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## Litigation Update

# Federal Litigation and Enforcement Trends for Colleges and Universities Part 2: Downstream Litigation Exposure and Risk Mitigation Strategies

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Higher education institutions continue to navigate a complex litigation environment shaped by aggressive federal oversight, heightened plaintiff activity and a fast-evolving regulatory landscape. Part 1 of our series examined the core federal enforcement focus areas — False Claims Act (FCA) exposure, civil rights and Title IX enforcement, and research compliance. This second installment explores the downstream litigation risks arising from these enforcement trends. Key areas include athletics and Name, Image and Likeness (NIL) disputes; cybersecurity and data privacy class actions; whistleblower retaliation litigation; and institutional strategies for mitigating these emerging exposures.

The third and final article in this series will analyze the Federal Trade Commission's (FTC's) evolving jurisdictional reach over nonprofit institutions, including the agency's increased focus on data security standards and the commercial character of modern university operations.

### I. Athletics, NIL and the Expansion of Private Claims

Institutions face increasing litigation connected to athletics governance and the changing regulatory treatment of NIL rights. After the NCAA's loosening of NIL restrictions, federal and state courts have seen a rise in suits alleging unfair competition, contract interference and violations of state NIL statutes. These cases often target athletic departments and affiliated organizations, asserting that institutional policies improperly restrict NIL opportunities or fail to ensure equitable access.

Simultaneously, Title IX-based athletic equity claims continue to surface, particularly as universities revise scholarships and funding structures in the NIL era. Plaintiffs are testing theories that NIL compensation — when facilitated through institutional channels — must be administered in a gender-equitable manner. Enforcement risk is amplified when internal NIL collectives, athletic foundations or third-party sponsors operate under ambiguous governance or compliance policies.

#### *Practical Implications*

- Universities should establish centralized NIL oversight mechanisms to align athletics, compliance and legal teams.
- Equitable resource allocation and transparent contract policies can help preempt disparate impact allegations.

- Governance documentation that aligns protocols and formalizes touchpoints between athletics departments, advancement offices and NIL entities can demonstrate a cohesive compliance framework in litigation or regulatory review.

## II. Cybersecurity, Data Privacy and Class Action Risk

The expanding digital footprint of higher education has made universities high-value targets for cyber intrusions and data breaches. Recent years have seen a surge in class actions following unauthorized disclosures of student records, healthcare data and research information. Plaintiffs increasingly rely on state privacy statutes such as the California Consumer Privacy Act (CCPA), and often cite violations of federal standards like FERPA and HIPAA as evidence of negligence in broader tort claims.

Beyond breach events, litigation risk arises from alleged failures to adequately disclose data practices or safeguard third-party vendor relationships. Investigations by the Department of Education's Office for Civil Rights (OCR) and the FTC often run in parallel with civil litigation, particularly where universities are recipients of federal funds supporting sensitive research or health initiatives. While the FTC's jurisdiction over nonprofit universities is generally limited, the agency may assert authority if an institution's activities carry a significant commercial character or if it operates for the profit of its members.

### *Key Institutional Steps*

- Centralize privacy oversight across athletics, advancement and research to ensure consistent data disclosures and de-siloed compliance monitoring.
- Formalize contractual vendor safeguards, mandatory notification windows and discretionary "right-to-audit" provisions within all enterprise-wide agreements.
- Implement post-incident protocols that prioritize privileged legal assessments of reporting obligations and readiness for parallel regulatory inquiries.

## III. The Rise of the 'Relator': Qui Tam and Retaliation Risks

The nexus of expanded federal funding and aggressive whistleblower incentives has transformed internal grievances into high-stakes qui tam litigation. Beyond traditional research misconduct, plaintiffs — acting as relators — are increasingly leveraging the FCA to challenge institutional certifications regarding cybersecurity standards (e.g., using the DOJ's "Civil Cyber-Fraud Initiative") and civil rights compliance.

Retaliation claims under 31 U.S.C. § 3730(h) and Title IX present a distinct, often more volatile, litigation track. These claims can survive even if the underlying fraud allegations are dismissed, as courts focus on whether an institution's "adverse action" was even partially motivated by a whistleblower's protected activity. For universities, the risk is compounded by parallel enforcement: A single internal report can trigger a sealed DOJ investigation while simultaneously fueling a public employment lawsuit.

### *Strategic Mitigation*

- Insulate investigative functions from personnel decision-makers to preclude "knowledge contamination" and neutralize inferences of retaliatory intent.
- Maintain a privileged, contemporaneous record of nonretaliatory performance or budgetary reasons for adverse actions involving individuals in protected activity.
- Deliver targeted training to administrators on the expansive statutory scope of "protected activity," emphasizing that even informal internal inquiries regarding grant management or institutional equity can trigger robust antiretaliation protections under the FCA and Title IX.

#### IV. The Integrated Defense: Strategic Evidentiary Readiness

The contemporary litigation landscape for higher education is characterized by synergistic risk, where regulatory inquiries and private class actions frequently draw from the same factual record. While federal regulators and the plaintiffs' bar operate independently, their interests often align; the factual record generated during a federal probe — whether via civil investigative demands or administrative audits — often provides the foundational discovery for high-stakes civil complaints. In this environment, a university's defense is anchored in evidentiary readiness: the ability to demonstrate that institutional actions were governed by consistent, well-documented and legally sound protocols long before litigation commenced.

##### *Strategic Outlook*

- **Prioritize Privileged Risk Assessments:** Transition from administrative gap analyses to counsel-led privilege reviews for high-stakes data and research integrity audits. This ensures that internal self-evaluations — critical for institutional improvement — do not inadvertently become discoverable admissions in subsequent litigation.
- **Regulatory and Public Alignment:** Resolve discrepancies between public-facing privacy representations, student handbooks and federal certifications. Inconsistent messaging across these domains is a primary vulnerability used by relators to establish materiality in FCA litigation.
- **Pre-Litigation Record Development:** Adopt a governance model that prioritizes the contemporaneous documentation of institutional intent. Every critical decision — from vendor onboarding to adverse personnel actions — must be memorialized with a nonretaliatory record that anticipates the scrutiny of both a jury and a federal investigator.

As federal enforcement and private litigation become increasingly intertwined, universities must treat compliance not as a static administrative requirement, but as a dynamic component of litigation strategy. Disputes in 2026 are rarely confined to a single regulatory silo; they bleed across departments, fueled by a sophisticated plaintiffs' bar that leverages administrative scrutiny to drive civil liability. By modernizing governance structures and ensuring that every internal inquiry is conducted with an eye toward future defensibility, institutions can mitigate the compounding risks of this unprecedented enforcement era.

The concluding installment of this series will examine the shifting boundaries of FTC oversight, specifically analyzing the agency's use of "commercial character" tests to challenge traditional nonprofit exemptions and its heightened expectations for institutional data security.



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