender and transsexual employees and students. This paper discusses the common questions that arise and the issues that need to be considered in the event your institution has employees or students who self-identify as transgender, as well as those who are contemplating, in the process of or have completed a gender change surgery.

A. Applicable Laws

1. Discrimination and Harassment Laws That Protect Transgender Individuals

When first approached with this situation, many institutions wonder whether there are laws that protect transgender individuals from discrimination or harassment. Currently, there are no federal anti-discrimination laws that explicitly recognize transgender status as a protected category. Nor are there any federal laws that explicitly prohibit discrimination in employment on the basis of sexual orientation, gender expression or gender identity. Finally, transgender status is not considered a disability under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. As such, institutions are not required to provide “reasonable accommodations” to transgender individuals under the federal disability laws.

Although there are no explicit federal statutory provisions pertaining to transgender status, numerous federal courts have recognized discrimination on the basis of an employee’s transgender status as impermissible sex-based discrimination under Title VII, where it involves gender-stereotyping. Under Title VII, which prohibits discrimination on the basis of race, color, sex, religion and national origin, employers cannot require an employee to act or appear a certain way based on gender. For students, courts have recently begun to interpret Title IX (which prohibits discrimination on the basis of sex) as prohibiting discrimination and harassment on the basis of gender-stereotyping.

3 “Transgender” is an umbrella term that describes individuals whose gender identity or expression does not conform to prevailing social expectations or whose gender identity or expression does not match the gender they were assigned at birth. “Transsexual” refers to someone who has transitioned from one gender to another and may include people who identify as neither man nor woman. Transition may involve a change in gender expression, name and pronoun preference. Transition frequently includes hormone therapy, counseling and surgery.” Pat Griffin, Chalk Talk: Inclusion of Transgender Athletes on Sports Teams; Women’s Sport Foundation, “It Takes a Team.” The instant paper refers to this group as transgender individuals.

4 The Employment Non-Discrimination Act of 2009, currently pending in Congress, would prohibit discrimination on the basis of sexual orientation.
Gender stereotyping issues generally arise with respect to dress codes or other employer expectations pertaining to appearance. The rules pertaining to gender-stereotyping can be articulated as follows:

- An employer may require a transgender employee to comply with its lawful standards of grooming, hygiene, and dress for members of the gender with which that employee identifies.

- It is not permissible for an employer to require, for example, a biologically male employee who presents as a female to comply with a dress code for male employees. Such a requirement would constitute a violation of Title VII.

In addition to the prohibition against gender-stereotyping under Title VII, some states and municipalities explicitly prohibit discrimination and harassment on the basis of sexual orientation, gender identity and gender expression. (See Section VI, Appendix 1: States, Counties and Cities with Anti-Discrimination in Employment Laws on Gender Identity, Expression or Appearance and Behavior.)

- Be sure to check your institution’s jurisdiction to see if there are state or local laws pertaining to gender expression and identity.

2. Privacy Laws That Protect Transgender Individuals

In addition to discrimination laws, it is important to consider the impact of applicable privacy laws, particularly the Family Educational Rights and Privacy Act (“FERPA”) and any state confidentiality laws. It is critically important to train those individuals who have substantial interactions with transgender students or employees, particularly your Residence Life staff, including student Resident Advisors, and your Athletics staff on the legal importance of maintaining confidentiality regarding this highly sensitive issue.

Note that the Health Insurance Portability and Accountability Act (“HIPAA”) Privacy Rules will likely not apply to your institution’s records about employees, unless the transgender employee is receiving treatment from your campus health care center and your institution is a HIPAA-covered entity. Nor will HIPAA’s privacy rules protect student information. For students, the information covered by HIPAA is subject to several exceptions. First, education records and treatment records, as defined by FERPA, are specifically excluded from the definition of PHI. Accordingly, student medical records, if covered by FERPA, are not subject to the Privacy Regulations. So if your institution discloses information gained from a student’s on-campus medical records, then this disclosure is regulated only by FERPA not by HIPAA.
a. FERPA

FERPA protects the privacy of student’s education records. Generally, institutions must have written permission from the student in order to release any information from a student's education record. However, FERPA allows institutions to disclose those records, without consent, under certain circumstances. Institutions may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. Directory information may be defined by your institution. However, the Family Policy Compliance Office (“FPCO”), the agency responsible for enforcing FERPA, has taken the position that “FERPA would not permit ... information that is considered harmful or an invasion of privacy - such as students' SSNs, race, or gender - be designated and disclosed as ‘directory information.’”

