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WHITE PAPER

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A Guide to Navigating the COVID-19 Crisis for Institutions of Higher Education

The coronavirus (COVID-19) pandemic presents the world of higher education with an unprecedented set of challenges that will likely persist for years to come. During the pandemic and beyond, colleges and universities will be forced to re-evaluate fundamental aspects of their operations, all while facing financial shortfalls, declining enrollment, new government regulations, and novel health and safety concerns. These challenges will be particularly acute for institutions already facing thin margins and a fierce competitive environment.

Successful navigation of the current crisis will require good judgment, informed decision-making, and a practical knowledge of the relevant legal issues. This *White Paper* provides a practical, high-level overview of the key legal issues confronting institutions of higher education. Whether seeking to minimize litigation risks, to access needed liquidity, or to prepare to reopen, colleges and universities can use this document as a starting point to steer a course through the current COVID-19 pandemic and into the future.

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The Higher Education Initiative of Jones Day's COVID-19 Task Force has prepared and consolidated summaries of an array of subjects crucial to pandemic planning for institutions of higher education. Those subjects include:

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These summaries are designed to provide a high-level introduction and overview of the relevant law. The risks and opportunities identified here will vary depending on an institution's specific circumstances.

LITIGATION RISKS

As the COVID-19 crisis evolves, institutions of higher learning will face litigation risks on a number of fronts. These risks include the potential for: (i) class actions seeking refunds on behalf of students; (ii) negligence, nuisance, and failure-to-warn claims; (iii) False Claims Act litigation; (iv) labor- and employment-related claims; and (v) commercial litigation, among others.

Class Actions Seeking Refunds

A large and growing number of putative class action lawsuits have been filed against colleges and universities for their actions in response to the COVID-19 pandemic. These lawsuits typically seek to recover some portion of students' tuition payments (generally the purported difference in value between in-person instruction and online distance learning), as well as prorated portions of housing, meal plan, student fee, and other payments students made to schools that closed campuses due to the pandemic. To date, the most common claims are based on breach of contract, unjust enrichment, conversion, and violation of state consumer protection laws.

The susceptibility of any particular college or university to these types of lawsuits will depend on several factors, including the circumstances of each individual institution and the language of the governing contracts. But there are a few key, preliminary considerations to analyze in evaluating the risks associated with such litigation:

- What do the relevant enrollment agreement provisions say about the nature of instructional services to be provided by your institution?
- Do the relevant agreements governing enrollment, housing, meal plans, or other services include force majeure provisions? Do those provisions reference pandemics or epidemics?[1]
- Was the campus closure responsive to pronouncements or orders from state or local authorities making performance under a contract impracticable or impossible?
- Do the relevant agreements contain arbitration or forum selection clauses?

In addition, some institutions may be protected from certain claims that have been filed under sovereign immunity, COVID-19-related immunity provisions at the state or federal level, or other statutory provisions.

Colleges and universities can prepare to defend class action lawsuits by investigating the facts related to these key questions in advance and preparing the record needed to present them. Our Business and Tort Litigation Practice can assist with those efforts. We have been closely monitoring these suits as they have been filed, and have been preparing potential defenses.

Negligence/Failure-to-Protect Claims

Colleges and universities may also face claims alleging that they caused undue harm or otherwise "failed to protect" students, employees, or third parties from COVID-19. Factors important to litigating such claims include:

- The nature and foreseeability of the specific event or incident at issue;
- Whether the university followed government recommendations or applicable guidance;
- Whether advice from public authorities on the matter at issue was conflicting such that there is no clear standard of care;

- Whether the event or incident at issue constitutes a "public emergency" such that the university should be excused from any liability for such claims;
- Whether the student or third party waived or released the claim at issue or otherwise assumed the risk associated with the claim;
- Whether state or federal immunity statutes extend additional protections to the university;
- Whether the risk or injury at issue can be attributed to any particular source linked to the university as the legal or proximate cause.

Institutions should also review these factors and consider taking preventive steps as they allow students back on campus. Our Business & Tort Litigation Practice has studied these issues and can advise institutions on how to reduce the risk of a lawsuit, or defend universities if litigation has been initiated.

False Claims Act

There is likely to be significant False Claims Act ("FCA") litigation regarding government funding for various programs related to the pandemic. At their core, FCA suits involve allegations that institutions or businesses improperly obtained or used federal funds. More than 90% of FCA cases commence with a private whistleblower (a "relator" under the statute) filing an action under seal. That is followed by a period of investigation by the Department of Justice and other agencies for the purpose of evaluating the claims and deciding whether the government should join the suit. Potential liability increases with government involvement, although relators and their counsel can and often do pursue claims even if the government declines to intervene. In either scenario, FCA claims can result in multimillion-dollar damage awards or settlements.

