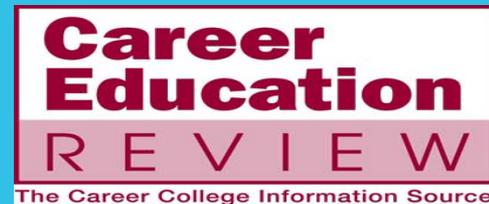


CAREER EDUCATION REVIEW  
AND  
RITZERT & LEYTON, P.C.

WEBINAR SERIES:  
"INCENTIVE COMPENSATION: WHO IS WITHIN  
THE BAN? WHO IS WITHOUT? AND HOW CAN I  
COMPENSATE MY EMPLOYEES?"

OCTOBER 15, 2015



# DISCLAIMER

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# PURPOSE OF WEBINAR

- Why should you care about incentive compensation?
  - Focus for the U.S. Department of Education (“ED”) in program reviews or audits;
  - Active area of litigation which can subject institutions to enormous costs and other burdens; and
  - Potential basis for loss of accreditation/licensure or other negative regulatory impact.

# PURPOSE OF WEBINAR

- Focus for government investigations;
- Focus for litigation;
  - Including manufacturing cases based upon (i) written policies or (ii) practices alleged to happen in contradiction to written policies.
- Can you manage your employees (along with their expectations), compensate them appropriately, and remain compliant?

# WHERE DOES THE BAN APPEAR?

- The regulation is at 34 C.F.R. § 668.14, which recounts what is necessary for an institution to do to participate in Title IV programs – namely, execute a Program Participation Agreement (“PPA”).
- The incentive compensation ban is therefore an integral component of the PPA.
  - Violations can lead ED (or a *qui tam* relator in the context of a False Claims Act lawsuit) to conclude, with support, that the school violated a material requirement of the PPA and that, potentially, all Title IV funds disbursed pursuant to that PPA were invalid.

# WHAT DOES THE BAN PROHIBIT?

- Prohibits a school from “provid[ing] any commission, bonus, or other incentive payment based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, to any person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the award of title IV.”  
34 C.F.R. § 668.14(b)(22)(i).

# POLL QUESTION #1

- Can the Campus President receive a bonus based upon EBITDA?

# POLL QUESTION # 1 - DISCUSSION

- ED imposes a two-part test:
  1. Is it a commission, bonus, or other incentive payment?
    - Broad definition: “[A] sum of money or something of value, other than a fixed salary or wages, paid to or given to a person or entity for service rendered.” 34 C.F.R. § 668.14(b)(22)(iii)(A).
  2. Is it paid based in any part, directly or indirectly, on success in securing enrollments or the award of financial aid?
    - Again, a broad definition with inherent flexibility.

# TO WHOM DOES THE BAN APPLY?

- ED's guidance states, "[P]ersons or entities that undertake or have responsibility for recruitment and decisions related to securing financial aid."
  - Thus, any employee, regardless of title or other/additional job duties, can be subject to the ban if they engage in "covered activities." Dear Colleague, GEN-11-05 (3/17/11).

# TO WHOM DOES THE BAN APPLY?

- However, ED does note that an employee subject to the ban must engage in a “covered activity.” These are:
  - “Targeted information dissemination to individuals;”
  - “Solicitations to individuals;”
  - “Contacting potential applicants; aiding students in filling out enrollment application information.”

Dear Colleague, GEN-11-05 (3/17/11).

## POLL QUESTION #2

- The College President was once an Admissions Rep, so he often turns up in the Admissions Office. He talks with Reps, shares strategies, offers advice, and has been known to observe enrollment discussions. He also sometimes steps in when he thinks a Rep is having trouble connecting with a student to talk about the value of a college education. Based upon the college's financial performance, he is looking forward to a bonus this year.

Can the College President receive a bonus without violating the ban?

## POLL QUESTION #2 - DISCUSSION

- First part of ED's two-part test:
  - A monetary bonus certainly constitutes prohibited compensation if the individual is a “covered” person.
  - Remember, rank, job title, executive status, written job duties, etc., have no bearing. Instead, ED's analysis focuses upon what actually occurs day to day with regard to actual work practices and activities.

## POLL QUESTION #2 - DISCUSSION

- Second part of the two-part test:
  - Under ED’s guidance, a senior executive or manager is not engaged in “covered activities” if he/she is engaged in “policy decisions . . . related to the manner in which recruitment, enrollment, or financial aid will be pursued or provided.”
  - Involvement in exclusively policy-related decision-making is not a “covered activity.”
- Burden is always on the institution to show the compensation was not prohibited (i.e., that one prong of the two-part test fails).

## POLL QUESTION #3

- The new Director of Admissions wants to energize her staff. She knows she cannot pay bonuses or provide gifts to Reps, so she starts a contest. The Rep who completes the most interviews in one week will receive four (4) hours of paid time off.