- Your institution may disclose a student’s name change as “directory information.”

- Check your institution’s FERPA policy and annual notification form to ensure that gender is not designated as directory information.

To the extent that a student’s education records contain information about his or her transgender status or request to change his or her gender, this information must remain private and can only be disclosed:

- To school officials (including contractors, consultants, vendors or volunteers) who have a legitimate educational interest;

- To other schools to which a student is transferring;

- To specified officials, such as the Comptroller General of the United States, the Attorney General of the United States, the Secretary of Education or State and local educational authorities;

- In connection with financial aid for a student if such a disclosure is to:

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determine eligibility for the aid; determine the amount of the aid; determine the conditions for the aid; or enforce the terms and conditions of the aid;

- To organizations conducting certain studies for or on behalf of the school to develop, validate or administer predictive tests, administer student aid programs or improve instruction;

- To accrediting organizations;

- To comply with a judicial order or lawfully issued subpoena;

- To school officials, emergency personnel, parents or other necessary individuals in cases of health and safety emergencies; and

- To state and local authorities, within a juvenile justice system, pursuant to specific state law.

- If the disclosure consists solely of designated directory information.\(^7\)

b. State Privacy Laws

The privacy laws in your institution’s jurisdiction may protect the confidentiality of student or employee records. In addition, to the extent that state law privileges apply (attorney-client privilege or patient-therapist privilege), this information would be protected from disclosure.

In general, information protected by privacy laws may be disclosed on a “need-to-know” basis only. For example, if an employee is transitioning from male to female, this information may legitimately be disclosed to her supervisor and those in her department so that expectations are properly managed. Institutions should work closely with the transgender individual who has requested an official name or gender change to ensure that the individual feels comfortable with the scope of the disclosure. Some individuals may wish to have a broad disclosure to alert people of the change and to raise awareness of this issue. Others may transition more quietly.

\(^7\) 34 CFR § 99.31.
and prefer a limited announcement that pertains only to their name change and pronoun change.

- Be sure to check the state privacy laws that apply to your institution and know what you can/cannot disclose.

- Work closely with the transgender individual to assess the necessary scope of disclosure.

- If in doubt about the individual’s preferred scope of disclosure, make the disclosure to those who have a legitimate need to know and limit the disclosure to the name change and the individual’s preferred gender.

3. **Institutional Policies & Procedures**

In some cases, even if the jurisdiction does not explicitly prohibit discrimination on the basis of gender expression or gender identity, some institutions have chosen to include these as protected categories under their Equal Employment Opportunity (“EEO”) and non-discrimination policies. This is an internal institutional decision which must be considered in accordance with your institution’s governing principles.

- At a minimum, have a policy that prohibits gender-stereotyping to ensure compliance with Title VII and Title IX. (See Section VII, Appendix 2: Sample Policy on Gender-Stereotyping, Gender Expression & Identity.)

- Consider your institution’s environment to determine whether your policies are appropriately inclusive for the realities of your campus.