Jones Day has handled numerous FCA cases in which the plaintiffs alleged that an institution of higher education had defrauded the government by submitting claims for financial aid in violation of applicable regulations. Many of those suits were filed against for-profit institutions, but with expanded federal aid being provided to colleges and universities during the pandemic, these claims are likely to be filed against nonprofit institutions as well. This is particularly so as any institution of higher education seeking federal funds under the CARES Act must submit a "certificate of agreement" subjecting it to FCA liability for failure to comply with the terms and conditions of the award.[2]

Should you have questions or concerns regarding FCA matters, our dedicated Federal and State FCA defense group, which has handled more than 80 FCA actions in the past few years alone, is available to assist.

Labor and Employment

To mitigate labor-and-employment-law risk related to COVID-19, institutions of higher education should evaluate and implement policies, procedures, and protocols consistent with relevant governmental orders and guidance from the Centers for Disease Control and Prevention ("CDC"), the Equal Employment Opportunity Commission ("EEOC"), and the Occupational Safety and Health Administration ("OSHA"). Where the workforce is unionized, collective bargaining agreements will also need to be analyzed, and the union will need to be consulted. Among other things, such analysis and consultation will inform the manner in which institutions notify employees in the event of a COVID-19-positive occurrence; draft policies for telecommuting, sick leave, and expense reimbursement; and generally address employment agreements and wage and hour issues during the pandemic.

Moreover, colleges and universities, like all employers, must determine when and how to effectively reopen. In doing so, they will be faced with decisions regarding temperature scans, face coverings, Americans with Disabilities Act accommodations, privacy concerns, COVID-19 testing, and antibody tests. All of these questions raise employment law issues with respect to faculty and staff.[3]

In addition, there are a number of claims likely to arise in the context of COVID-19. These could come in the form of single-plaintiff or classwide discrimination suits alleging:

- Violations of Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act resulting from termination, furlough, and/or return-from-furlough decisions;
- WARN Act violations;
- Wage and hour claims arising under the Fair Labor Standards Act and relevant state law;
- OSHA and related health and safety claims;
- Family and Medical Leave Act violations;
- Claims under sick/vacation policies and laws;
- Whistleblower claims.

Our Labor & Employment Practice, which has represented large public universities, private universities, and smaller liberal arts colleges or their boards in a wide variety of matters, has extensive experience with respect to all such potential actions and has been advising clients on these and related pandemic issues. Our experienced practitioners are available to assist institutions confronting these issues.

Force Majeure and Other Clauses Excusing Performance

Institutions of higher learning should identify and carefully review key contracts and other agreements that may be disrupted by the COVID-19 crisis to determine whether they contain force majeure clauses or other similar provisions. Such provisions may excuse performance, restrictions, or delays of certain contractual obligations due to the pandemic and its effects. However, the scope of any force majeure provision is governed by its text, and the way courts interpret these provisions varies widely across jurisdictions. Likewise, when these clauses are implicated, the relevant rights, remedies, notification requirements, and mitigation obligations differ from contract to contract.

Accordingly, whether and how force majeure provisions apply requires a contract-by-contract, fact-specific review of an array of agreements, ranging from food services contracts to event contracts. Colleges and universities must also be mindful that force majeure provisions can be both a sword and a shield. For some contracts, they may wish to invoke force majeure to be relieved from certain obligations. For other contracts, they may need to defend against a counterparty invoking such clauses to excuse their own non- or delayed performance. This requires a coordinated approach with knowledge of the governing law across jurisdictions.

CYBERSECURITY

The COVID-19 pandemic has prompted many educational institutions to accelerate adoption of "ed-tech" to replace traditional classroom settings with virtual learning environments. This accelerated change poses heightened cybersecurity and privacy risks.

Cybersecurity

Online learning tools are vulnerable to malicious attacks from bad actors looking to exploit the surge in distance learning fueled by the pandemic. State and federal authorities have warned that the use of education-technology platforms and services prompts cyberattacks, and some institutions have already experienced phishing campaigns, ransomware attacks, and hijacking of video-teleconferences. These risks may be exacerbated as internal IT resources become overloaded by the shift to support virtual learning.

Additionally, U.S. law enforcement and national security officials are issuing increasingly stark warnings that organizations engaged in research and treatment related to COVID-19—including educational institutions—are targets of a surge of attempted cyber intrusions and other malicious cyber activity. In particular, officials have expressed concerns that threat actors are attempting to steal research, sensitive data, and intellectual property related to potential COVID-19 vaccines and treatments.

