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OF COUNSEL – WINTER 2002

the newsletter of

NORTHEASTERN UNIVERSITY OFFICE OF THE UNIVERSITY COUNSEL

YOUR QUESTIONS AND ANSWERS

1. New Anti-Terrorism Laws

Question 1: What impact has the September 11th tragedy had on FERPA and Northeastern University students' educational records?

Answer: Recently, the USA Patriot Act was signed into law by President Bush to aid the government in the investigation and prosecution of acts of terrorism. This act supercedes conflicting federal and state law. Among other things, this act will require the mandatory disclosure of student educational records and require disclosure of information provided to the NCES (National Center for Education Statistics) in certain situations.

Section 507 of the USA Patriot Act amends FERPA (Family Educational Rights and Privacy Act) to permit the University to disclose student educational records without the consent of the student. The government must have a valid court order to obtain the records from the University. The government may then use these records as evidence in a trial or other administrative or judicial proceeding. The University will not violate FERPA by disclosing educational records without the consent of the student and is not required to make a record of the disclosure as FERPA usually requires.

How may this affect the University? Under Section 507, it is now possible that a student's otherwise confidential educational records may be released to the U.S. Attorney General or other authorized agent without the authorization of the student. If the government reasonably believes there is information contained in a student's educational records relevant to the prosecution or investigation of domestic or international terrorism or terrorist related acts, then with the court order, the records must be disclosed.

Keep in mind that this only applies when the government is investigating acts of terrorism and has obtained a court order. FERPA still applies to all other situations involving the release of student educational records.

Similar to Section 507, Section 508 of the Act requires that information reported to the NCES by the University be disclosed to the federal government in certain situations. The Act requires that NCES disclose all reports, records and information provided by the University to them if the federal government has a court order. The information requested by the government must be relevant to an investigation or prosecution of terrorist or terrorist related acts.

IMPORTANT NOTE: Please be reminded not to respond to court orders/subpoenas on your own. Forward any subpoenas to this office for appropriate guidance and response.

Question 2: How else might this Act affect the faculty, staff and students at the University?

In several possible ways:

a. This Act also allows electronic communication providers to voluntarily disclose information about a customer and the contents of the customer's communication to the government if the provider

believes that there is a danger of death or serious physical injury. University faculty, staff and students may be included as customers. In addition, the scope of information the government may obtain by a court order from electronic communication providers has increased. Government officials, with a court order, may now obtain stored voice-mail messages and additional customer information from electronic communication providers. The scope of the government's ability to conduct electronic surveillance with a court order has also been expanded.

b. This Act imposes penalties against those who are in possession of a toxin, biological agent, or delivery system of a type or in a quantity that is not reasonably justified by a research or other peaceful purpose. Furthermore, this Act makes it a crime for nationals of countries who have been determined to be supporters of terrorism, persons convicted of serious crimes and certain others to be in possession of or transport a "select agent". For example, anthrax is a "select agent". Select agents also include various other bacteria and viruses, some of which are typically used in legitimate research. If you have any specific questions about "select agents", please contact the University's Office of Environmental Health and Safety at x2769.

c. In reference to the monitoring of foreign students, this Act expands the Illegal Immigrant Reform and Immigrant Responsibility Act, which permits the government to collect from the University information concerning foreign students attending the University. The information which can be collected includes the student's name and address; visa classification and issue or extension date; full-time enrollment status; and any disciplinary action taken against the student resulting from a criminal conviction. New INS requests for this type of information from the University are likely.

2. Changes For Those Holding or Seeking to Obtain Nonimmigrant Visas

Question 1: In general, since September 11th, has anything changed relating to my applying for and obtaining a nonimmigrant visa?

Answer: Yes. The State Department has imposed a mandatory twenty (20) day waiting period in connection with nonimmigrant visas for males applying for a visa from the following countries: Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

Question 2: I have made an appointment to go to Canada to apply for a nonimmigrant visa, has this process changed since September 11th?

Answer: Yes this process has changed. You may no longer go to Canada or any other third country to apply for a nonimmigrant visa even if you already have or are planning on making an appointment. Appointments in Canada and Mexico that have been made by those seeking to apply for nonimmigrant visas are not being honored. Currently, this applies across the board to all nationalities except for citizens of Canada and Mexico. United States consular posts in Mexico and Canada are no longer offering nonimmigrant visas to those people not citizens of either of these countries. The State Department has suspended the on-line nonimmigrant visa appointment system and the 900 number appointments for third country national processing at border posts.

Question 3: I hold a nonimmigrant visa and have planned a weekend trip to Canada, is there anything new that I should be aware of concerning re-entering the United States?

Answer: Yes. You now must have a valid visa stamp in your passport which states the same visa classification as your valid Notice of Approval (I-797) to re-enter the United States. Previously, it was possible to re-enter the United States after being outside the country for less than 30 days without a visa stamp. All that was required was a valid passport and a valid Notice of Approval. However, this is no longer sufficient. The State Department has stated that a valid visa stamp indicating the same classification as the Notice of Approval may also be required to re-enter the United States after being out of the country for less than 30 days.

3. "Act of War", Force Majeure and Contractual Obligations

Question: What are "act of war" and force majeure clauses and how may they affect contractual obligations?

Answer: An "act of war" clause is typically used in insurance policies, merger and acquisition agreements, financing and underwriting agreements, hostile takeover proposals and supply and service contracts. For example, the University's contracts with service providers like hotels, arenas and other event-related venues typically contain "act of war" clauses. In these types of agreements as well as other financial agreements, an "act of war" means a war, armed hostility or other national or international calamity directly or indirectly involving the United States. If losses occur because of one of these situations, then a party, under an "act of war" clause, would be allowed to back out of a deal. It is currently unclear whether an act of terrorism would constitute an "act of war" under these types of agreements.

A force majeure clause is more commonly found in contracts than an "act of war" clause. A force majeure clause allows a party to withdraw from performing a contractual obligation if there is an unforeseen event beyond a party's control that makes it impossible to carry out the contract. Types of events that fall under force majeure clauses include war, "acts of god", strikes, lockouts, epidemics, explosions, and government preemption. Force majeure clauses do not allow a party to withdraw from their contractual obligations due to fluctuations in the market.

If you have any specific questions about these types of clauses in any contracts you are responsible for or manage, feel free to contact us at x2157.

If you have any questions you'd like to see responded to in this space, please submit them to the Office of University Counsel at 115 Churchill Hall. Depending upon the nature of your question, we'll either answer you personally or address your issue in a future edition of this newsletter.

Of Counsel has been prepared as a general summary of important developments. It is not intended as individual legal advice. Should you have any questions or need information concerning a specific situation or any of the content of this advisory, please contact the Office of University Counsel, 115 Churchill Hall, x2157.

This edition of Of Counsel was prepared with the assistance of Northeastern University law clerk Jessica Mooney.