II. **QUESTIONS ARISING WITH TRANSGENDER EMPLOYEES & STUDENTS**

A. **Pre-Notice of a Gender Change**

When an individual begins to consider a gender change, there may be a continuum of behavior that begins to attract attention. In some instances, a student or employee may begin cross-dressing or taking hormones that alter their physical appearance over a period of time. This behavior may precede gender reassignment surgery or the individual’s request to change their name and gender on file with your institution. Common questions pertaining to this “pre-notice” period include:
Transgender Issues

1. Can your institution ask the individual if they are transitioning?

If a student or employee begins cross-dressing, taking hormones or otherwise experimenting with a gender other than his or her assigned birth gender, your institution should not explicitly ask the individual if they are transitioning or consider themselves a transgender individual. Due to the sensitivity of this issue, an institution should not act until the individual comes forward, when he or she is ready, to request that your institution’s records be changed to reflect his or her new gender or name. An employee or student who does not self-identify as transgender may be very upset if your institution questions why his or her appearance does not match conventional gender expectations. Moreover, to the extent your institution’s jurisdiction (or policies) prohibits discrimination on the basis of gender identity or gender expression, asking these types of questions may give rise to legal liability if the student or employee is then treated differently based on his or her response.

2. What level of behavior should trigger institutional response?

Institutions often ask what they should do about students or employees who are exhibiting behavior that does not conform to the individual’s gender assigned at birth, where the institution has not received a request for a name or gender change. For example, if a male student begins cross-dressing as a female, but has not notified your institution that he prefers to be identified as a female, should he be moved to the female residence halls?

Again, your institution should wait until the individual comes forward, when he or she is ready, to request institutional changes, such as changing his or her name of record or moving residence halls. Prior to that, an institutional response is not required. Moreover, to the extent your institution’s jurisdiction (or policies) prohibits discrimination on the basis of gender identity or gender expression, taking actions such as moving the cross-dressing male to a female residence hall without his consent could subject your institution to liability for discrimination based on gender expression.

B. Notice of a Gender Change

Common questions pertaining to institutional notice of gender change include:

1. When is your institution on notice of a gender change?

Your institution should consider itself on notice of a gender change when an employee or student discloses this information to Human Resources, the Dean of Students or another administrator with sufficient authority to be deemed a decision-maker. If an employee or student employee who is not a decision-maker, such as a Resident Advisor receives notice of a gender change, that employee should discreetly report this to the appropriate administrator for further follow up. Your institution’s procedures to be followed in the event an employee discloses the existence of a disability should provide a workable analogy in the event of a
disclosure of a gender change. Once the student or employee discloses the existence of a
gender change, Human Resources or the Dean of Students should explain your institution’s
procedures pertaining to name and gender changes as well as any available transgender
resources on campus.

2. What is sufficient notice?

The disclosure of a gender change may be oral, written, formal or informal. It does not need to
be a formal written request and is sufficient if made to Human Resources, the Dean of Students
or another administrator with sufficient authority to be deemed a decision-maker. However,
once the disclosure has been made (in any form), your institution should take steps to
appropriately document the disclosure and its responses to the same. Your institution should
acknowledge receipt of the request for a name and gender change so that the individual feels
adequately supported by your institution.

3. Can your institution require medical certification?

Due to the extremely sensitive nature of this issue and the privacy concerns, an institution
should not require proof of surgery or hormone treatment. Your institution’s Human Resources
Director or Registrar should not be placed in a position where they are making judgments about
the authenticity of a person’s gender. Many commentators have likened gender selection to
rational or ethnic selection on EEO forms – employees and students are allowed to self-identify
and are not required to show proof of race or ethnicity. In addition, “many transsexual
students [and employees] who desire surgery often cannot afford the procedures and many
trans men feel that the surgical outcomes are still inadequate.”8 Thus, as a best practice, an
institution should never insist that individuals complete sex reassignment surgery or hormone
therapy before changing their records.

4. What can your institution require as verification of the name and
gender change?

Your institution can require an individual to verify a name and gender change by requesting
proof, such as a social security card (name) or driver’s license (name and gender). If your
institution requires official documentation to support a request for a name and gender change,
it should establish a consistent policy so that all employees and students are required to
establish proof of the same. For example, if a female non-transgendered employee is not
required to show proof that she is female, then your institution should not ask transgendered

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8 Beemyn, Brett Genny, “Serving the Needs of Transgender College Students” Journal of Gay and Lesbian Issues in
Education (Fall 2003).
employees to show proof of their gender. This policy can be implemented on a going-forward basis for new hires so that current employees are not suddenly asked to prove their gender.