Does this contest violate the ban?

# POLL QUESTION #3 - DISCUSSION

- Are the recipients engaged in “covered activities” (and therefore “covered employees” under the ban)?
- Apply the two-part test:
  - Is it a commission, bonus, or incentive payment?
  - Is it paid in any part, directly or indirectly, upon success in securing enrollments?

# COVERED ACTIVITIES UNDER THE BAN.

- What are “covered activities?”
  - These are activities that, if engaged in, will subject an employee to the ban. ED’s guidance suggests that contact with a prospective student in just about any form constitutes a “covered activity.”
- Specifically, this could be contact through preadmission or advising, scheduling an appointment to visit the enrollment office, or involvement in a prospective student’s signing of an enrollment agreement or financial aid application.

# COVERED ACTIVITIES UNDER THE BAN.

- What is not a covered activity?”
- ED’s guidance provides the following examples of activities that are exempt from the ban:
  - “Broad information dissemination;”
  - “Advertising programs that disseminate information to groups of potential students;”
  - “Collecting contact information;”
  - “Screening pre-enrollment information to determine [if a student meets admissions standards];” and
  - “Determining whether an enrollment application is materially complete, so long as the enrollment decision remains with the institution.”

## POLL QUESTION #4

- Several Admissions Reps at the college do well with their general work duties (e.g., show up on time, act professionally, etc.). However, even after significant coaching from the Admissions Director, they continue to underperform enrolling students. The Admissions Director would like to terminate these underperforming Reps.

Would termination violate the ban?

# POLL QUESTION #4 - DISCUSSION

- In applying the two-part test, is termination something of value?
- Minimal guidance from ED on this issue, but some plaintiff's attorneys have attempted to proceed on this theory without success.

# POLL QUESTION #5

- Career Services personnel want to give small gifts (e.g., a \$5 Starbucks card; a \$20 Amazon card) to graduates who complete a form listing their job title, employer, wages, etc., which the school uses to report placement statistics.

Does providing these gift cards violate the ban?

# POLL QUESTION #5 - DISCUSSION

- Is it “a sum of money or something of value?”
  - Yes, so it is prohibited from that perspective.

BUT

- Is it “based in any part, directly or indirectly, upon success in securing enrollment?”

# SUCCESS IN SECURING ENROLLMENTS.

- How does the regulation define activities subject to the ban?
  - “[A]ctivities that a person or entity engages in at any point in time through completion of an educational program for the purpose of the admission or matriculation of students for any period of time or the award of financial aid to students.”  
34 C.F.R. § 668.14(b)(22)(iii)(B).

# SUCCESS IN SECURING ENROLLMENTS.

- ED's guidance also sheds light on this topic in defining "covered activities."
  - More specific than the regulations ("targeted information dissemination;" "solicitations to individuals;" "contacting potential . . . applicants)."
- Suggests the concern is with direct communications or interactions with students.
- This would be consistent with the ban's statutory purpose, which is "preventing an institution from providing incentives to its staff to enroll unqualified students." 67 Fed. Reg. 67053 (Nov. 1, 2002).

## POLL QUESTION #6

- The Admissions Director knows about the ban, but wants to motivate his staff. He promises new hires that if they enroll 50 students during their first 90 days, he will increase their salary by \$10,000. When the VP for Compliance storms into his office, the Director says, “I set that goal so high that nobody can make it. We’ll never have to adjust anyone’s salary.” This proves true and the school never adjusts any Rep’s salary by \$10,000.

Does making this type of promise violate the ban?

# POLL QUESTION #6 - DISCUSSION

- Under ED's two-part test:
  1. The individuals who will receive the payment are “covered persons” engaged in “covered activities” (because they are Reps, after all).
  2. A salary adjustment of \$10,000 is certainly a “sum of money or something of value.” It meets both prongs.

# POLL QUESTION #6 - DISCUSSION

- However, no money was actually paid by the college (i.e., nobody received a salary adjustment). Does this impact the analysis?
- Relevant considerations regarding this hypothetical relate back to the purpose of the ban when it was enacted in 2002.
- Is a promise alone sufficient?

# POLL QUESTION #7

- The Campus President wants to buy lunch for staff in the Admissions and Financial Aid Departments. She says that all staff in both departments are invited and that the school will provide training before lunch is served. The Financial Aid Director says some of his new recruits need to be packaging more students because he is underwhelmed with their performance so far. He does agree to let his more experienced FA Reps attend, though his “underwhelming performers” must stay and work the floor.

Does prohibiting some FA Reps from attending the luncheon violate the ban?

# POLL QUESTION #7 - DISCUSSION

- Again, look at the two-part test:
  1. Is a lunch “something of value?” (No, it does not depend upon which restaurant provides the food!)
  2. Is it provided “based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid?”
- Under the Campus President’s original proposal, no, it is neutral because all staff in both departments are invited.
- Under the FA Director’s proposed restrictions, there is significant potential for a violation.

