



# THE LEGAL ISSUE

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## What is "The Legal Issue"?

The Office of University Counsel has created this newsletter as a means of keeping you apprised of developments in state and federal laws, rules, regulations and University policies. It is intended to serve as a means of highlighting issues that may affect the University. Topics will include new legislation, recent employment cases, and significant rule changes. It will be sent out each quarter, and past issues will be kept on our website, located at [www.uchsc.edu/ouc](http://www.uchsc.edu/ouc). Also included will be a section called "The Back Page," which will focus on frequently misunderstood or new University policies. We will also provide bios for new attorneys who have recently joined the Office of University Counsel. We hope that "The Legal Issue" will be a valuable resource for you and we urge you to contact us with suggestions for topics you'd like to see included in future issues. Please send suggestions to [mary.stone@uchsc.edu](mailto:mary.stone@uchsc.edu). As our disclaimer indicates, "The Legal Issue" is not a substitute for legal advice from your advising counsel.

## House Bill 06S-1023

### Verification of Lawful Presence for Recipients of Public Benefits

By Annalissa Philbin, Legal Staff Associate/Researcher, UCDHSC

On July 31, 2006, Governor Owens signed into law House Bill 06S-1023. The Act requires State entities to verify the lawful presence in the United States of each person over eighteen who applies for a state, local, or federal public benefit. C.R.S. § 24-76.5-103(1). The purpose of this article is to provide general guidance regarding the implementation of this Act at the University. This new law has a significant impact on University registrars, financial aid offices, and health clinics.

#### **What Are Public Benefits under the Act?**

The Act defines public benefits broadly and includes any grant, contract, or loan, provided by a federal, state or local agency and any health, postsecondary education, or other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit.

Under this broad definition, several expenditures or in-kind benefits provided directly to individuals by the University trigger the requirements of the Act. Examples include:

- University, state, or federal financial aid;
- University or state scholarships;
- Resident tuition;
- Stipend payments from the College Opportunity Fund;
- Free or reduced cost health services provided by University clinics or funded by the state; and
- University contracts, grants, and loans with individuals.

The definition of public benefits does not include general state services that are supported in whole or in part by state funds. For example, the requirements of the Act are not triggered simply by an application for admission or when a member of the public wishes to use a University library or facility.

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## House Bill 06S-1023

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The Act also defines limited exceptions, specifically providing that verification is not required for the provision of public benefits that are:

- ♦ Necessary for the treatment of an emergency medical condition;
- ♦ A part of short-term, non-cash, in-kind emergency disaster relief;
- ♦ For immunizations for immunizable diseases;
- ♦ For the testing and treatment of symptoms of communicable diseases;
- ♦ In-kind community health services necessary for the protection of life or safety not conditioned on an individual recipient's income or resources; or
- ♦ For prenatal care.

Additionally, verification is not required for education/information or similar programs intended to serve the general public or certain populations of the general public. Moreover, verification is not required where the services are provided without an individualized application process. Finally, verification is only required where the public benefits are to be provided to persons eighteen years of age or older. Where a parent applies for a public benefit on behalf of his or her child, verification of lawful presence of the child is not required, and verification of the parent is also not required.

### What Are the Verification Requirements of the Act?

The Act requires that, *upon application* for any described benefit, the agency must require the applicant to provide a specified form of photo identification AND execute an affidavit stating that that he or she is a U.S. citizen or a legal permanent resident or that he or she is otherwise lawfully present in the U.S. pursuant to federal law.

The Act specifies the following acceptable forms of identification, which must be provided in-person (faxed copies of acceptable photo identification will not meet the requirements of the Act):

- ♦ Valid Colorado driver's license or a Colorado identification card (which includes only a current Driver's License, Minor Driver's License, Probationary Driver's License, Commercial Driver's License, Restricted Driver's License, an Instruction Permit, or an Identification Card);
- ♦ U.S. Military card or a Military dependent's identification card;
- ♦ U.S. Coast Guard Merchant Mariner card; or
- ♦ Native American tribal document.<sup>1</sup>

In addition to presenting a valid form of identification, the individual must also execute an affidavit in which the individual swears or affirms under penalty of perjury that the statement made in the affidavit is true and complete. The affidavit does not need to be notarized, and may be accepted electronically. Affidavit language that has been approved by the Attorney General's Office as meeting the affidavit requirements of HB1023 is available at your campus Office of University Counsel.

These are general guidelines to help University departments that provide publicly funded benefits to comply with the requirements of the Act. The Office of University Counsel will do its best to inform University constituents of future changes to this law and any rules or regulations implementing this new law. If you have specific questions regarding your particular program, please contact your campus Office of University Counsel.

<sup>1</sup> Until March 1, 2007, the Department of Revenue has approved additional forms of identification including driver licenses from a limited number of other states, a valid unexpired Resident Alien Card, Permanent Resident Card, Temporary Resident Alien Card, or Employment Authorization Card. You may contact your campus Office of University Counsel for a complete list of acceptable identification.