C. Modification of Records to Reflect Name & Gender Changes

1. Internal Records
   a. Name Changes

A transgender student or employee’s request to change his/her name of record should be treated identically to any other name request. The Admissions and Records office should adhere to its normal procedure and process the request in the same manner as any other name-change request.

For example, if your institution’s qualifying documentation for a name change consists of driver’s license, social security card, court order, or other document of similar authority, then this same process should be followed with respect to changing a name based on a gender change. If the transgendered student or employee has availed himself/herself of your institution’s stated procedures for changing his/her name on these documents, and can thus produce documentation of the type normally required, the name change should be granted. If he or she is unwilling or unable to do so, the change should be refused.

If your institution does not normally allow name changes, then it should consider the impact of this policy on a transgender individual and determine whether the policy should be modified. For example, many institutions do not change names on degrees once they have been conferred. Such a policy would be problematic for an alumni who undergoes a gender change. Institutions that do not currently allow names to be modified on degrees (or other internal records), should consider developing a policy that is more flexible to accommodate the needs of transgender individuals.

Once the employee has disclosed his or her name change, he or she must be addressed by his or her new name and the correct pronoun associated therewith.

- Make sure you have a stated procedure on name changes that is applied consistently to all employees and students, regardless of transgender status.

2. Gender Changes

A transgender student or employee’s request to change his/her gender of record on all college forms should be granted without requiring a showing of proof. Again, due to the extremely sensitive nature of this issue and the privacy concerns, your institution should not require proof of surgery or hormone treatment before changing its records.
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Note that the availability of name/gender change procedures is especially important for students. According to transgender policy experts, “an accurate gender designation in college files is critical to avoid outing transgender students and to help protect them from discrimination when they apply for jobs, graduate and professional schools, and at any other time that they would need to show a college document.”9 In light of the potential for harassment of transgender students, particularly in the residence halls or locker rooms, your institution’s Residence Life staff and Athletics staff must be explicitly trained about the need to comply with an individual’s request for a name and gender change. Correct use of the individual’s new name and the appropriate pronoun can establish model behavior for others to follow.

3. External Records

   a. Statistical/EEO Reporting

Once a student or employee has self-identified as having changed gender, your institution should change its records and reporting to conform with the new gender. For example, the U.S. Department of Education Integrated Postsecondary Education Data System (IPEDS) annually requires a number of employment reports focusing on the race and sex of employees. Once an employee has self-identified as having had a gender change, your institution’s IPEDS report should incorporate this new status.

   b. Health Benefits

The same principle would be true for other external records such as health benefits. Many questions arise with respect to the impact of gender changes — such as the availability of health benefits or the filing status for same-sex domestic partners who were previously considered married.

For example, if a married heterosexual male employee transitions to a female and remains married, it should be her decision to transfer to a domestic partner health benefits plan or stay on the health insurance plan as a married person. Again, due to privacy concerns, administrators should not be placed in the position of deciding the legality of a marriage or domestic partnership for the purposes of health plan eligibility. Administrators have a duty to report what they have been told by the employee and should follow the procedures that are in place for non-transgendered employees. If all employees are required to show proof of marriage, then transgendered employees may be required to show proof of marriage. Once that initial showing has been made, institutions risk breach of privacy or emotional distress

9 Id.
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claims if they attempt to invalidate a marriage based on a subsequent gender change. Leave this to the insurer.

- Institutions should report an employee’s stated gender and marital status and let the insurance company determine the validity of the employee’s stated information.

- If institutions verify marital status for all employees, then they may verify marital status for transgender employees. Institutions should not question the validity of a marriage certificate for a non-transgender employee, nor should they question the validity of a marriage certificate for a transgender employee.

c. Taxes

Similar questions arise with respect to impact of a gender change on the filing status for same-sex domestic partners who were previously considered married.

