Phillips Lytle LLP

By the Book

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A LEGAL UPDATE FOR EDUCATORS FROM PHILLIPS LYTLE

Clery Act Update and the Campus SaVE Act

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (commonly referred to as the "Clery Act"), 20 U.S.C. § 1092(f), was named after a 19-year old freshman at Lehigh University who was raped and murdered in her campus dorm. The Clery Act requires colleges and universities receiving federal aid to: keep and disclose crime information from, on, or near campus (within the Clery geography); provide an Annual Security Report ("ASR") by October 1st of each school year; maintain a crime log and crime statistics; have a policy to timely disclose emergencies or threats to the campus community; as well as have policies to handle reports of missing students.

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On March 7, 2013, President Barack Obama signed into law the Violence Against Women Reauthorization Act (“VAWA”), Pub. L. No. 113-4, 127 Stat. 54 (2013). Embodied in the VAWA is the Campus Sexual Violence Elimination Act (“Campus SaVE Act”), Pub. L. No. 113-4, § 304, 127 Stat. 89 (2013), which expands the Clery Act and other regulations. The Campus SaVE Act expands the Clery Act’s coverage rights to include victims of domestic violence, dating violence and stalking. The Campus SaVE Act updates prevention guidelines and victim rights, including confidentiality for victims. The Campus SaVE Act also provides new prevention and awareness programs that must be supplied to new students and new employees. Some of the amendments include:

- **New ASR Statistics:** Institutions must collect and publish ASR statistics of domestic violence, dating violence and stalking incidents that are reported to campus security or local authorities.
- **Policy Inclusion within the ASR:** Institutional policies regarding domestic violence, dating violence, sexual assault and stalking prevention, and policies that an institution will follow upon a report of domestic violence, dating violence, sexual assault or stalking should be included in the ASR.
- **New Categories of “Hate Crimes:”** Crimes motivated by prejudice against a victim’s national origin or gender identity are now reportable “hate crimes.”
- **Victim Confidentiality:** Institutions must withhold a victim’s name when making timely reports to the campus community of crimes considered a threat to other students and employees. Institutions must also develop a policy for protecting a victim’s confidentiality in disclosure of public records.
- **Procedures:** Institutions must develop and promulgate procedures for reporting, investigating and adjudicating reports of domestic violence, dating violence, stalking and sexual violence incidents, including policies and procedures to address and prevent campus sexual violence, such as personnel training.
- **Student Disciplinary Proceedings and Investigation Standards:** Institutions must adopt procedures for investigating and conducting student discipline proceedings in domestic violence, dating violence, sexual assault and stalking cases. These procedures must include:
  – That the investigation and resolution will be prompt, fair and impartial;
  – A “statement of the standard of evidence” used during the proceeding;
  – The annual training of officials conducting the proceedings to ensure the protection of the victim’s safety and the promotion of accountability;
  – The identification of sanctions or protective measures the institution will impose after final determination that rape, acquaintance rape, domestic violence, dating violence, sexual assault or stalking has occurred;
  – That the accuser and the accused are afforded equal opportunity to present during the disciplinary proceeding. Both parties must have the ability to be accompanied at any meeting or proceeding by an advisor of their choice;
  – The accuser and the accused must be simultaneously notified in writing of the outcome of the proceeding, appeal procedures, any change to the result before it becomes final, when the result will become final, and that disclosure of the outcome are unconditional; and
  – Institutional policies must address the protection of a victim’s confidentiality, including record-keeping that excludes a victim’s personally-identifiable information.
- **Victim Notification of Rights:** Institutions must have a policy of notifying victims (students or employees) of their rights and options in writing, including:
  – The importance of preserving evidence;
  – To whom an offense may be reported;
  – The option to, or not to, seek campus security or police assistance;
  – Possible sanctions that may be imposed following an institutional disciplinary procedure;
  – The institution’s responsibilities regarding judicial no-contact, restraining and protective orders;
  – Existing counseling, health services, mental health services, victim advocacy, legal assistance and other victim services on-campus and in the community; and
  – Options for, and available assistance for, changing academic, living, transportation and work situations, if requested by the victim and such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus security or local law enforcement.
- **Education and Awareness Programs:** Institutions must offer new students and new employees programs that promote

awareness and prevention of rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking. These programs must include:

– A statement that the institution prohibits those offenses;

– The definition of domestic violence, dating violence, sexual assault and stalking in the applicable jurisdiction;

– The definition of consent for sexual offenses in the applicable jurisdiction;

– "Safe and positive" options for intervention by bystanders an individual may take to "prevent harm or intervene" in situations;

– Recognition of signs of abusive behavior and instruction on how to avoid potential attacks;

– Information about the institution's policies and procedures; and

– Ongoing prevention and awareness (below).

- **Ongoing Awareness Campaigns:** Institutions should continue to have prevention and awareness campaigns for students and faculty throughout the school year.
- **Anti-Retaliation:** "No officer, employee, or agent of an institution…shall retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights or responsibilities under [the Clery Act]."

The new Clery Act amendments become effective in March 2014. The U.S. Department of Education has issued preliminary guidance on these amendments, requesting that institutions exercise their "best efforts" to include statistics for the new crime categories in 2013 in the ASR due in October 2014. U.S. Department of Education, *Implementation of Change Made to the Clery Act by the Violence Against Women Reauthorization Act of 2013* (May 29, 2013).

There may be other changes to an institution's responsibilities under the VAWA, Office For Civil Rights, *"Dear Colleague" Letter*- (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf, the Clery Act, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2012), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (2012), New York employment laws, New York Human Rights Laws and other statutes and regulations, so it is important for each education institution to consult legal counsel to determine the effects and specific application to its institution.

Penalties for violations of the Clery Act include $27,500 per violation (which increases to $35,000 per violation occurring on or after October 2, 2012) and possible suspension or loss of federal financial aid, including grants, loans, and work-study programs

Those with questions about the Clery Act can contact Amanda L. Lowe, Attorney in the Education Practice, at (716) 504-5747 or alowe@phillipslytle.com. ■

The National Labor Relations Board's Jurisdiction Over Religious Colleges and Universities

The Acting Regional Director of Region 2 of the National Labor Relations Board (NLRB) issued a decision that the NLRB had jurisdiction to conduct an election for adjunct faculty members employed by Manhattan College, a College sponsored by the De La Salle Christian Brothers. The issue was whether the NLRB could assert jurisdiction over the College in light of the Supreme Court decision in *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) where the Supreme Court held that exercise of NLRB jurisdiction over church-operated schools would raise serious constitutional questions arising out of the First Amendment Religion Clauses, and the National Labor Relations Act must be construed in a manner to avoid such questions. The Court held that where the purpose of a parochial school was a propagation of a religious faith, the NLRB could not exercise jurisdiction over such school.

Although the NLRB at one time held that *Catholic Bishop* applied only to parochial elementary and secondary schools, the Board now considers the application of *Catholic Bishop* to educational institutions at all levels on a case-by-case basis. Thus, in *St. Joseph's College*, 282 N.L.R.B. 65, 66 (1986), the Board declined to exercise jurisdiction on the basis that the College was financially dependent on a Religious Order; all members of the Board of Trustees were required to be members of the Order; the Bishop of the Diocese in which the college was located was authorized to remove faculty members whose conduct was "not in harmony" with church teachings; and faculty members were prohibited from inculcating ideas contrary to the position of the Catholic church. However, in the *Manhattan College* decision, the Regional Director found that *National Labor Relations Board v. Catholic Bishop* did not preclude jurisdiction, based on an exhaustive analysis of the governance, mission, employment policies, admission policies and academic requirements of Manhattan College.