Using platforms that fail to safeguard personal information and intellectual property can result in loss of value, business interruption, reputational harm, private and civil penalties, and fines under federal and state laws. Colleges and universities should therefore establish plans to respond to and mitigate cyberattacks consistent with industry standards and regulatory requirements. This includes carefully selecting reputable solutions that have adequate technical and organizational safeguards in place to protect students and their data.

Data Privacy

The rush to create and expand virtual learning environments during the COVID-19 pandemic also raises personal information privacy risks and compliance challenges. Institutions must carefully develop a strategic approach to managing the sharing and disclosure of educational records and other personal information in this expanded virtual environment.

Compliance with domestic and international privacy laws mandating the protection of personal information in educational records raises novel issues in the e-learning context. Institutions will have to carefully assess whether—and to what extent—third-party providers require access to personal information or educational records to facilitate services, and then execute written contracts that limit collection and protect the use of personal information in the event of a data security breach. Likewise, colleges and universities should develop protocols that prevent educators from unlawfully disclosing

personal information from educational records while online or working remotely.

Even outside the remote learning environment, privacy laws will dictate when and how educational institutions report threats of exposure to COVID-19. While some of these laws require consent prior to disclosure of health-related information, others contain health or safety emergency exceptions. Institutions should also assess legal restrictions and obligations under various laws applicable to personal health information, including the U.S. Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

Likewise, educational institutions contemplating the use of contact-tracing applications or other wearable technologies to track exposure to the virus should be mindful of the myriad data privacy issues raised by these technologies. The law concerning the use of these technologies is evolving and not yet settled, and there is a risk that regulators and courts will conclude that use of these technologies is inconsistent with state employment surveillance laws or otherwise impinges on reasonable expectations of privacy. Such technologies also may implicate other privacy considerations, including notice and transparency requirements, consent for data collection and use, and data security controls.

Jones Day's Cybersecurity, Privacy & Data Protection Practice is well versed in advising higher education institutions on these and related issues. We are available to assist as educational institutions expand their virtual footprint.

TELEHEALTH AND VIRTUAL RESEARCH

As in-person interaction has been limited or put on hold by the COVID-19 crisis, telehealth services have come to the forefront as an alternative way to meet medical and research needs.

Telehealth for Meeting Student Behavioral and Mental Health Needs

Various reports indicate an increased need, especially among students, for mental and behavioral health services. Institutions of higher education are already utilizing technology platforms to deliver e-learning solutions to students, and, in certain circumstances, these or similar platforms may be appropriate tools for addressing mental and behavioral health needs. Telehealth utilization has increased dramatically in the last several years, and it has served as one of the only forms of on-going access to mental and behavioral health providers during the COVID-19 crisis. The provision of telehealth services requires the navigation of nuanced federal and state regulatory requirements, and Jones Day has deep experience in assisting providers, developers and other stakeholders across the United States in the establishment of compliant, scalable telehealth systems. That experience allows us to offer institutions of higher learning insightful and practical approaches for the successful integration of telehealth strategies.

New Reimbursement Options for Telehealth Services

Early in the COVID-19 crisis, we observed that telehealth can and should play a significant role in delivering health care and life sciences services at a time when in-person options are limited and collaboration among health providers is crucial (see our recent *Commentary,* "Telemedicine and the Coronavirus Crisis," and the article, "Incorporating Telemedicine as Part of COVID-19 Outbreak Response Systems"). As the crisis evolved, regulators and policymakers from around the globe recognized the benefits of telehealth and worked to understand and remove many long-standing legal barriers, including reimbursement, technology options, and multijurisdictional practice capabilities. In a matter of weeks, most of the prevailing hurdles to Medicare coverage for telehealth were removed, and during the public health emergency, the Centers for Medicare & Medicaid Services will pay for telehealth services in a manner similar to services provided in-person. To meet ongoing patient and community needs, many health providers are working to make as many professional services as possible available for delivery via telehealth. Now that many of these offerings are reimbursable, it is important to understand the specifics for meeting the reimbursement criteria. Further, it appears telehealth is here to stay given its now demonstrated capacity to connect patients and providers. Thus, many organizations are taking steps to develop long-term and sustainable telehealth strategies.

Our telehealth team—with more than a decade of experience dedicated to the topic across the United States—can assist with addressing the myriad legal and reimbursement considerations for successful telehealth transactions and compliant operational processes. This often involves coordinating

cross-organizational telehealth teams, including representatives from clinical, information technology, legal, and payor contracting departments, in order to select appropriate technologies, negotiate third-party arrangements, assess different telehealth use cases, and ensure the legal and regulatory compliance of those structures (including compliance of potential third party telehealth vendors).