The same principle applies here - administrators should not be placed in the position of deciding the legality of a marriage or domestic partnership in the event of a gender change. Administrators should follow the procedures that are in place for non-transgendered employees and refrain from assessing the validity of a marriage for tax filing purposes based on a subsequent gender change. Leave this to the state, the courts or the IRS.

- Your institution should document what it has been told with respect to gender changes and the impact on marriage or domestic partnership so that it has a valid basis for defending the accuracy of its external reports.

III. ACCOMMODATIONS/ASSISTANCE FOR TRANSGENDER INDIVIDUALS

Transgendered employees and students may require accommodations or assistance to help protect their privacy and protect them from harassment – particularly during the initial stages of the gender-changing process.

A. Restrooms

All students and employees are entitled to safe, harassment-free restrooms on campus. The issues surrounding transgender use of restrooms assigned by gender are the most ripe for
claims of harassment or breach of privacy brought by transgender individuals. Transgender individuals may feel unsafe using multi-stall restrooms, particularly if they are in the early stages of their transition. Other individuals may feel uncomfortable having the transgender individual use the same restroom. The more your institution can do to resolve the restroom issue early, the less likely it is that the transgender employee or other individuals will feel uncomfortable using the restroom on campus. To the extent there are still issues, your institution should work with the transgender employee to proactively reach an acceptable solution. This approach also is applicable to issues that arise with respect to locker rooms.

According to transgender policy experts, “to avoid potential confrontations and to make campus restrooms more accessible to transgender individuals, colleges should publicize the location of single occupancy restrooms and designate more unisex facilities. Ohio University’s Office of Lesbian, Gay, Bisexual and Transgender (“LGBT”) Programs, for example, launched a “LGBT Restroom Project” in 2001 to identify restrooms in residence halls and academic and administrative buildings that were not gender specified and to encourage administrators to make other single occupancy restrooms available to people of all genders (Ohio University Office of Lesbian, Gay, Bisexual, and Transgender Programs, 2001).”

Other steps may include:

- Educating campus leaders about the need for gender-neutral restrooms, such as by having them view the film Toilet Training (available from the Sylvia Rivera Law Project: http://www.srlp.org).

- Having single-occupancy men’s and women’s restrooms converted into gender-neutral restrooms by changing signs.

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10 Claims brought by non-transgender employees pertaining to a transgender individual’s use of a restroom are generally dismissed. *Cruzan v. Special School Dist.* 294.F.3d 981 (8th Cir. 2002) (Lawsuit brought by a non-transgender female claiming religious discrimination and sexual harassment/hostile work environment, based on the presence of a transgender person in the same restroom, was dismissed.)

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B. Residence Halls

Another area of potential conflict is the residence hall. If a male student transitions to become a female, policies that assign roommates on the basis of gender may need to be modified. The transgender female may not be ready to live in an all-female hall. The transgender may be subject to harassment by female students who are uncomfortable living with a student who was previously a male. Again, the best strategies for resolving these conflicts is to work with the transgender student on an individualized basis and to train the Residence Life Staff, including Resident Advisors about the sensitive issues that arise when placing a transgender student in a residence hall. Your institution should assess the needs of the transgender student and determine whether and to what extent it can meet that student’s needs.

In addition, experts recommend the following steps with respect to the placement of transgender individuals in residence halls:

- Identify and publicize the names of individuals within residence life who are knowledgeable about trans concerns and can provide support to transgender students.

- Require all residence-life staff to attend a training session on trans issues.

- Have an inclusive housing policy that enables transgender students to be housed in keeping with their gender identity/expression and, if desired, to have a single room.

- Create gender-neutral restrooms and private showers in existing and newly constructed residence halls.

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- Establish a LGBT student organization, in accordance with your institution’s governing principles.\(^{13}\)

C. On Campus Health Care

Another area that your institution should review is the availability of adequate on-campus health care for transgender individuals. For example, is your on-campus health care center sufficiently knowledgeable about the interaction between hormone treatments and other medications? Is your on-campus health care center generally aware of any transgender-specific health care conditions that might arise?

