



Schools Accepting COVID-19 Loans Must Be Aware Of Workplace Law Consequences

Insights

4.05.20

Many independent and private schools are contemplating applying for Paycheck Protection Program (PPP) and/or Economic Injury Disaster (EIDL) loans under the CARES Act. The PPP loan offers an attractive incentive in substantial loan forgiveness when used for authorized payroll and other permitted expenses. While the program is certainly attractive, with loan forgiveness amounting to “free money,” there may be a catch for independent and private schools accepting either type of loan.

Schools Need To Understand Consequences

An easy-to-miss provision in the application, on page 4, states:

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the “Equal Employment Opportunity Poster” prescribed by SBA.

In addition to the plain language of the application, the Small Business Administration has indicated in a recent FAQ to faith-based organizations that acceptance of an SBA loan constitutes the receipt of federal financial assistance (FFA). Under numerous federal laws, the acceptance of FFA requires the borrower to comply with certain civil rights laws. The mere application for an SBA loan seems unlikely to be receipt of FFA. However, sources also indicate that once banks are prepared to accept applications, award of the loans will be instantaneous or nearly so, thus providing a school little time to decide whether to decline the funds.

Schools should be aware that by accepting a loan and its grants, they accept FFA and become subject to a number of civil rights laws to which they may not have previously been subject.

As noted above, the PPP loan application form expressly states that the borrower, by accepting the loan, commits to comply with several civil rights laws. These include:

- **Title VI of the Civil Rights Act of 1964** — prohibiting discrimination against any individual on the basis of race, color, or national origin. 13 C.F.R. § 112 *et seq.*;
- **Title IX of the Education Amendments of 1972** — prohibiting discrimination on the basis of sex in any education program or activity. 13 C.F.R. § 113 *et seq.*;

- **Age Discrimination Act of 1975** — prohibiting discrimination against any person on the basis of age. 13 C.F.R. § 117 *et seq.*

Although the application only specifically cites to the above laws, it is clear that other laws become applicable as well, including **Section 504 of the Rehabilitation Act of 1973**, which prohibits discrimination against qualified individuals with a handicap. 29 U.S.C. § 701 *et seq.*

What Does This Mean For Schools?

Schools should be ready to evaluate their current policies and practices to assess whether they may need to adjust them in order to comply with the laws to which they will now be subject.

Title VI

Under Title VI, schools must not discriminate on the basis of race, color, or national origin against employees, students, parents, or other participants in the business. This includes, among other things, employment practices, admissions and enrollment criteria, and other treatment. In an education setting, this includes not discriminating against students who are English language learners.

Since non-profit institutions already have these obligations under the Internal Revenue Code as a part of their tax-exempt status, this law adds no new obligations to the organization other than perhaps more clearly protecting students who are English language learners. Schools should be aware that compensatory damages may be available for individuals who provide evidence of intentional discrimination. Injunctive relief may also be awarded.

Title IX

Under Title IX, schools may not deny admission, or discriminate in the admissions process, against any person on the basis of their sex. This includes discrimination on the grounds of sexual orientation and gender identity. Schools may also not discriminate on the basis of sex in employment, student admissions rankings, determining limits upon admission of one sex over another, recruitment efforts, school programs or activities, athletics, course offerings, facilities, and financial aid. Schools must also strengthen their policies against sexual harassment. Importantly, schools must also establish a Title IX Coordinator to receive and investigate complaints of sexual harassment, sexual abuse, and sexual violence. The investigations must be conducted in accordance with Title IX investigation guidelines.

However, religious schools may apply for a waiver if application of Title IX is inconsistent with the school's religious tenets. Individuals who believe the school has not complied with Title IX may either complain to the federal Office of Civil Rights (OCR) or may file an independent lawsuit. Aggrieved employees may be entitled to back pay, front pay, compensatory damages, attorneys' fees, costs, and injunctive relief. Aggrieved students may be entitled to compensatory damages, attorneys' fees, costs, and injunctive relief.

Age Discrimination Act Of 1975

Under the Age Discrimination Act of 1975, schools may not discriminate on the basis of age in the denial of admissions, financial aid, or otherwise treat an individual differently in its business and activities because of age. This applies to students, parents, and others with whom the school conducts business.