The material contained in this newsletter has been prepared by the Office of University Counsel for informational purposes only. This newsletter does not provide legal advice. By providing this information, an attorney/client or other relationship is neither intended nor established. The Office's client is the University and not any particular employee. We urge you to consult with your advising counsel regarding your individual situation.

- ♦ UCB: (303) 492-7481
- ♦ UCCS: (719) 262-3820
- ♦ UCDHSC – 9<sup>th</sup> Ave. and Fitzsimons Campuses: (303) 315-6617
- ♦ UCDHSC – Downtown Denver Campus: (303) 556-6511

*Edited by Mary Stone, UCDHSC Office*

# Religious Discrimination in Higher Education

By Jennifer Watson, Senior Legal Staff Associate/Researcher, UCDHSC

As institutions of higher education struggle with the challenges of creating and maintaining a diverse student body, student requests for religious accommodations are arising more frequently. Examples of such requests on college campuses across the country include the following:

- Student requests to carry religious ceremonial knives;
- Student requests for exemption from mandatory meal plans on the basis that their religious beliefs impose dietary restrictions that cannot be met by campus dining facilities;
- Student requests for excused absences from classes that meet during times that conflict with the students' prayer times;
- Student requests for exemptions from mandatory immunization requirements; and
- Students in health professional programs requests to be exempt from clinical practices that the students disagree with on the basis of religious beliefs.

University administrators should be aware of the legal issues that arise when students request accommodations on the basis of religious beliefs. Requiring a student to participate in practices that conflict with his/her religious beliefs or prohibiting a student from engaging in religious practices may violate the student's First Amendment right to freely exercise religion.

In general, the state may not implement a rule or policy that places a significant burden on a practice that is sufficiently related to a student's sincerely held religious belief. The meanings of "significant burden," "sufficiently related," and "sincerely held" have been widely litigated by the courts. However, any rule or policy that substantially burdens a student's religious beliefs is likely to implicate the student's First Amendment free exercise rights.

A state or government rule or policy that does significantly burden a student's sincerely held religious beliefs is not necessarily unconstitutional. The rule or policy may be upheld if it is (1) generally applicable and (2) neutral in both its purpose and effect. A generally applicable regulation is a regulation that applies to all persons or activities. Exceptions to generally applicable regulations may occur for reasons of public health or safety. For example, a highway speed limit is considered generally applicable, even though ambulances are allowed to exceed the speed limit to preserve life or health. Allowing exemptions for secular or nonreligious reasons, but not allowing exemptions for religious reasons, breaches the principle of general applicability. For example, excusing students from mandatory attendance requirements for health or personal reasons, but not excusing students for religious reasons would fail the principle of general applicability.

In addition to being generally applicable, regulations that effect an individual's sincerely held religious beliefs must also be religiously neutral. The principle of neutrality requires a regulation to be neutral in both its purpose and effect. A court will examine the regulation's objective, the history and content of its enactment, and its intended consequences. In addition, a court will look at the manner in which an otherwise neutral regulation is applied. A facially neutral regulation applied in a discriminatory manner will be considered non-neutral. For example, a regulation prohibiting all students from burning incense in residence halls – even though generally applicable – may be deemed non-neutral if the regulation was adopted with the intent, or has the effect, of only prohibiting religious activity.

The following measures can be taken by University administrators in order to reduce the risk of a student filing a religious discrimination claim:

- Approach all religious accommodation requests seriously.
- Treat all religions equally.
- Accord equal consideration to religious and nonreligious requests.
- Implement policies and procedures for requesting and responding to accommodations.
- Consult with legal counsel.

# Unpaid Internships

## What U Should Know About the Appropriate Use of Student Work

By Manuel Rupe, Senior Assistant University Counsel, UCDHSC

Students at higher education institutions often participate in unpaid internships at health care institutions, businesses, governmental agencies, as well as educational and non-profit organizations. These "real world" experiences, particularly for undergraduate students, are intended to provide students with an opportunity to explore their future careers and professions before entering the workforce. While internships and experiential education are becoming important components of higher education curriculum, students and educational administrators involved in internship coordination and placement need to understand the appropriate legal limitations that are placed on students' work. Student internships should be valuable educational experiences, and employers should not be allowed to exploit students' free labor for their own financial gain.