When reviewing the availability of adequate on-campus health care for transgender individuals, your institution should take the following steps:

- If your institution has the resources, it may consider asking transgender students about their health-care experiences and how services could reasonably be improved, to the extent possible.

- Identify, affiliate with, and publicize the names of counselors, nurses, and doctors who are supportive of transgender students and knowledgeable about trans health concerns.

- Require all campus health center staff to attend a training session on trans health concerns.

- Enable patients to identify their preferred name and gender identity on intake forms, rather than having “M” and “F” boxes.\(^{14}\)

- Train health center staff to ask patients their preferred name and to use appropriate pronouns.

\(^{13}\) *Id.*

\(^{14}\) Some transgender individuals feel that the use of Male/Female boxes on forms does not address their current situation, particularly for those who are early in the transition process. Thus, forms can be modified to be more inclusive by asking: Gender: ______________________________. This allows individuals to write in an answer in a manner that addresses their particular status, *e.g.* male, female, transitioning male, questioning female.
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- If your institution’s campus health center dispenses prescriptions, ensure that prescription labels match the patient’s preferred name.

- Offer gender-neutral restrooms and private changing rooms for patient use in health-care facilities.

- Make gynecological exams available outside of women’s health services so that female-to-male transsexual students can receive proper medical care.

- Provide a confidential way for patients to make appointments, such as through a web-based program.\(^{15}\)

In addition to taking the foregoing steps, your institution should consider having mental health counselors who have an awareness of the issues faced by transgender individuals. Research shows that transgender individuals may be subjected to a heightened level of harassment on campus. Having mental health care counselors who are responsive to the needs of transgender individuals may prevent transgender employees and students from becoming depressed or lacking in feelings of self-worth. Some institution’s mental health care counselors have created designated “Safe Zones” where transgender individuals can raise their concerns without fear of retaliation or disclosure.

D. Athletics

Another question that often arises pertains to the participation of transgender athletes on sports teams. Recently, the NCAA adopted a new policy that aims to allow the transgender student-athlete to participate in competition in accordance with his or her gender identity while maintaining the relative balance of competitive equity among sports teams. While this new policy has its critics who question whether the new policy affirms gender stereotypes and treats transgender men and women differently, it is nonetheless recommended that institutions follow the NCAA’s policy.

\(^{15}\) id.
The new policy will allow transgender student-athletes to participate in sex-separated sports activities so long as the athlete’s use of hormone therapy is consistent with the NCAA policies and current medical standards, which state:

- A trans male (female to male) student-athlete who has received a medical exception for treatment with testosterone for gender transition may compete on a men’s team, but is no longer eligible to compete on a women’s team without changing the team status to a mixed team. A mixed team is eligible only for men’s championships.

- A trans female (male to female) student-athlete being treated with testosterone suppression medication for gender transition may continue to compete on a men’s team, but may not compete on a women’s team without changing it to a mixed team status until completing one calendar year of documented testosterone-suppression treatment.

Thus, under the new NCAA rules, subject to institutional and conference participation guidelines, a male student-athlete who competes on the institution’s baseball team during one sport season and decides to transition during the offseason would no longer be eligible to compete on the softball team the following season just by virtue of the fact that the student-athlete is legally classified as female on appropriate state identification documents as required by state law without creating a mixed team and disqualifying the softball team from a women’s championship. The trans female could, however, continue to compete on a men’s baseball team without disqualifying the team from the men’s championship.

Transgender student athletes who are not undergoing hormone therapy remain eligible to play on teams based upon the gender of their birth sex and may socially transition by dressing and using the appropriate pronouns that match their gender identity. This would not impact the team’s classification as a “male” or “female” team.