The Regional Director found that although Manhattan College is sponsored by the Christian Brothers and has a commitment to a continued relationship with the Christian Brothers, the College also affirmed its commitment to academic freedom and to institutional autonomy. The Regional Director noted that the majority of the Board of Trustees were lay people, that the financial support provided by the Christian Brothers was minimal compared to the overall budget of the College, and although faculty appointments included an agreement to respect the College's Catholic identity and LaSallian tradition, the purpose of the College was primarily secular and not the "propagation of a religious faith." *Nat'l Labor Relations Bd.*, 440 U.S. at 503. The decision quoted from the College's own statement: "[T]he mission of the College within the Church is strikingly different from that of parochial schools and Catholic high schools where indoctrination in the faith and insistence on religious observance is seen as part of their mission." *Manhattan Coll.*, No. 2-RC-23543, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *21 (Jan. 10, 2011). The College stated that it had "no intention of imposing Church affiliation and religious observance as a condition for hiring or admission, to set quotas based on religious affiliation, to require loyalty oaths, attendance at religious services, or courses in Catholic theology." *Id.* at *31-32 (internal quotations and citation omitted). The decision further noted that the role of the adjunct faculty was to fulfill academic obligations and not to advance a religious mission, and concluded that exercising jurisdiction would not lead to unconstitutional entanglement.

This decision confirms that even where Catholic colleges are sponsored by a Religious Order and have a continuing commitment to remain Catholic, the NLRB will examine the governance, the mission, the curriculum and the documents prepared by the colleges themselves, and will likely exercise jurisdiction over most Catholic colleges and universities.

If you would like more information about the NLRB's jurisdiction over religious colleges and universities, contact James R. Grasso, Partner in the Education Practice, at (716) 847-5422 or jgrasso@phillipslytle.com. ■

New York State Creates New Growth Opportunities for Educational Institutions Through the START-UP NY Program

At the conclusion of the most recent session of the New York State Legislature, Governor Cuomo signed into law his widely anticipated plan to create "tax-free" areas of the State on and around college campuses.

Available locations are mostly "to be determined," by Empire State Development Corporation ("ESDC") and/or a specially-appointed board, but will include:

- Vacant building space or land on or within one mile of (and in certain limited cases beyond one mile of) a college, university or community college;
- Space within an incubator affiliated with a university or college;
- Location at one of 20 targeted "strategic state assets" off-campus and affiliated with a college, university or community college.

An eligible business located in a START-UP NY area can receive, for a period of 10 years, exemptions from or credits against income, sales and other taxes. Certain employees of eligible businesses are eligible for New York State income tax exemptions (subject to additional ESDC approvals) for 10 years.

Potential START-UP NY locations are more limited in downstate New York; and off-campus areas and all private college and university-located or -affiliated areas are further limited as to the amount of acreage that may be ultimately designated.

The program is scheduled to commence January 1, 2014, so the next few months will require strategic thinking and positioning for educational institutions statewide.

For further information on the START-UP NY Program, please contact Donald T. Ross, at dross@phillipslytle.com or (518) 472-1224 ext. 1255. ■

New York Public School Districts Not Subject to Division of Human Rights Jurisdiction

The New York State Court of Appeals held in *North Syracuse Central School District v. New York State Division of Human Rights*, 19 N.Y.3d 481, 488 (2012) that a public school district is not an "education corporation or association" as contemplated by Executive Law § 296(4). The public school students in these proceedings filed complaints with the New York State Division of Human Rights ("SDHR") under the Executive Law alleging that the school districts engaged in discrimination on the basis of race and/or disability. Since the Court found that public school districts were not "educational corporation[s] or association[s]," SDHR lacked jurisdiction to investigate the students' complaints.

Notwithstanding this decision, students subject to harassment on the basis of race and/or disability may have rights under federal law and may be able to file a complaint with the Office for Civil Rights of the U.S. Department of Education. Complaints against public schools providing K-12 instruction or against public post-secondary institutions may be filed with the Commissioner of Education pursuant to New York Education Law § 310 or § 313, respectively.