Virtual or Decentralized Research Alternatives

Institutions of higher learning, particularly those that include academic medical centers, are frequently engaged in a wide range of human subject research, subject to the federal Common Rule, FDA regulations, state rules pertaining to the practice of medicine, HIPAA, and state privacy laws. COVID-19 has disrupted the ability of many such institutions to conduct needed clinical trials utilizing traditional methods and workflows. That being the case, some institutions have adopted novel solutions, such as "virtual trials" and "decentralized trials," to ensure the continuation of ongoing research. We have been advising various clients across the United States and abroad on the adjustment of protocols to incorporate decentralized/virtual trial aspects in compliance with applicable regulatory requirements. Further, innovation and unique approaches to research may present opportunities for intellectual property advancement, and our Intellectual Property Practice often collaborates to advise on various approaches for thoughtful IP development and protection.

THE CARES ACT

The recently enacted Coronavirus Aid, Relief, and Economic Security ("CARES") Act contains several provisions designed to help institutions of higher education weather the COVID-19 crisis. In addition to making nearly $14 billion in new federal funds available to colleges and universities through the Higher Education Emergency Relief Fund, the Act waives certain requirements with respect to existing federal grants and loans.

Higher Education Emergency Relief Fund

The CARES Act calls for the disbursement of nearly $14 billion to institutions of higher education based on formulas contained in the legislation. The bulk of the funds are designated for institutions receiving Title IV funding, and are allocated largely on the basis of Pell Grant recipient enrollment data. Other funds are set aside for minority-serving institutions (including Historically Black Colleges and Universities ("HBCUs")) and institutions with the "greatest unmet needs related to coronavirus."

To access these funds, colleges and universities must sign and return a "certification and agreement," acknowledging the terms and conditions of the funding. Among other things, institutions must certify that:

- A recipient receiving funds for emergency financial grants to students will use funds only for that purpose, to cover expenses related to coronavirus disruptions.
- A recipient receiving funds for institutional purposes will use funds only for costs incurred after March 13, 2020, and associated with significant changes to the delivery of instruction due to coronavirus.
- The recipient will document that it has continued to pay its employees and contractors during the period of any disruption/closures "to the greatest extent practicable."
- The recipient will promptly and "to the greatest extent practicable" use all funds within one year and document efforts to do so.

Institutions must use at least 50% of any funds received to provide emergency financial aid grants to students for COVID-related expenses. Remaining funds may be used to cover any COVID-related institutional costs. Those costs, however, cannot include payments to contractors for pre-enrollment recruitment activities, endowments, or certain capital outlays (i.e., facilities related to athletics, sectarian instruction, or religious worship).

In addition to complying with reporting requirements contained in section 15011 of the CARES Act, institutions receiving funds will be expected to report to the Secretary of Education regarding the manner in which grants were distributed to students, how grant awards were calculated, and the contents of any instructions provided to students along with the grants.

Waiver of Federal Grant and Loan Requirements

The COVID-19 pandemic has made it effectively impossible to meet many federal financial aid requirements. The CARES Act includes several provisions designed to ensure that students

and institutions are not penalized as a result. For example, those provisions mandate that students will not lose federal grants or loans solely because they could not fulfill certain requirements, such as attending class, showing up to work, or graduating on time, due to the COVID-19 pandemic. In addition, a few provisions give institutions the flexibility to shift some federal funding to address needs arising from the COVID-19 emergency. Specifically, the CARES Act:

- Waives the institutional matching requirement for various campus-based aid programs (§ 3503);
- Allows institutions to employ unused work-study funds for supplemental grants (§ 3503);
- Permits institutions to award Supplemental Educational Opportunity Grants to students impacted by the COVID-19 pandemic (§ 3504);
- Authorizes institutions to issue work-study payments to students unable to work due to COVID-19-related workplace closures (§ 3505);
- Removes various consequences related to a student's eligibility for subsidized loans or Pell Grants for semesters unable to be completed because of COVID-19 (§§ 3506, 3507, 3508, 3509);
- Allows certain foreign institutions to offer distance learning to U.S. students receiving Title IV funds for the duration of the COVID-19 emergency (§ 3510);
- Authorizes the Secretary of Education to defer payments and waive certain outcome requirements for various loan and grant programs benefiting HBCU and minority-serving institutions (§§ 3512, 3517);
- Defers student loan payments, principal, and interest for six months, through September 30, 2020, without penalty to the borrower for all federally owned loans (§ 3513); and
- Permits the Secretary of Education to waive or modify current allowable uses of funds for institutional grant programs (i.e., TRIO, GEARUP, Title III, Title V, and sections of Title VII) so colleges can re-deploy resources and services to COVID-19 efforts (§ 3518).

