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# ISLAMIC SOCIETY OF NORTH AMERICA (ISNA) WEST COAST EDUCATION FORUM

## Legal Issues and Concerns for Islamic Schools

*1/18/2014*

*PRESENTED BY:*

Michael Blacher



# Legal Issues and Concerns for Islamic Schools

ISNA West Coast Education Forum | January 18, 2014


Presented by: Michael Blacher

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## Legal Issues and Concerns for Islamic Schools

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### Agenda

- Ministerial Exception
- Social Media, Privacy, and Free Speech
- Disability Discrimination
- Harassment and Retaliation
- Wage and Hour Law
- Arbitration
- Breach of Contract
- Waivers

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## Ministerial Exception



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**What is the Ministerial Exception?**

- A Constitutional Bar Against “Ministers” Suing Their “Church” for Discrimination
  - First Amendment
    - “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”
    - Establishment Clause
      - Government Cannot be Involved in Selection of a “Minister”
    - Free Exercise Clause
      - Government Cannot Impose an Unwanted “Minister”

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**Contrast – Title VII Exceptions**

- Title VII allows religious organizations to limit employees “connected with carrying on . . . of its activities” to members of *own faith* (42 U.S.C. 2000e-1(a))
- Similar for parochial schools (42 U.S.C. 2000e-2(e))
  - Covers more than ministers
  - But only applies to certain religion claims

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**Contrast – California FEHA**

- Fair Employment and Housing Act (“FEHA”) prohibits race, gender, age, disability, and other discrimination
  - Covers more than ministers
  - But only applies to FEHA claims
- Does not apply to *religious* non-profit corporation.

Gov. Code, § 12926(d)

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**Who is a Minister?**

- In 2012 United States Supreme Court Recognized Ministerial Exception for First Time

*Hosanna–Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (2012) 132 S.Ct. 694.*

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**Who is a Minister?**

Four Key Factors from Supreme Court's Decision:

1. Church Held Perich Out as a Minister;
2. Significant Degree of Religious Training and Formal Process of Commissioning;
3. Perich Held Herself Out as a Minister (by claiming parsonage); and
4. Job Duties had a Role in Conveying Church's Message and Mission.

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**California Case**

- Church terminates pre-school teacher for living with her boyfriend and raising child together without being married.
- Court finds she is "minister," a spiritual leader in her role as teacher.
  - *Henry v. Red Hill Evangelical Lutheran Church of Tustin* (2011) 201 Cal.App.4th 1041.

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## Social Media, Privacy, and Free Speech



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### Why Issues Arise In Social Media

- Personal Life Overlaps with Professional Life
- Misunderstanding the Technology
  - Privacy Settings, Groups, Being Tagged
- Misunderstanding Legal Rights and Obligations
  - Discipline for Off-Duty Conduct
  - Privacy Rights

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### Types of Issues that Arise

- Harm to Reputation of the School
- Inappropriate Communications with Student/Recent Alums/Other Employees
- Liability:
  - Harassment/Discrimination/Retaliation; Defamation;
  - Violation of Third Party Privacy
- Mandated Reporter Issues

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### When Should School be Involved?

- Sliding Scale



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### Harm to Reputation

An email to students blaming the “Republican/Tea Party controlled House of Representatives” for the shutdown U.S. Census Bureau website blackout.

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### Privacy Rights

- Balancing test:
  - (1) Does the employee/student have a reasonable expectation of privacy (both objectively and subjectively); and
  - (2) Was the school's intrusion into that privacy reasonable?
    - Taking into consideration the school's legitimate business needs and the offensiveness of the intrusion.

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**Relevant Documents**

- Enrollment Agreement
- Employee Agreement
- Student/Parent Handbook
- Employee Handbook
- Anti-Bullying Policy
- Anti-Workplace Violence Policies
- Anti-Harassment and Discrimination Policies
- Electronic Use Policies
- Code of Ethics

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**Social Media**

Employer Violated National Labor Relations Act by Terminating Employee Based on Facebook Posts Regarding Working Conditions.