For more information, contact Amanda L. Lowe, Attorney in the Education Practice, at (716) 504-5747 or alowe@phillipslytle.com. ■

False Claims Act and Education Funds Lost to Fraud

While enforcement of the False Claims Act has traditionally been focused on the health care industry, universities and for-profit educational institutions have been increasingly targeted, typically based on representations and certifications made in connection with participation in federal student loan programs. On the other side of the coin, New York State's analogue to the False Claims Act, strengthened by amendments that took effect in 2010, provides New York State universities and school districts with an effective, and so far underutilized, means to proactively seek recovery of funds lost due to fraud brought upon them by others. In any event, the educational community is certain to become more aware of the federal and state false claims acts in the years ahead.

FEDERAL FALSE CLAIMS ACT

The federal False Claims Act (FCA) was originally passed in 1863 as a means for the federal government to recover financial losses incurred when useless goods were sold to the Union Army during the Civil War. The current version of the FCA, as amended in 1986 and further strengthened in 2009, far exceeds the scope originally contemplated by Congress when it enacted the statute known as "Lincoln's Law."

In its current form, the FCA is a powerful, wide-ranging tool in the hands of the government and "whistleblower" plaintiffs (a/k/a, *qui tam* relators). Importantly, civil liability under the FCA is not limited to "direct," false, or fraudulent claims such as where payment is made by the federal government for goods or services that are not delivered, or where the government is billed for a higher-priced good or service than was actually provided. Rather, civil liability under the FCA may also be based, among other grounds, on a false certification theory – i.e., where a defendant "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B) (2012).

Importantly, the FCA provides a statutory penalty of "not less than $5,000 and not more than $10,000" for each violation plus "3 times the amount of damages which the Government sustains because of the act of that person," plus costs and attorneys' fees. 31 U.S.C. § 3729(a)(1) (2012); 31 U.S.C. § 3730(d) (2012). The damages may be reduced to "2 times the amount of damages which the Government sustains because of the act of that person" if the defendant complies with the FCA's self-reporting provision. 31 U.S.C. § 3729(a)(2) (2012).

Recent reported False Claims Act cases against educational institutions have been predicated on violations of statutory, regulatory, and/or contractual requirements that educational institutions agree to abide by in order to receive federal subsidies under Title IV and the Higher Education Act. For instance, in United States ex rel. *Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006),

the Ninth Circuit Court of Appeals held that FCA liability under a false certification theory may be based on a false statement that violates a statutory or regulatory requirement, such as certifying compliance with federal restrictions on payments to recruiters.

The case law interpreting the False Claims Act continues to evolve. How aggressively the government and *qui tam* plaintiffs will seek to apply the FCA against universities and other educational institutions is uncertain. What is certain is that universities and other educational institutions cannot afford to ignore the encouragement provided by the FCA to be scrupulously compliant with all applicable federal regulations and requirements, and to immediately seek the assistance of outside counsel upon learning about any potential FCA violation or investigation.

NEW YORK FALSE CLAIMS ACT

Conversely, the New York False Claims Act (NY-FCA), enacted in 2007 and substantially amended in 2010, provides the state and local governments, including school districts, with a relatively new, and largely untested, mechanism to recover funds lost through fraud. In language similar, but not identical to the federal FCA, the NY-FCA, State Finance Law §§ 187-194, empowers the New York State Attorney General, local governments, and private persons (i.e., whistleblowers) with the authority to bring a civil action against any person, including any corporation, that "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;" "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;" or conspires, obtains, or withholds money or property from the state or local government through false or fraudulent conduct. N.Y. State Fin. Law § 189(1) (McKinney 2002 & Supp. 2013).

The statute defines "knowing and knowingly" to be satisfied when the person "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." N.Y. State Fin. Law § 188(3)(a) (McKinney 2002 & Supp. 2013). In other words, a cause of action under the FCA "require[s] no proof of specific intent to defraud, provided, however that acts occurring by mistake or as a result of mere negligence are not covered by this article." N.Y. State Fin. Law § 188(3)(b) (McKinney 2002 & Supp. 2013).