Institutions of higher education should carefully review the provisions summarized above and their specific circumstances to assess their potential eligibility for relief under the CARES Act. Our Government Regulation Practice has examined the CARES Act in detail, and is available to assist colleges and universities in performing this analysis.

INSURANCE COVERAGE

Educational institutions can proactively manage their COVID-19 exposure by carefully reviewing their existing insurance programs to determine whether they afford adequate coverage for COVID-19 and other infectious disease–related losses. While the scope of coverage will depend upon the specific terms of each insurance policy and the relevant law, a number of policy provisions may be available to provide coverage.

Property Policies

Any review of existing insurance programs should begin with first-party property policies. Such policies are generally written on an "all risk" basis so as to provide broad coverage in response to losses caused by a covered peril. That said, there are a number of issues likely to arise when seeking coverage for COVID-19 losses under a property policy.

- There will likely be a question as to whether the policyholder must show the actual existence of COVID-19 at an insured location or whether the potential presence is sufficient to trigger the policy.
- Property policies often require "physical" loss or damage to trigger coverage. Notwithstanding widespread disavowals by the insurance industry, a "physical" loss requirement is not an insurmountable obstacle to coverage. Indeed, courts in a number of jurisdictions have determined that contamination and other incidents that render property uninhabitable or otherwise unfit for its intended use constitutes "physical loss or damage." If these loses are established, then resulting costs incurred (such as for deep-cleaning measures or loss reduction efforts) are candidates for coverage.
- Third, some property policies contain virus or contaminant exclusions. The language of these exclusions varies dramatically and needs to be reviewed carefully as some may not apply in the COVID-19 setting. And even if these exclusions apply, the policy may nonetheless provide separate coverage for cleanup costs.

Property policies also often provide coverage for business interruption losses, including losses associated with government orders. For example, the adoption of distance-learning as a means of managing risks to community members may trigger losses in revenue and grant money. Likewise, stalled

and delayed research and capital improvement projects could potentially generate recoverable losses. And widespread cancellation of revenue-generating athletic programs will similarly impact operational revenue. Examination of property coverage can help identify whether these types of losses or extra expenses associated with COVID-19 may be covered.

Other Coverage

Property polices are not the only form of coverage that should be analyzed. A targeted review of liability insurance can help reveal how such policies might respond to third-party claims for bodily injury resulting from alleged exposure to harmful conditions. For educational institutions with a presence in health care, a review of errors and omissions coverage can reveal the extent to which insurance could respond to bodily injury claims of non-employees. Claims that employment practices initiated in response to the COVID-19 pandemic are discriminatory or violate employee privacy rights may be covered under employment practices liability insurance programs. Likewise, worker's compensation coverage should be reviewed with an eye toward the potential for coverage as an "occupational disease." Finally, cyber insurance policies may offer coverage for losses resulting from COVID-19-related social engineering and phishing campaigns, as well as cyberattacks occasioned by increases in telework/remote access and the use of employees' personal electronic devices.

For a more detailed discussion of these and related issues, please see our Jones Day *Commentary*, "Time for a Policy Checkup: Maximizing Insurance Coverage for Coronavirus Losses." Our Insurance Recovery Practice is available to assist colleges and universities in conducting the analyses described above.

CONSTRUCTION PROJECTS AND CAPITAL PROGRAMS

The pandemic raises a number of issues for educational institutions with construction projects at various stages of planning or completion.

First, the progress of construction projects already underway may have been impacted by "stay at home" orders, with some jurisdictions prohibiting most construction and others permitting construction to proceed subject to revised safety and social distancing requirements. Contractors may be asserting or contemplating claims for extensions of time and increased costs based on a variety of contractual and legal theories that can have significant financial ramifications for the project.

Second, in light of the uncertainty and financial challenges associated with the pandemic, many colleges and universities, like other institutional owners, may be re-evaluating their capital programs. This may include everything from cancelling projects under contract to reassessing the timing and necessity of planned projects. The pandemic may also cause educational institutions planning new facilities, such as dorms and other types of student housing, to reconsider the design of such facilities to afford greater flexibility to adapt to social distancing needs in times of crisis.

Our construction practice team has been working with owners on strategies to keep time sensitive projects moving throughout the course of the pandemic. It has also advised owners on how to defend against claims or achieve practical resolution of disputes without litigation or arbitration. Similarly, we are actively advising owners on how best to implement major adjustments to construction programs, including ongoing projects, in a way that minimizes financial exposure to claims by design professionals or contractors.

