LEGAL UPDATES

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COVID-Related Class Actions Against Higher Education Institutions

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COVID-19 has caused devastating losses—tangible and intangible—at U.S. colleges and universities. Those losses appear destined for aggravation by a tidal wave of class action litigation on the horizon.

By mid-April, nearly all institutions of higher education in the United States had closed their campuses and moved students to distance learning platforms. Some did so proactively, but the vast majority would have been forced to shutter on-ground operations when state and local orders across the country coalesced around the concepts of quarantines, social distancing and mandated closures of non-essential businesses.

Given what we know about the infectiousness and virulence of COVID-19, these were eminently responsible and prudent decisions that accomplished two important objectives: they protected students and institutional personnel from the public health risks associated with COVID-19; and the implementation of distance learning offered the majority of students access to instruction needed to stay on track toward an academic credential.

Nonetheless, these decisions to shut down campuses have now become the subject of a number of class actions that have been filed. During April 2020 alone, several dozen lawsuits were filed against U.S. colleges and universities. More are being filed every day. Although the causes of action vary from case to case, broadly speaking, the lawsuits are premised on theories of breach of contract and unjust enrichment.

These lawsuits are trending as higher ed legal developments often do—launching at large, coastal flagship institutions and moving inland across the nation, ultimately impacting a large cohort of institutions large and small, public and private, secular and faith-based. To mitigate the risk of litigation in

this area or to mount a strong defense, there are several actions that can be taken proactively.

Develop a risk assessment

While most of the lawsuits filed to date share common themes and legal theories, the individual complaints—and the fact sets presented therein—do offer a window into how the litigation might develop. When assessing potential COVID-19-related litigation risk, each institution will need to map onto their current and past practices how these early lawsuits present and frame their claims. The resulting assessments should provide some degree of clarity about how to consider and adapt current operations across multiple areas, including student housing, marketing, food services and academic instruction, among others. It can also form the building blocks of litigation strategy development should that become necessary. Among the many substantive issues to consider are the following:

Force majeure

Impossibility of performance

Educational malpractice doctrine

Article III standing

Jurisdictional defenses

Failure to identify a specific contractual promise

Failure to allege an actionable breach

Communications audit

The student-institution relationship is rarely, if ever, memorialized in a comprehensive, formal contract; therefore, plaintiffs seeking to substantiate contract-related claims will scrutinize the array of institutional communications issued through the close of the Spring 2020 term. Force majeure-related defenses often turn on whether the performing party has undertaken reasonable efforts to overcome or mitigate the effects of nonperformance. For this and myriad other reasons, it is important to measure what, exactly, has been promised to students against institutional efforts to make good on those promises. A thorough audit of an institution's communications is critical, an exercise that should include both communications that marketed or promoted the institution prior to the pandemic and communications that aimed to remediate the effects of the pandemic.

Communications necessarily vary from institution to institution; however, metrics underlying the assessment are often the same:

Were the communications forthright, timely and clearly articulated?

Were they consistent with the institution's established policies and procedures?

Were they widely broadcast and available for the intended audience?

Review student agreements

In some cases, students have entered into a written agreement with their college or university with regard to enrollment, housing, meals or other services. A thorough review of any such agreements will be important to assess risk, determine whether modification of any standard agreements is necessary, and develop a risk mitigation plan.

Class actions and class certification

Clearly, the highest exposure to COVID-19-related litigation risk for colleges and universities is in the class action arena, and institutions should consider the implications of class certification early in their risk assessments. Rule 23 of the Federal Rules of Civil Procedure and most comparable state court rules set forth requirements for plaintiff classes and provide ample grounds from which to build a defense. The "student experience," which has figured prominently in the early lawsuits, is usually highly individualized, even on the same campus; therefore, meeting Rule 23's predominance and typicality requirements—that is, where common questions of law or fact predominate over individual issues, and the claims of the class representative are typical of the entire class—will be a challenge for many plaintiff classes seeking certification. For lawsuits that survive motions to dismiss, we anticipate class certification to be hotly contested. To mount effective defenses on this issue, institutions need to evaluate the communications mentioned above with an eye toward class certification strategy.

Assess risk mitigation strategy

Some schools have been proactive in refunding all or some fees associated with ancillary services (although tuition refunds have been extremely rare). These refunds, however, have not shielded institutions from class action litigation. Several named defendants in early lawsuits implemented some form of refund. Indicators from early suits suggest the risk of being sued is high and potentially universal throughout the U.S. higher education sector.

Institutions contemplating a refund program should bear this in mind, balancing student need, institutional culture, fiscal realities and the very real risk of future litigation. Absent protective legislation, for most schools, refund programs are likely a prologue rather than a final act. They need to be crafted carefully, blending seamlessly into litigation strategy—because, unfortunately, we anticipate most institutions will be forced to reckon with the financial and reputational risks of class action lawsuits.

Contact us

Husch Blackwell's Higher Education practice group has years of experience handling high-stakes, high-profile litigation—including class action litigation—on behalf of colleges and universities. Our team brings together a wealth of litigation and regulatory subject-matter experts to scope, budget and execute a wide range of approaches and strategies that meet client objectives.

For more information regarding how higher education institutions should approach COVID-19-related class action litigation, please contact Martin Loring, Michael Hayes or your Husch Blackwell contact.

Comprehensive CARES Act and COVID-19 guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.