A person found to violate the NY-FCA may be subject to a civil penalty between $6,000 and $12,000, plus "three times the amount of all damages" sustained by the government, plus costs and attorneys' fees. N.Y. State Fin. Law § 189(1)(g), (3) (McKinney 2002 & Supp. 2013). Actions commenced by a whistleblower (known as a "*qui tam* civil action") are subject to a specific procedure delineated in the statute and provide the whistleblower with the possibility of being awarded 15-25% of the total recovery just for commencing the case, and 25-30% if the government does not intervene, plus expenses, costs, and attorneys' fees. N.Y. State Fin. Law § 190 (McKinney 2002 & Supp. 2013).

Importantly, the 2010 Amendments to the NY-FCA included, among other things, a provision adding liability for consequential damages. N.Y. State Fin. Law § 189(1)(g) (McKinney 2002 & Supp. 2013). This new provision supplies a significant inducement for whistleblowers and local municipalities such as school districts to use the NY-FCA to try to recover the costs of repair or replacement arising from a contractor's false or fraudulent claims. For example, in September 2012, the New York Attorney General's Office announced an $18 million settlement with a food management services provider for improperly overcharging more than 39 New York schools and school districts statewide, by receiving discounts from food vendors it worked with, but not passing on those savings to New York's schools, as required by law.

Because local governments themselves, and "any person" can bring civil actions for violations of the NY-FCA on behalf of the state or local governments, the NY-FCA supplies New York schools and school districts with an effective means, in a climate of tight budget restraints, to recover scarce and necessary funds lost through fraud.

Those with questions about the False Claims Act may contact Alisa A. Lukasiewicz, Attorney in the Education Practice, at (716) 504-5739 or alukasiewicz@phillipslytle.com. ■

IRS Report Scrutinizes Unrelated Business Income Reporting by Tax-Exempt Organizations

The Internal Revenue Service (IRS) has released a final report (the "Report") summarizing its findings from a study focused on the level of compliance by tax-exempt colleges and universities with respect to unrelated business income ("UBI") and executive compensation reporting. The Report provides that significant compliance issues exist and that the IRS will start to look at UBI reporting more broadly. It also provides that the IRS will seek to increase awareness amongst tax-exempt organizations of the importance of using appropriate comparability data in determining compensation amounts of disqualified persons.

The multi-year study began in 2008, when the IRS sent questionnaires to about 400 randomly selected tax-exempt colleges and universities. After examination of questionnaire responses and federal tax returns submitted by each of these organizations, the IRS subsequently chose 34 colleges and universities for audits.

The audits resulted in UBI tax ("UBIT") increases for 90% of the colleges and universities examined; over 180 changes to the amounts of UBIT reported on Forms 990-T (Exempt Organization Business Income Tax Return); and disallowance of more than $170 million in losses and net operating losses. The majority of the adjustments to amounts of UBIT reported arose from the following activities:

(a) fitness, recreation centers and sports camps,
(b) advertising,
(c) facility rentals,
(d) arenas, and
(e) golf.

Reasons for adjustments included:

(a) misclassification of an activity as a trade or business,
(b) misallocation of expenses,
(c) errors in computation or substantiation, and
(d) misclassification of related activities.

The executive compensation aspect of the examinations focused mainly on compliance with section 4958 of the Internal Revenue Code (the "Code"), which imposes a tax in instances where certain tax-exempt organizations pay more than reasonable compensation to disqualified persons. Disqualified persons can potentially include, among others, officers, directors, trustees, and key employees. Most of the audited organizations that were subject to Code section 4958 attempted to meet the rebuttable presumption standard, under which the IRS presumes that the tax under Code section 4958 is inapplicable if certain requirements are met. About 20% of these organizations failed to meet the standard because of problems with their compensation comparability data.

The IRS also reviewed employment tax and employee plan issues for employees of the audited organizations. All of the completed audits thus far have resulted in adjustments in wages, which can lead to tax assessments and penalties. A quarter of the audited organizations were subject to retirement plan reporting review and half of such organizations were found to have reporting issues.

The release of the Report reinforces the continuing trend of increased nonprofit organization scrutiny by the IRS. While the Report focuses on compliance by tax-exempt colleges and universities, it should serve to caution all tax-exempt organizations with respect to UBI reporting and the other reporting issues addressed by the Report.

