University of Dayton

Office of Legal Affairs

January 2022 Guidance Document:
WORKPLACE PRACTICES & LEGAL CONSIDERATIONS

1. Take care with written communications

- Do not inadvertently waive the University's attorney-client privilege, which is a court-recognized doctrine that insulates certain communication from required disclosure in litigation. What this means is that **you should not forward an email if the email is to or from an attorney who represents UD** (including both attorneys from our Office of Legal Affairs and outside counsel). An example of what could go wrong is included as an attachment to this document.
- Be careful in writing. Anything you write that is not covered by the attorney-client privilege could eventually be discoverable during a lawsuit.
- Watch what you say in all forms of communication (e.g., email, Google chats, texts, etc.). All forms of communication are discoverable, meaning, they might need to be handed over if there's ever litigation. Consider turning off your history in Google chat.
- Even if you delete something, forensics specialists can find it. "Email is eternal" is an adage for a reason.

2. Allow disciplinary processes to play out, without interference or commentary

- Do not investigate a complaint by an employee or student on your own. Refer the issue to the appropriate unit (e.g., HR, Equity Compliance Office, Legal Affairs) and let them handle it. (The one exception to this is under the Staff Dispute Resolution policy where, if you are a supervisor, you may have a designated role to receive certain disputes and carry out some steps.)
- Do not give your opinion (verbally or in writing) about the validity, or lack thereof, of a complaint by a student or employee, *unless* you are the final decision maker and the investigatory process has been fully completed.
- Do not give your opinion (verbally or in writing) about a situation involving potentially inappropriate conduct on campus unless you are the final decision maker and the investigatory process has been fully completed.

- Do not pressure in any way the investigatory unit about progress, information or outcome. As unsatisfying as it may be, you may not be entitled to know the progress of the matter or even the outcome (for confidentiality, retaliation and other reasons).

3. Tips for when to consult with Legal Affairs (in other words, ideas for developing a "risk antenna")

- If someone mentions a lawyer about something pertaining to UD, that does not mean you can or should no longer deal with them (as that could be retaliation in response to someone engaging in protected activity). Instead, consult with Legal Affairs as soon as someone mentions a lawyer.
- If you are dealing with someone who acts as though they have been wronged – e.g., they claim their rights have been violated, they receive a negative performance review they claim was undeserved, etc. – consider reaching out to Legal Affairs.
- If you run into a legal question in the workplace, rather than trying to figure it out on your own, please reach out to Legal Affairs for assistance. Often times things are more complex than they may seem (i.e., several competing considerations), they may be counter-intuitive, or may not be easily accessible by non-lawyers (e.g., a statute that's on the books but was actually declared unconstitutional by the courts, meaning the law has no effect). Licensed attorneys are trained to analyze and research legal requirements and also have unique tools at their disposal.
- If someone engages in what is considered "protected activity," be particularly careful not to treat them differently *because of* that activity. Common examples of protected activity include:

  - FMLA requests/leave;
  - Requests for ADA accommodations;
  - Requests for religious accommodations;
  - Complaining about improper pay (e.g., overtime pay);
  - Expressing concerns about discrimination or harassment;
  - Whistleblowing (reporting concern about potentially illegal activity).

  If someone has engaged in protected activity, do not make a disciplinary or termination decision – even if it is based on a legitimate reason and not on the protected activity – without first consulting with HR or Legal.
- Please consult with Legal Affairs before ceasing a process, activity or program that could have a compliance component or risk-management benefit. Examples include the regular posting of a notice, offering a type of training, engaging in a regular process that helps ensure fairness/consistency, etc.
- If you have a project or transaction that will require legal review or input, particularly one with a looming deadline, let Legal Affairs know as soon as possible so that they can plan and prioritize appropriately.

- Keep in mind the need to report incidents. E.g., if you learn of potential discrimination, report to the Equity Compliance Office; if there's an injury or property damage, report to insurance; etc.
- When in doubt, reach out.

4. **Be careful not to treat anyone differently – even if "for the good" – on the basis of a protected class.**
   - Certain civil rights laws (e.g., Title VI, Title VII, Title IX, the ADA) prohibit discrimination based on protected classes, which include race, religion, national origin, sex (including gender identity and sexual orientation), age, disability, etc.
   - Efforts intended to assist, rather than impede, an individual or group can be held to be discriminatory.
   - While it is acceptable to have directed or focused programming or groups, membership or attendance for such programming or groups should be explicitly open to all.
   - A somewhat related corollary to this is to be careful about excluding viewpoints (such as political views) that may not match your own. Any such exclusion could be viewed as a form of discrimination and could run afoul (depending on the setting) of free speech or academic freedom principles. (This hand-out is too short to delve into the complexities of this, but suffice it to say that anything presented as an open forum for all viewpoints should take care to indeed be fair and open, i.e., have an objective process that applies to all.)

Attachment

Attachment: Attorney-Client Privilege Waiver Scenario

Here's a hypothetical scenario of how waiver of the attorney-client privilege could inadvertently occur and end up harming the University:

Step 1. The privileged communication.

University lawyer emails non-lawyer colleague about liability and indemnification provisions in construction contract:

Sam,

Note that, as written, if there's a delay at all in the completion of the project and Contractor ABC can blame any of that on a Sub's work, they may be able to avoid having to make us whole for that delay. Granted there is conflicting language elsewhere in the contract that makes them responsible for the whole project. So that it's clear, however, we recommend revising the language making them responsible for the actions of their Subs. We also recommend adding in provisions assigning a cost to each day of delay, and making it clear that time is of the essence.

Please let me know if you have any questions.

Step 2. The inadvertent waiver of the privilege!

Non-lawyer colleague forwards that email to someone else on their team. For business reasons – including just wanting to get the contract signed sooner rather than later so that the work can begin – they sign the contract without revising the language.

Step 3. Life happens, and things don't turn out as planned.

Project is significantly delayed, keeping a residence hall off-line for an entire semester, and the University has to foot the bill in finding alternative housing for the students. Many construction issues are to blame, including the fact that two subcontractors (a plumber and an elevator installer) did not finish their work in time.

Step 4. Dispute arises.

The Contractor refuses to compensate the University for the costs it incurred because of the delay. The University sues.

Step 5. Ut-oh.

During the discovery phase of the litigation, the University is required to disclose the forwarded email, since it is not privileged. The Contractor seizes upon that as a key piece of evidence in their defense, indicating (in their view) that the University entered into the contract knowing it would be challenging to recover in the case of any delay. Much to the University's legal defense team's chagrin, it turns out that the judge agrees with the Contractor's viewpoint.