However, age may be considered where the consideration is a factor necessary to the school's normal operation, as in, for example, when age is used as a measure to approximate certain characteristics of a student (e.g., reading comprehension) or used to determine the appropriate age for admissions as required by state law. Although no money damages are available to an aggrieved individual, injunctive relief and attorneys' fees may be granted.

Section 504 Of The Rehabilitation Act

Section 504 of the Rehabilitation Act (Section 504) prohibits discrimination against people with disabilities by entities that receive federal financial assistance. This law predates the Americans with Disabilities Act (ADA), but has similar obligations to both employees and students/parents.

Both religious and secular schools already must comply with ADA Title I (prohibiting disability discrimination in employment). In addition, although schools that are "controlled by a religious entity" are exempt from the obligations to accommodate students and parents with disabilities, all other schools (including schools that are not "religious enough") must comply with ADA Title III. Importantly, however, all schools (religious or not) that accept the SBA PPP and EIDL loans will now have to comply with the obligations to accommodate students and parents with disabilities under Section 504. There is no religious exemption.

Under Section 504, schools may not exclude qualified handicapped students from their programs if the student can, with "minor adjustments," be provided an appropriate education within the scope of the program or activity. Schools may also not charge more to the handicapped student, unless such charge is justified by a substantial increase in cost to the school. The school must also comply with the same evaluation and placement requirements as public schools. 34 C.F.R. § 104.39.

Schools receiving federal financial assistance and employing 15 or more persons must also designate at least one employee to coordinate the school's efforts to comply with and carry out their responsibilities under Section 504. That person's contact information must be published with the school's notice of non-discrimination typically found in bulletins, application forms, recruiting materials, etc.

The additional concern for any school becoming bound by Section 504 is that if the school is sued and the parent/student prevails, the school could be responsible to pay compensatory damages for humiliation, embarrassment, emotional distress, and similar concerns, in addition to attorneys' fees, costs and injunctive relief. Aggrieved employees may be entitled to back pay, compensatory damages, attorneys' fees, and injunctive relief. Complaints may be filed with OCR or the school can be sued directly by the employee, parent, or student.

How Long Do These Obligations Last?

The SBA guidance states that “once the loan is paid or forgiven, the nondiscrimination obligations will no longer apply.” Thus, if schools pay the loan off quickly, they will not be obligated to comply with the federal laws in the future.

However, they may be obligated to continue to meet requirements that they incurred while the loan was outstanding, such as continuing to honor commitments to accommodate disabilities for any student they admitted during that period. This is a particularly important consideration as many of our schools are in the middle of their enrollment season.

In addition, if the school has a summer camp and/or is engaging in distance learning during the period of the loan, the school must comply with the non-discrimination and accommodation obligations during that period of time as well. Over the last few years, we have seen an uptick in the number of claims asserted against summer camps for failure to accommodate students with mobility impairments, diabetes, and other conditions.

Finally, an SBA regulation suggests that if FFA proceeds are used to pay rent or mortgage, it could extend the duration of federal regulation for the life of the building. However, the SBA PPP loan application states that the loan funds may be used for rent or mortgage interest. Whether the use of these loans would indeed extend federal regulation for the life of the building is an unanswered question that we are monitoring. 13 C.F.R. § 113.115

Conclusion

Schools across the country are engaging in a cost-benefit analysis and determining whether the benefits of accepting the loan outweigh its risks and obligations. Our [Education Practice Group](#) stands ready to assist you on these [and other COVID-19-related issues](#). If you have any questions about this situation or how it may affect your school, please contact any member of our [Education Practice Group](#) or your Fisher Phillips attorney.

Make sure you are subscribed to [Fisher Phillips’ alert system](#) to gather the most up-to-date information. You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People





Suzanne K. Bogdan

Partner

954.847.4705

Email



Susan M. Guerette

Partner

610.230.2133

Email



Kristin L. Smith

Partner

713.202.5421

Service Focus

Counseling and Advice

Industry Focus

Education

Trending

COVID-19/Vaccine Resource Center