Phillips Lytle tax attorneys frequently assist clients with questions of not-for-profit organization tax compliance and reporting. Please contact Geanne Blazkow at (716) 847-7075 or Kelly Marks at (716) 847-5426 if you have questions. ■

Compliance with FERPA: The Debate Between Students' & Parents' Rights

Ever since the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, popularly known as "FERPA" or the "Buckley Amendment," was enacted in 1974, colleges and universities across the country have been challenged with ensuring regulatory compliance on their campuses. In particular, the interplay between the rights of the student and the "perceived rights" of the student's parents or legal guardians often generates confusion for administrators and educators in higher education.

At its very core, the fundamental purpose of FERPA is to provide college students the right to control the disclosure of their education records to others, inspect and review their own education records, and seek amendment of their education records. Pursuant to 34 C.F.R. §99.3, a student is defined as "any individual who is or has been in attendance at an educational… institution." An "educational institution" is "any public or private…institution" that receives funds "under any program administered by the Secretary [of Education]." 34 C.F.R. §§99.3, 99.1 (2012). Unlike the primary and secondary levels, the protections under FERPA belong to the student, and not the student's parents or legal guardians, regardless of the student's age.

The rights under FERPA transfer from the parents to the student once the student turns 18 years old or enters a post-secondary institution at any age. Once a student turns 18, an institution is required to provide the student with access to their education records. It is not required to provide third party access to the student's education records even if the third party is a parent.

This tension between students' and parents' rights was recently illustrated in the Administrative Decision *Letter to Tagg*, 113 LRP 5521 (FPCO 2012) that concluded that the parents of a 22-year-old student had no rights under FERPA. What makes this decision particularly of interest is the fact that the student provided the institution with written consent to disclose her records to her parents. Even though the student gave written consent, the Family Party Compliance Office ("FPCO") held that a school *may*, but is not required to, provide a third party with access to the student's education records. Because the student, not the parents, held the rights under FERPA, the FPCO was unable to assist the parents.

Although many colleges and universities offer parents access to student's records, a parent has no such defined right under FERPA. Even in the situation when a parent or legal guardian claims a student as a tax dependent and provides the university with the most recent year's tax return, it is within the school's discretion as to whether or not the parents may obtain access to their child's educational records. Specifically, pursuant to 34 C.F.R. § 99.31(a)(8), if a student is claimed as a dependent by either parent for tax purposes, then either parent may have access to the student's education records under this provision. Therefore, if a student is a dependent for income tax purposes, the institution *may* disclose any education records, including financial records to a student's parents. However, it is important to note that the institution retains the discretion as to whether or not such disclosure will be made. The operative word that both lawyers and educators must note is "may" and not "must."

As in the *Tagg* administrative decision, parents must be advised that even with consent, an institution can still deny them access to their child's records. A golden rule for all practitioners in higher education to remember when questions arise is that FERPA protects the college student's rights—not the parent's.

Questions pertaining to FERPA may be directed to Alisa A. Lukasiewicz, Attorney in the Education Practice, at (716) 504-5739 or alukasiewicz@phillipslytle.com. ■

Collection of Student Loans: Update on Interpretations

The Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. §§ 1692-1692p (2012), passed in 1977 and effective in 1978, has undergone a series of amendments over the years, but maintains one of its primary purposes, which is to prevent "debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e) (2012).

The FDCPA, when applicable, prohibits harassing and abusive collection tactics, including, but not limited to:

- Telephone contact before 8:00 a.m. and after 9:00 p.m. local time.
- Failure to stop communications with consumers after receiving written notice from the consumer that he/she desires no further communications, or refuses to pay the alleged debt, with exceptions, including advising that collection efforts are being terminated or that the collector intends to file a lawsuit.
- Causing a telephone to ring or engaging any person in conversation on the telephone repeatedly or continuously with the intent to annoy, abuse or harass.
- Communicating with consumers at their place of employment after being informed that this is unacceptable or prohibited by the employer.
- Contacting a consumer known to be represented by an attorney.
- Communicating with the consumer after request for validation has been made and before the requested validation has been mailed.
- Misrepresentation or deceit, including misrepresenting that the collector is an attorney or law enforcement officer.
- Publishing the consumer's name or address on a bad debt list.
- Seeking amounts not available under the contract or provided for by law.
- Threatening arrest or legal action that is neither permitted nor actually contemplated.
- Using abusive or profane language.
- Revealing or discussing the debt with third parties, other than the consumer's spouse or attorney.
- Contact via embarrassing media.
- Making false reports on the consumer's credit report or threatening to do so.

