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Guiding Employers & Educators

SHPC Legal Update

THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

DECEMBER 2016

IN THIS ISSUE

Finding The Right Fit: What Schools And Other Non-Profits Should Know About Updating Their Bylaws

By Gary D. Finley

"Bylaws" is a term that may conjure up images of a dusty tome concerning archaic points of parliamentary procedure. Those who have served on the board of trustees of an independent school or other non-profit organization have likely encountered the term and may have a more complex understanding of what bylaws do, and how they relate to effective governance.

Most of the time, however, bylaws are little more than an afterthought for most trustees, the nearly imperceptible background music underlying board meetings. Few give much consideration to bylaws except, perhaps, when a committee of the board is tasked with updating the bylaws, before board elections, or when an issue arises as to the board's authority to take a certain action.

This is, in fact, how it should be. Bylaws are designed to be unobtrusive and facilitate an organization's smooth operation.

But this does not mean that there is one perfect set of bylaws – one magic set of provisions that can be adopted wholescale to ensure the proper functioning of your board. What is tricky about bylaws – and also makes them more interesting than they are usually given credit for – is that *your organization's bylaws can and should be as unique*

continued on page 2

Massachusetts SJC Rejects Claim Of Union Evidentiary Privilege

By Brian M. Doyle

In a matter of first impression in the Commonwealth, the Massachusetts Supreme Judicial Court ("SJC") recently declined to recognize a new type of evidentiary privilege that would protect communications between union members and union officials from disclosure outside of a labor dispute setting. The SJC concluded, in *Chadwick v. Duxbury Public Schools*, 475 Mass. 645 (2016), that the appropriateness of any such privilege was a matter for the Legislature to decide, and that there was no evidence that the Legislature had intended to create such a privilege.

Background

The issue arose as a result of a discrimination and retaliation lawsuit filed against the Duxbury Public Schools by a former English teacher, Nancy Chadwick. Chadwick suffered from post-traumatic stress disorder, which was allegedly exacerbated by the conduct of her department chair. As a result of continuing performance issues, Chadwick was eventually placed on a performance improvement plan, and subsequently was dismissed from the Duxbury Public Schools at the end of the 2014-2015 school year.

In the course of discovery, the Duxbury Public Schools sought from Chadwick all communications concerning her claims, including communications she had with the Duxbury Teachers Association, the union representing teachers in

continued on page 5

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SHPC LEGAL UPDATE: THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW **DECEMBER 2016**

continued from page 1

Finding The Right Fit: What Schools And Other Non-Profits Should Know About Updating Their Bylaws

as your organization itself. Of course, bylaws need to fit the specific dictates of applicable laws. If they do not, board actions can be called into question, and an organization's non-profit status may even be challenged. But, just as importantly, an organization's bylaws need to be the right fit for its philosophy, aspirations, and actual practices.

Updates To Bylaws

It is important for every non-profit organization to review and update its bylaws periodically. The board committee tasked with this responsibility needs to have an intimate knowledge of both the organization itself and the board's current and aspirational practices. Working closely with experienced legal counsel, the committee should strive to create a document that avoids potential roadblocks to effective governance but is also consistent with legal requirements and best practices.

Below is a non-exhaustive list of some of the most important items to consider when reviewing and updating your organization's bylaws:

General Provisions – Non-profit bylaws usually include an introductory section with various provisions required by state law. One issue frequently addressed is whether the organization has "members," in addition to trustees. Many schools and other non-profits choose not to have members, while others prefer to have such a dual governance structure.

The "General Provisions" section typically also addresses the organization's purpose and non-discrimination policies. As these provisions go to the heart of a non-profit's mission, and bear directly on its non-profit status, they should be amended only upon careful consideration and consultation with experienced legal counsel.

Board Of Trustees – Bylaws normally include a section detailing the composition and functioning of the board itself. This section addresses, among other matters, the powers and responsibilities of the board, any requirements for board membership, the process by which trustees are elected, when and how often board meetings are held, and how many trustees constitute a quorum needed for the board to act.

> "It is important for every non-profit organization to review and update its bylaws periodically."

Updating these provisions requires careful consideration of a number of issues, including:

- The "right" number of trustees. Often, this is specified as a minimum and maximum, rather than a specific number. In general, the board should be large enough to allow for a diversity of perspectives and appropriate distribution of responsibilities, but not so large as to impede efficient governance.
- Whether to provide for trustee term limits and "staggered" board terms. Decisions on these issues can impact a board's institutional knowledge.
- Whether the Head of School (or Executive Director) is automatically a member of the board, in a voting or non-voting capacity.