RESTRUCTURING ALTERNATIVES

Bankruptcy is not a viable option for most distressed educational institutions. Amendments to Title IV of the Higher Education Act of 1965 preclude any institution of higher learning that files for bankruptcy from accessing federal student aid funding (e.g., Pell Grants, Stafford Loans, and PLUS Loans). In the few instances where a college or university nevertheless filed for bankruptcy, the U.S. Department of Education promptly revoked the institution's Title IV status. As a result, those institutions did not continue as going concerns and were ultimately liquidated.

With bankruptcy effectively off the table, it is imperative for educational institutions to closely monitor cash sources and uses as long as COVID-19 threatens in-person instruction. In particular, development of a granular cash source and use projections for successive three-month increments is necessary to identify possible cash troughs. Best forecasting practices

include developing a "base case" scenario and toggling certain assumptions to show alternative "worst" and "best" cases. Best case may be a return to pre-pandemic operations, but possibly with a recognition that such return will occur over the course of several years or with a modified academic calendar. Worst case may assume a substantial decline in 2020-2021 matriculation; refunds for tuition, room, and board; increased expenses to transition to on-line learning (e.g., increased server capacity, software purchases, training, and outsourcing); additional pandemic-related costs (e.g., additional cleaning staff, expanded housing options, and potential COVID-19 litigation expenses); and declining revenue from lost athletics, summer programs, and conferences.

Such forecasting will allow an institution's leadership to evaluate contingency planning options, which may include ways to generate and preserve cash, reduce or defer expenses, and create budget space to pay for new or unanticipated expenses. As to the first, institutions of higher education may have untapped resources to create additional liquidity outside of tuition increases. For example, selling (or leasing for extended periods) certain non-core assets (e.g. parking garages or other real estate) may provide immediate cash to bridge near-term liquidity gaps.[4] It may also be possible to rally alumni to make philanthropic contributions to specific and targeted expenses. Raising capital through debt is likewise always an option, but, subject to credit agency ratings, may have high transactional costs. It is also possible that federal, state, and local funding may be available for COVID-19 specific expenses.[5] On the expense side, institutions should take a hard look at (i) shedding and outsourcing services; (ii) reorganizing academic programs to support core academic programs while reducing or eliminating unproductive courses; (iii) appropriately balancing tenured, contract, and adjunct faculty; (iv) deferring or restructuring retiree payments and healthcare obligations; and (v) hiring freezes and headcount reductions where possible.

All indications are that institutions of higher learning will face significant financial and operational challenges for the foreseeable future. Diligent monitoring of finances will help institutions develop contingency plans to address financial and operational headwinds and balance competing interests. Our Business Restructuring and Reorganization Practice stands ready to assist with these efforts.

MONETIZING EXISTING, NON-CORE ASSETS

As the availability of traditional funding sources has diminished, many educational institutions have been pressed for capital—a difficulty only exacerbated by the current economic upheaval. In response to this need, colleges and universities have increasingly been forced to turn to non-traditional sources of liquidity. While doing so, many institutions have discovered that they are in possession of non-core assets—such as parking systems, student housing, utility systems, golf courses, and various amenities—that can be monetized through concessions and public-private partnerships. The amount of funds available through these transactions can be significant, at times amounting to well over $1 billion.

Colleges and universities in need of liquidity should therefore carefully review their assets to determine if any are suitable for monetization. Jones Day is well positioned to assist with this effort. Our public-private partnership team has undertaken cutting-edge work on this front for years, assisting a number of prominent educational institutions in raising significant amounts of capital by turning non-core assets into sources of revenue generation. In fact, Jones Day has been involved in more public-private partnership monetization transactions involving higher education institutions in the United States than any other law firm, including first-of-a-kind transactions with respect to parking and energy systems.

EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

The COVID-19 pandemic may impact higher education institutions' employee benefit programs and executive compensation in a number of ways. These impacts could be driven by the need to reduce costs due to declining enrollments, shrinking endowments, or government support, and recent legal changes that affect benefit programs.

Retirement Plans

Institutions may need to reduce or eliminate employer contributions to, or benefits under, broad-based retirement plans. Before doing so, they should confirm that they are not violating applicable tax and/or ERISA rules related to prohibited cutbacks. Further, they must comply with applicable notice

(including advance notice) obligations. An institution experiencing significant layoffs should likewise confirm that those layoffs have not resulted in what is known as a partial retirement plan termination, which would require full vesting of all affected plan participants.

Institutions implementing CARES Act changes to their retirement plans, such as special distribution and loan provisions for 403(b) and 401(k) plans, should: (i) amend their plan documents; and (ii) notify plan participants about these changes in accordance with fiduciary disclosure obligations. We are aware that some third-party administrators are discouraging proactive disclosure of CARES Act changes, which is contrary to applicable fiduciary standards.