E. Institutional Travel

Institutions should also be aware that travel for institution-related events can pose issues similar to those raised in the residence hall. For example, if students are assigned rooms on the basis of gender, institutions should be sensitive to any transgender individuals (who have notified your institution of their transgender status) who might feel uncomfortable with a room assignment based on gender. This situation should be addressed on a case-by-case basis, depending on the sensitivity of the transgender individual.
IV. TRAINING

Due to the extremely sensitive nature of the issues that arise when a person changes gender on campus, your institution should conduct training on all of the points raised in this paper. As with any form of discrimination or harassment, the more familiarity that employees and students have with these issues, the less likely that your institution will be faced with claims of discrimination or harassment. Students (particularly Resident Advisors who are likely to be on the front lines of issues arising in the residence halls) and employees (particularly Human Resources and Residence Life staff, coaches, faculty, Deans of Students or other administrators who interface with students on a regular basis) should be trained that in addition to gender-stereotyping, the following conduct could be considered discriminatory (whether by law or by policy) and should be avoided:

- Repeated failure to address a transgender individual by his or her desired name or to refer to the individual by the proper pronoun, including with regard to the individual’s name tag, employer identification code, student ID card, e-mail address, etc.

- Refusal to modify website biographies, department home pages, photos, or other indicators of the individual’s previous gender;

- Refusal to allow transgender individuals to use the appropriate restroom or locker room;

- Invasive inquiries regarding a transgender individual’s medical history or genitalia;

- Persistent, unwelcome and pervasive name-calling and taunting and other offensive or intimidating conduct that renders the transgender individual’s work or living environment to be subjectively and objectively hostile;

- Requiring the transgender individual to comply with standards of dress not routinely imposed on other members of the gender group with which the individual identifies;
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- Assigning different work to transgender individuals based on their status;

- Limiting the amount of public contact that a transgender individual in his or her position would ordinarily have; and

- Isolating transgender individuals from non-transgendered individuals based on complaints or assumptions regarding a students’ or employees’ comfort level in working with transgender individuals.

V. CONCLUSION

In order for your institution to successfully integrate transgender individuals on campus and protect itself from liability for harassment, your institution should carefully consider its stated policies and their impact on transgender individuals. Your institution should also consider the availability of adequate facilities and available accommodations. Finally, your institution should take care to evaluate the issues on a case-by-case basis and work with the transgender individual to resolve any problems that arise.
VI. SAMPLE: POLICY ON GENDER-Stereotyping, GENDER IDENTITY AND EXPRESSION

[INSTITUTION] is committed to equal employment and educational opportunities. [INSTITUTION] does not discriminate based on an individual's sex, gender identity or expression. This means that [INSTITUTION] does not allow discrimination based on an individual’s failure to conform to traditional behavioral expectations associated with the individual’s stated gender. Such discrimination includes, but is not limited to:

- Requiring a female employee or student to “act like a woman”;
- Requiring a male employee or student to “act like a man”;
- Requiring an individual to wear clothing or otherwise appear in a manner that conforms to the individual’s stated gender, such as requiring women to wear skirts or have long hair;
- Treating an individual differently because he or she has self-identified as transgender;
- Treating an individual differently because he or she is contemplating, in the process of or has completed a gender change surgery.

[INSTITUTION] further prohibits harassment based on an individual’s sex, gender identity or expression. Such harassment includes, but is not limited to:

- Teasing, threatening, bullying, ostracizing or otherwise harassing an individual based on his or her sex, gender expression or identity.

Employees who feel they have been subjected to discrimination or harassment on the basis of sex, gender identity or expression should notify their supervisor or Human Resources as soon as possible. [INSERT REFERENCE TO INSTITUTION’S PARTICULAR COMPLAINT PROCEDURE].

Students who feel they have been subjected to discrimination or harassment on the basis of sex, gender identity or expression should notify [SPECIFY] as soon as possible. [INSERT REFERENCE TO INSTITUTION’S PARTICULAR COMPLAINT PROCEDURE].

Individuals who violate this policy will be subject to discipline including, but not limited to suspension, expulsion, termination or removal from campus.