*Butler Medical Transport, LLC and Michael Rice and William Norvell, Case 5-CA-97810.*

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**Free Speech**

- Generally, Federal or State Constitution not applicable to independent schools
  - No “state action”
- **High School Student Free Speech Exception:**
  - Private secondary school may not discipline high school students solely on the basis of speech that is protected by the First Amendment (Ed. Code § 48950).
  - Does **not** apply to:
    - Harassment, threats, or intimidation
    - Reasonable time, place, and manner restrictions
    - Speech in religious private secondary schools, to the extent inconsistent with religious tenets of school.

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## Disability Discrimination



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### Disability Discrimination

University Did Not Discriminate Against or Fail to Accommodate Employee with ADD Where Diagnosis Came After Her Termination

*Fuoco v. Lehigh University* (2013) --F.Supp.2d--, [2013 WL 5964016]

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## Harassment and Retaliation



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**Harassment**

Expands the definition of “sexual harassment” under FEHA

- Clarifies that harassment does not need to be motivated by sexual desire to be considered sexual harassment.

**SB 292**  
(Amends Section 12940 of the Government Code)

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**Retaliation**

Co-Worker's Sexual Comments Did Not Create Hostile Work Environment, But Employee's Termination Following Her Complaints May Constitute Unlawful Retaliation.

*Westendorf v. West Coast Contractors of Nevada, Inc. (9th Cir. 2013) 712 F.3d 417.*

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**Wage and Hour Law**



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**Applicable Laws**

- Fair Labor Standards Act (FLSA)
- California Labor Code
  - Especially Labor Code § 515.8
- State Wage Orders
  - Wage Order 4
- Education Code wage provisions do NOT apply

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**Categories of Exemptions**

Three Main Categories of Job Positions that are Overtime Exempt:

- Executive
- Administrative
- Professional

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**Typically Exempt Positions**

- School administrators
- Business manager
- Human resources or personnel manager
- Admissions director
- Academic counselor/advisor
- Deans and department heads

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### Which Teachers May Be Exempt?

- California Labor Code § 515.8
  - Primary duty of teaching at a K-12 school
  - Customarily and regularly exercises discretion and independent judgment as a teacher
  - Baccalaureate or higher degree from accredited institution, or is in compliance with CCTC requirements or the equivalent in another state.
  - **Earns at least two times the minimum wage for 40 hours worked.**

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### Minimum Wage

Raises Minimum Wage

- Effective July 1, 2014, minimum wage will increase to \$9.00 per hour
- Effective January 1, 2016, minimum wage will increase to \$10.00 per hour
- May affect which employees are exempt from overtime pay.

**AB 10**  
(Amends Section 1182.12 of the Labor Code)

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### Documenting Pay

Reminder:

- California Wage Theft Prevention Act
  - Rate of Pay
  - Overtime
  - Workers' Compensation Information
    - [http://www.dir.ca.gov/dlse/LC\\_2810.5\\_Notice.pdf](http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf)
    - <http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html>

**AB 469**  
(Amends Sections 98, 226, 240, 243, 1174, and 1197.1 and adds Sections 200.5, 1194.3, 1197.2, 1206, and 2810.5 to, the Labor Code)

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**Independent Contractor**

- Department of Labor Looks at "Totality of the Circumstance:"
  - The extent to which the services rendered are an integral part of the principal's business;
  - The permanency of the relationship;
  - The amount of individual investment in facilities and equipment;
  - The opportunities for profit and loss;
  - The degree of independent business organization and operation;
  - The nature and degree of control by the principal; and
  - The degree of independent initiative, judgment, and foresight exercised by the one who performs the services.

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**Arbitration**



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**Arbitration**

Agreement to Arbitrate Found Unconscionable Where Employee Forced to Sign and Several Provisions Favored Employer.

*Vega v. Frandeli Group LLC, 2013 WL 5652489.*

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## Breach of Contract



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### Tuition

School's Tuition Agreement Requiring Full Year's Tuition if Student Withdraws After Deadline is Permissible.

*W. Res. Academy v. Franklin*, 2013 WL 5569210.

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## Waivers



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**Waivers**

Court Excludes School's Trip Waiver and Release Agreement as Void as a Matter of Public Policy and Unenforceable.

*Munn v. Hotchkiss School (2013) 933 F.Supp.2d 343.*

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