Officers And Agents – Non-profit boards typically include a number of officers, such as a chair (or president), vice-chair, treasurer, and clerk. We recommend that bylaws contain a section specifying, among other things, how officers are elected, what qualifications they must have, and what responsibilities they hold.

Resignations, Removals And Vacancies – From time to time, trustees decide to step down before their terms are up. In other cases, a board may find it necessary to remove a "problem" trustee, such as one who consistently disrupts or fails to attend board meetings. The bylaws should include a section covering such changes, including potential grounds for trustees to be removed, the board vote required for a removal (*e.g.*, a two-thirds majority), and the process for replacing a member who has resigned or been removed.

Committees – Bylaws often provide for a number of standing committees – sometimes too many. We recommend revising bylaws to include only those committees that actually exist and are necessary for effective governance (such as an executive committee and finance committee). Bylaws should also allow for the creation of additional committees as needed, whether permanent or *ad hoc*.

Head Of School/Executive Director – One of the most important roles of the board of an independent school or other non-profit is the selection and oversight of the Head of School or Executive Director, who acts as the organization's CEO. Bylaws should include a section summarizing the responsibilities of the Head of School or Executive Director and outlining his or her relationship with the board.

Compensation – Generally, trustees of schools and other non-profits are not paid for their board service. This section of the bylaws confirms that fact, and also describes the role that the board plays in establishing the compensation levels of the Head of School/Executive Director and other senior administrators.

Indemnification – Bylaws typically include a section defining the circumstances under which trustees and officers will be indemni-

continued on page 3

continued from page 2

Finding The Right Fit: What Schools And Other Non-Profits Should Know About Updating Their Bylaws

fied should they find themselves embroiled in a lawsuit stemming from their service to the organization. These provisions should be carefully reviewed by counsel to ensure compliance with legal requirements and best practices.

Conflicts Of Interest – Trustees sometimes have direct or indirect financial interests in the school or other non-profit, such as ownership of a company with which the organization does business. It is important that the bylaws include a section detailing when such potential conflicts of interest arise, and how they will be handled (*e.g.*, recusal of a trustee from discussion and voting on matters in which he or she has a financial or other personal interest).

Amendments – Finally, the bylaws should include a section detailing how they may be amended – for instance, notice requirements for proposed amendments, and the board vote required for their approval (*e.g.*, a two-thirds majority). State law frequently prescribes requirements for bylaw amendments, so legal counsel should be consulted on this subject.

Conclusion

In drafting and amending bylaws, there is no one-size-fits-all solution. Trustees are in the best position to understand the mission of their organization and how the board can function most effectively. As such, they are typically the key players in reviewing and amending bylaws.

At the same time, enlisting experienced legal counsel to assist in this process is critical to ensure that revisions to your bylaws protect your organization's interests and are compliant with all legal requirements.

We frequently assist schools and other non-profits with reviewing and updating their bylaws, and we would be happy to help guide your organization through that process.

Schwartz Hannum Attorneys Named To Super Lawyers® List

The Firm is thrilled to announce that three of our attorneys were named to the 2016 ***Massachusetts Super Lawyers***® List! We believe that this honor is a team effort that comes from the excellent work of every employee at the Firm.



Sara Goldsmith Schwartz, William E. Hannum III, and **Jaimie A. McKean** were selected for inclusion in the 2016 Massachusetts Super Lawyers® list in the area of Employment & Labor Law. Sara and Will were first acknowledged by Super Lawyers® in 2004. This is Jaimie's third year selected for inclusion, after previously being named to the Rising Stars List from 2008-2013.

Schwartz Hannum is proud of our Super Lawyers and we congratulate each of them on this achievement. We also extend our gratitude to the ***entire*** Schwartz Hannum team for their continued hard work and service.

FLSA Violations Can Be Costly For H-2B Employers

By Julie A. Galvin

A federal judge recently approved a settlement in excess of $700,000 paid by a Pennsylvania landscaping company, Earth Care, Inc., to resolve claims brought against it under the Fair Labor Standards Act ("FLSA") by Mexican workers who were employed in the U.S. under the H-2B visa program. The plaintiffs' court complaint accused Earth Care of taking advantage of foreign workers who were unfamiliar with their rights by failing to pay them the wages required under the terms of their H-2B visas and the FLSA.