Health and Welfare Plans

Recent guidance has delayed applicable deadlines for both plans and participants in connection with the pandemic. While certain deadlines may be delayed, in many instances plans will still be expected to meet applicable deadlines as soon as reasonably possible; thus, they should not rely on this guidance except to the extent necessary.

The deadlines for participants and beneficiaries to enroll in coverage following a special enrollment event (such as marriage, birth, or adoption) or a COBRA qualifying event have been extended during the outbreak. Deadlines for participants or beneficiaries to file claims and appeals also have been extended. Institutions will need to satisfy their fiduciary disclosure obligations to notify impacted individuals of these important extended deadlines. The changes to COBRA deadlines are of particular importance to the extent the institution has experienced recent layoffs or reductions in hours triggering COBRA rights for large groups of individuals. The spate of recent lawsuits challenging the adequacy of COBRA notices highlights the enhanced risk associated with failing to provide sufficient notice of applicable COBRA deadlines to participants and beneficiaries.

Institutions implementing CARES Act changes for health plans, such as new telehealth and COVID-testing and treatment coverage obligations, should: (i) amend their plan documents; and (ii) notify plan participants about these changes in accordance with fiduciary disclosure obligations. As noted above, these actions should be taken to comply with applicable fiduciary standards, regardless of contrary advice from some third-party administrators.

Executive Compensation

Institutions may face the need to cut back or restructure executive compensation packages. This may be particularly challenging for many tax-exempt higher education institutions given the need to comply with *both* Section 457(f) and Section 409A of the Internal Revenue Code. Under Section 457(f), taxation of nonqualified executive deferred compensation generally can be delayed only until vesting, and IRS guidance provides limited circumstances under which vesting criteria may be altered (and, thus, income taxation further deferred). Thus, even if an executive is willing to delay receipt of compensation it may not be possible to delay taxation under Section 457(f), or to avoid or mitigate potential excise taxes on executive compensation.

Employees Returning to Work

Institutions will have a number of benefits-related issues to address when employees return from layoffs or furloughs. For example:

- **Health and Welfare Benefits**: Institutions should review and carefully follow plan terms and applicable tax rules when (i) reenrolling returning employees; and/or (ii) collecting any premiums that were delayed during a period of absence. Additionally, if a look-back safe harbor is used to determine whether an employee is "full-time" and thus eligible for coverage, consideration should be given to the impact of the period of the furlough/layoff on this status.
- **Qualified Retirement Plans**: Institutions should consider how employees' absence from work impacts eligibility for retirement plan participation, and should remind 403(b) or 401(k) plan participants if they need to take affirmative action to restart contributions. Consideration also should be given to how any absence will impact an employee's vesting and benefit allocations or accruals under qualified retirement plans. Also, if a returning employee is receiving qualified retirement plan distributions as a result of the furlough/layoff, plan terms may require distributions to cease upon re-employment. If an employer wishes to amend its plan(s) to minimize the adverse impact on participants due to furlough/layoff, such amendments should be adopted by the end of the 2020 plan year.

Our Employee Benefits & Executive Compensation Practice is available to assist colleges and universities with these efforts.

TAX RELIEF

Institutions of higher learning impacted by the COVID-19 pandemic may be able to benefit from various forms of tax relief.

Payroll Tax Credits and Deferrals

The CARES Act provides an employer, including a higher education institution, payroll tax relief in two forms. First, subject to certain eligibility requirements and limitations, an employer (other than one that received a Paycheck Protection Program ("PPP") loan under the CARES Act) impacted by the COVID-19 pandemic is entitled to a fully refundable tax credit against its portion of Social Security taxes (6.2% of wages). The credit is equal to 50% of qualified wages paid through the end of 2020, up to a maximum credit of $5,000 per employee. If the employer has more than 100 full-time employees, however, the credit is only available with respect to wages paid to an employee that is not providing services. Second, every employer (other than one that has a portion of any PPP loan forgiven under the CARES Act) may defer payment of its portion of Social Security taxes that would be otherwise payable between March 27, 2020 and December 31, 2020. The deferred amounts are required to be paid over the next two years, with 50% of the deferred amount to be paid by the end of 2021, and the remaining 50% to be paid by the end of 2022.

For a higher education institution with fewer than 500 employees, the Families First Coronavirus Response Act ("FFCRA") provides a refundable tax credit against its portion of Social Security taxes. That credit is equal to the "qualified sick leave wages" and "qualified family leave wages" the employer pays under the FFCRA. There are, however, limitations on the amount of the credit. As a result, the relief might not fully offset the costs associated with providing leave payments for certain employees.