The Fair Labor Standard Act, 29 U.S.C. § 210 et seq., which applies to most employers, generally requires employers to pay employees a minimum wage and overtime compensation. Student interns are typically not considered employees and, therefore, are not covered under FLSA. However, if student interns are used inappropriately the students may be considered employees, depending on six factors set forth in the U.S. Department of Labor's Wage and Hour Field Operations Manual:

- ◆ Employer must not derive any immediate advantage by using the student intern, whose presence may on occasion actually impede the employer's operations (i.e., student intern services are not for the convenience of the employer: in the clinical context, for example, it will be typical for procedures and efficiencies to be slowed dramatically to accommodate instruction for a student intern);
- ◆ Student intern must perform services primarily for his or her own benefit (i.e., student interns should not be performing tasks that only benefit the employer);
- ◆ Student intern must not displace regular employees and should be under continual supervision and direction (i.e., employer should not terminate employees and hire student interns as replacements);
- ◆ Student intern's training should be related to the position the student will apply for after graduation; thus, the training should not be for a specific position with the employer (i.e., if CU educational requirements extend beyond one job classification, employer should facilitate student intern working in different job classifications);
- ◆ Employer should not offer or guarantee the student intern a job at the end of the internship, and no offer or guarantee of employment should be made during or prior to the conclusion of the internship (i.e., employer should not promise a job to student intern to attract the student to their particular program or facility); and,
- ◆ The employer should clearly communicate to the student intern that he or she will not be compensated (or employer should communicate clearly whether any portion of the internship will be paid).

Importantly, various exceptions exist for particular careers and professions. However, if student interns are being misused, under FLSA employers may be liable (in addition to fines) to the student intern for twice the amount of wages owed to the employee, in addition to the employee's attorney fees. Student internships should be opportunities to grow and learn, but if the internship is little more than free labor for an employer, the student should be compensated for their work. Clear communications with internship sites can prevent these issues. You are encouraged to direct questions to the Office of University Counsel.

# THE BACK PAGE

## What is "The Back Page"?

The Back Page is where you'll find articles focusing on University policies. Some of these policies may be new, and some may simply be existing policies that we have found to be frequently misunderstood. Examples of topics include how to respond to subpoenas and Open Records requests, Family and Medical Leave, background investigations, disability accommodation. If there is a particular University policy you'd like us to address here, please send your suggestion to [mary.stone@uchsc.edu](mailto:mary.stone@uchsc.edu).

## Introductions

*Christine M. Arguello*

*Managing Senior Associate University Counsel, UCB*

Christine Arguello is a Colorado native who received her B.A. in Elementary Education from CU-Boulder, and her J.D. from Harvard Law School. She practiced law in Florida and Colorado for 15 years as a civil litigator before joining the faculty of University of Kansas School of Law to teach bankruptcy and contract law, where she also taught and directed the Trial Advocacy Program. She then worked in Colorado's Attorney General's Office from 1999 to 2002, including serving as Chief Deputy Attorney General for over two years. In 2002, Ms. Arguello returned to private practice as a Partner at Davis Graham & Stubbs LLP in Denver, where she practiced creditors' rights law and commercial litigation, focusing on employment law, including internal investigations of employment discrimination and sexual harassment. She joined the University's Office of University Counsel in April 2006.

*Rebecca "Becki" S. Currey*

*Senior Associate University Counsel, UCB*

Becki Currey earned her B.A. in biology and chemistry from Carroll College and her J.D. at the University of Montana. She began her law practice in Montana, where she worked for several years in both public and private practice before moving to Arizona where she had a private litigation practice. She then worked for six years in the employment litigation section of the Arizona Attorney General's Office. For the next seven years, and prior to joining the Office of University Counsel, she worked as assistant general counsel at Maricopa County Community College District in Phoenix, Arizona. The Maricopa County Community College District consists of 10 colleges and approximately 250,000 students. Her focus throughout her career has been public employment and education law. She joined the University's Office of University Counsel in August 2006.

*Manuel R. Rupe*

*Senior Assistant University Counsel, UCDHSC – Downtown Denver Campus*

Manuel Rupe graduated with a B.A. in History and Political Sciences from Kalamazoo College, received his J.D. from DePaul University College of Law, and recently earned a Ph.D. in Educational Leadership, with a concentration in higher education leadership, from Western Michigan University. Prior to joining the Office of University Counsel, Dr. Rupe worked in private practice as an Associate Attorney with Kreis, Enderle, Callander & Hudgins, P.C., in Kalamazoo, MI, for three years, and served as Assistant General Counsel at Ferris State University in Big Rapids, MI, from 2001 to 2006. Dr. Rupe also played varsity baseball during the four years he was a student at Kalamazoo College. Dr. Rupe joined the University's Office of University Counsel in August 2006.

*Jessica Chavez Salazar*

*Legal Staff Associate/Researcher, UCB*

Jessica Chavez Salazar is also a Colorado native, and she received a B.S. in Psychology from Colorado State University. Following graduation, she worked with CSU's Upward Bound Program. She earned her J.D. from the CU School of Law in 2004, and clerked for two years for The Honorable Thomas R. Ensor, District Court Judge for the Seventeenth Judicial District in Brighton, CO. She joined the University's Office of University Counsel in August 2006.