New York State also has its own debt collection regulations, which may be enforced by the Attorney General or District Attorney.

Student loans are considered "consumer debt" under the FDCPA. Therefore, if the student loan or the collecting entity qualify under the FDCPA, special precautions must be taken to ensure compliance with FDCPA guidelines. Violations of the FDCPA allow the student loan debtor to bring a private cause of action in federal court with potential claims for damages including, actual damages, statutory damages, and attorneys' fees and costs. It is also important to note that upon a student or former student filing bankruptcy, collection efforts with regard to the student loan must cease or else face penalties from the bankruptcy court.

The United States Court of Appeals for the Second Circuit recently addressed the interplay of the FDCPA and a student loan debtor who had previously filed for bankruptcy. *Easterling v. Collecto, Inc.,* 692 F.3d 229, 232 (2012). The case centered on the following notice, which was sent to the plaintiff:

ACCOUNT INELIGIBLE FOR BANKRUPTCY DISCHARGE.

YOUR ACCOUNT IS NOT ELIGIBLE FOR BANKRUPTCY DISCHARGE AND MUST BE RESOLVED.

It was this notice, received by Berlincia Easterling who was in default on her student loans, that sparked a lawsuit alleging violation of the FDCPA. Since whether collection efforts conform with the requirements of the FDCPA are determined from the perspective of the "least sophisticated consumer," so to protect the most amount of consumers from abusive debt collection practices, *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993),

# of Fair Debt Collection Practices Act Violation

Ms. Easterling argued that this notice was false, deceptive and/or misleading.

Student loans are presumptively non-dischargeable in bankruptcy, 11 U.S.C. § 523(a)(8) (2012); however, that presumption may be overcome if the debtor established, by a preponderance of the evidence, that requiring repayment of the student loan would "impose an undue hardship on the debtor." *Id.; In re Traversa*, 444 F. App'x. 472, 474 (2d Cir. 2011); *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1381 n.13 (2010). In this case, Ms. Easterling had previously filed for bankruptcy, but her student loan debt was not discharged. Nonetheless, the Court found that although Ms. Easterling may face "procedural and substantive hurdles" to discharge her student loan debt, she at all times retained the right to seek bankruptcy discharge of her debt, and, therefore, the collection letter stating the debt was "ineligible for bankruptcy discharge" was false on its face and fundamentally misleading. *Easterling*, 692 F.3d at 235.

Questions pertaining to the collection of student loans can be directed to Amanda L. Lowe, Attorney in the Education Practice, at (716) 504-5747 or alowe@phillipslytle.com. ■

At Phillips Lytle, our growing Education Practice has provided successful representation to numerous higher education institutions. Our team is comprised of attorneys from various practice areas including Corporate, Civil Litigation, Employee Benefits, Environmental, Intellectual Property, Labor & Employment, Project Development, Real Estate and Public Finance. This enables our attorneys to serve clients' needs that are unique to the educational field, and on general legal issues. Several of the attorneys from our Education Team have been continuously listed in *The Best Lawyers in America.*®

Phillips Lytle has counseled and represented colleges and universities in a variety of matters, including: school financing and bond issues; contract negotiations, administrative proceedings, arbitrations and labor relations; drafting by-laws; construction/commercial real estate and zoning; research and technology transfer; environmental law issues; employee welfare benefits; representation and consultation involving teaching staff issues; budget issues; student discipline; advisement on fundraising initiatives that could impact tax-exempt status as well as appellate proceedings and general litigation matters.

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