Public colleges and universities (as instrumentalities of their respective states) are currently ineligible for either of the credits described above. Additionally, there is no double-dipping: The CARES Act credit is not available with respect to wages paid that qualify for a FFCRA credit.

Existing Tax-Favored Disaster Relief Payments

A higher education institution may provide tax-free assistance to its employees and independent contractors who are experiencing distress of various kinds because of COVID-19. These "qualified disaster relief payments" include payments to individuals "to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster." The payments may cover a broad range of human needs and could be used not only for those who may have lost work, but also for those incurring costs related to child care, transportation, or other extraordinary expenses to continue working in essential services.

Elimination of Certain Charitable Contribution Limits

The CARES Act also expands deductions for charitable contributions to tax-exempt higher education institutions. Under the CARES Act, individual donors who do not itemize may deduct up to $300 of charitable contributions in addition to taking the standard deduction. Donors that itemize are allowed to fully deduct charitable contributions made in 2020. However, contributions made to establish a new, or maintain an existing, donor advised fund are not qualified contributions for purposes of this deduction and will be subject to existing limits.

Our Tax Practice can provide colleges and universities with more detailed analysis of the provisions described above.

PREPARATIONS FOR REOPENING

For many educational institutions, the shift to a "post-COVID" (or at least post-outbreak) world will be the defining event of a generation. In that world, the higher education community will face a series of challenges beyond current lived experience. Colleges and universities should proactively prepare for those challenges by thinking about reopening in phases.

Phase 1 requires analyzing the patchwork of "stay at home" orders to determine whether it is permissible to reopen the institution. In the absence of other judicial determinations, colleges or universities required to close under "stay at home" orders must wait for those orders to expire, terminate, or be modified before reopening. State and local governments may adopt phased reopening approaches that incrementally

authorize reopening and easing of restrictions for limited numbers and types of institutions at a time. While not binding, the Coronavirus Guidelines for America and the Guidelines for Opening Up America Again from the White House, will likely inform public expectations, particularly on topics where there is no applicable state or local order. These federal guidelines may also be indicative of, and help shape, evolving standards of care alleged in COVID-19-related litigation.

Phase 2 involves considering issues before reopening the institution, including policies such as social distancing, the use of expanded waivers to address potential litigation risks, and other measures to ensure health and safety. Many institutions, and potentially all colleges and universities, will be expected to develop and apply policies regarding personal proximity among students, employees, and third parties. Likewise, institutions may need to develop policies related to (i) personal protective equipment; (ii) temperature checks of students and employees; (iii) monitoring students and employees for symptoms indicative of coronavirus (i.e., testing, isolating, and contract tracing); and (iv) sanitizing classroom, living, and work spaces. Such policies will need to be designed and evaluated in light of federal guidance, state and local orders, and litigation risks. While employment law provides a framework for how these policies can be enforced with respect to employees, careful consideration will have to be given to their implementation as to students, potentially through amendments to housing agreements, student codes, or terms of enrollment.

Phase 3 involves considering issues when reopening the institution with a focus on educational and living spaces, travel, and vulnerable populations. Government orders and guidance, safety concerns, and reduced demand may all inform the decision of when or how to reopen, but in all events, institutions of higher education should outline clear policies for doing so. Those policies should include, where advisable, new "post-emergency" remote learning or telework guidelines, limitations on institution-related travel, and special accommodations for employees and students in vulnerable populations. If such provisions are not already in place, colleges or universities may need to consider amendments to terms of enrollment or similar documents to make clear that there may be circumstances that arise outside the control of the institution that necessitate reverting to alternative forms of delivering education, including on-line classes.

Phase 4 involves long-term strategic planning about educational models, government action, physical locations, and litigation. Among other things, institutions should consider the potential implications of (at least temporarily) reduced demand for an on-campus educational experience, immigration or supply-chain disruptions, and restrictions or limitations on government funding.

Each phase described above identifies issues that will arise for most colleges and universities—to varying degrees and in varying combinations—as reopening efforts unfold. This framework is a prompt to examine the specific facts of a matter and to help inform an institution's tactics and fundamental objectives. Our Government Regulation Practice is carefully monitoring the latest developments as portions of the country begin to "reopen," and is ready to advise colleges and universities as they begin that process themselves.

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ENDNOTES

1 A more detailed discussion of force majeure provisions is included later in this section.

2 See the “CARES Act” section for additional details regarding available funding and the certificate of agreement.

3 See the “Preparations for Reopening” section for additional guidance regarding reopening considerations.

4 See the “Monetizing Existing, Non-Core Assets” section for additional guidance.

5 See the “CARES Act” section for some recently enacted possibilities.