# ADJUSTMENTS TO SALARY.

- For those employees engaged in “covered activities,” institutions are significantly restricted as to when (and how) they can make adjustments to salary that do not violate the ban.
- Under the old “safe harbor” ED allowed no more than two adjustments per calendar year. BUT these safe harbors were rescinded in July 2011.

# ADJUSTMENTS TO SALARY.

- Under current regulations, any time an employee receives “multiple [i.e., more than one] adjustments to compensation in a calendar year . . . is considered to have received such adjustments based upon success in securing enrollments or the award of financial aid.” 34 C.F.R. § 668.14(b)(22)(i)B.
- Possible for an institution to rebut that presumption, but this could prove difficult, timely, and expensive.

# ADJUSTMENTS TO SALARY.

- What factors can an institution use to evaluate its employees and make associated salary adjustments?
  - Seniority is specifically allowed by ED. However, the difficulty is ensuring consistency of application.

# ADJUSTMENTS TO SALARY.

- Other “standard evaluative factors,” such as:
  - Job knowledge and professionalism;
  - Analytic ability;
  - Initiative in work improvement; and
  - Clarity in communications.

# ADJUSTMENTS TO SALARY.

- Other “standard evaluative factors,” such as:
  - Job knowledge and professionalism;
  - Analytic ability;
  - Initiative in work improvement;
  - Clarity in communications;
  - Use and understanding of technology;
  - Accuracy;
  - Thoroughness;
  - Dependability;
  - Punctuality;
  - Adaptability;
  - Peer rankings;
  - Student evaluations; and
  - Interpersonal relations.

# ADJUSTMENTS TO SALARY.

- The burden is always on the school to maintain documentation of compliance with the ban (and thereby to show it complies with the PPA's terms).
- Is there objective data supporting the evaluations?
  - Beware: ED's guidance indicates that it will take action if it perceives that non-enrollment criteria is used to disguise enrollment-based criteria (think, "disguise," "pretext," and "sham.")

# ADJUSTMENTS TO SALARY.

- Are managers applying the same standards to similarly situated employees?
- Can they objectively document the basis for ratings they give to various employees?
  - E.g., database entries, real-time notes/observations, routinized reviews, etc.
- Are salary adjustments provided on an objective basis?
  - ED will “reverse engineer” your data to see if those receiving high rating on “standard evaluative factors” also, coincidentally, your highest performers in terms of enrollments.

# POLL QUESTION #8

- Is it a violation if a school sends flowers to (i) graduates or (ii) employers as a “congratulations” or “thank you?”

# POLL QUESTION #9

- Does it violate the ban to provide compensation or a bonus to Program Advisory Board members if they sometimes refer students to the school?

# POLL QUESTION #8 & 9 - DISCUSSION

- Remember to apply ED's two-part test:

1. Is the gift provided “something of value?”

2. Is a graduate or an employer engaged in “covered activities?”

# FUTURE CHALLENGES

- March 2015 OIG report (3/24/15) critical of FSA:
  - Rescinds the “Hansen Memo,” which stated ED’s position that violations of the ban did not result in financial harm and could be remediated by a fine.
  - “[I]nternal procedures and guidance discouraged FSA employees from using all allowable enforcement actions at their disposal.”
  - “[F]ines were the only enforcement actions that FSA used to punish violators of the [ban].”
- We anticipate even more focus on this area and harsher punishment for violations.

# FUTURE CHALLENGES

- Continuing area of ED's regulatory enforcement focus.
  - FY 2015 OIG work plan continues the trend of incentive compensation compliance as a priority initiative. This includes significant review and oversight of FSA's enforcement actions in this area.
- Remains a very active area for False Claims Act litigation (either actions brought by the Government or by whistleblowers on behalf of the U.S.).

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Mr. Leyton is co-founder and President of the Washington, D.C. area law firm of Ritzert & Leyton, P.C. and head of the firm's Higher Education Practice Group. Since 1980, Mr. Leyton has represented many institutions of higher education, publicly traded companies, private investment groups and others including foreign institutions with respect to resolving regulatory/compliance matters at the federal and state levels and before accrediting agencies (national, regional and programmatic) and on occasion with respect to legislative matters. His practice also includes achieving desired transactional results through mergers, acquisitions and reorganizations.

The firm's higher education practice group of seven attorneys are involved on a daily basis with matters concerning the U.S. Department of Education (DOE), national, regional and programmatic accrediting agencies, state licensing and other regulatory agencies, other third parties, and when necessary litigation. Mr. Leyton has served three two-year terms on the Association of Private Sector Colleges and Universities and predecessor board of directors and is a frequent speaker on postsecondary education matters. He received his law degree from Catholic University School of Law in 1980, a master's degree in public administration from American University in 1974, and a bachelor's degree in political science from Antioch College in 1971.



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