This costly settlement serves as an important reminder that employers of H-2B workers need to ensure that their wage practices comply with all applicable federal and state wage laws, as well as the immigration laws.

The H-2B Visa Program

The H-2B visa program was created in 1986 as part of an amendment to the Immigration and Nationality Act ("INA"). H-2B visas are used to fill jobs in a variety of temporary circumstances, such as seasonal or peak-load employment.

Employers participating in the H-2B program must first obtain a temporary labor certification from the Department of Labor, certifying that there are no willing and qualified U.S. workers available to perform in the positions at issue and that U.S. workers will not be harmed by the hiring of foreign workers. As such, employers are required to pay H-2B workers at least the prevailing wage or the minimum wage for the positions, whichever is higher.

Wage Requirements For H-2B Employers

It is important for employers that hire H-2B workers to bear in mind that such workers are protected under the FLSA, as well as the immigration laws.

The FLSA establishes minimum wage and overtime requirements for employers, as well as other worker protections. Among other provisions, the statute prohibits employers from making certain deductions from pay, such as for tools, uniforms or similar expenses, if such deductions would bring a worker's pay below the required minimum hourly wage.

Under prior immigration regulations, including those in effect when Earth Care filed for the H-2B visas at issue, H-2B employers were permitted to deduct transportation expenses and visa fees from the wages paid to foreign workers, so long as doing so did not bring an employee's pay below the minimum rate set by the FLSA in the first week of employment.

Recently, however, new H-2B regulations were promulgated. Under those new regulations, employers must pay for or reimburse H-2B workers for transportation expenses or visa fees during the first week of employment, regardless of the overall compensation paid to such workers.

Earth Care's Alleged Violations

The lead plaintiff in the Earth Care case, which was conditionally certified as a class action, was Rogelio Ortega Hernandez. Mr. Ortega worked as a seasonal laborer for Earth Care under the H-2B visa program from 2010 through 2014.

In his complaint, Mr. Ortega alleged that he was paid less than the required prevailing wage rate for the work that he performed. Further, according to Mr. Ortega, Earth Care made improper deductions from his and other H-2B workers' paychecks, including for visa and travel expenses, bringing their wages below the required minimum rates. Finally, Mr. Ortega alleged that Earth Care did not reimburse those workers who completed their terms of employment for their return transportation costs to Mexico, as required under the H-2B regulations.

Under the settlement approved by the court, Earth Care, while denying liability, agreed to pay a total of more than $700,000 to the H-2B workers, in order to compensate them for their alleged lost wages and the improperly deducted travel and visa costs. In addition, Earth Care agreed to pay Mr. Ortega's attorneys' fees.

Recommendations For Employers

Thus, the Ortega lawsuit proved to be an expensive lesson for Earth Care. Employers using the H-2B or other temporary worker visa programs would be wise to take a number of important steps to avoid similar pitfalls:

- Review the wage rates of all foreign workers, including those working under H-2B visas, to ensure they are in compliance with all requirements, including prevailing wage standards, as well as federal and state minimum wage and overtime laws;
- Ensure that workers are not charged for work-related expenses in a manner not permitted under the immigration laws or the FLSA;
- Provide regular training to managers, HR personnel and payroll employees on these wage requirements; and
- Contact experienced employment or immigration counsel with any questions about these issues.

Please feel free to contact us if you have questions about the Earth Care settlement, or about any other issues relating to H-2B or other employment visas. We routinely assist employers with such matters and would be happy to help.

continued from page 1

Massachusetts SJC Rejects Claim Of Union Evidentiary Privilege

the school system. Chadwick objected to producing such communications, asserting that they were shielded by a union member-union privilege. On this basis, Chadwick withheld 92 e-mail communications from disclosure.

The School moved to compel production of the e-mails, and Chadwick responded with a motion for a protective order. The Superior Court declined to issue a protective order or to recognize the existence of a union member-union privilege, and ordered Chadwick to turn over the communications. Chadwick filed an interlocutory appeal, which was referred to a panel of the Appeals Court and subsequently transferred to the SJC.

SJC Declines To Recognize A Privilege

Chadwick based her privilege argument on M.G.L. c. 150E, the statute establishing the collective bargaining rights of Massachusetts public employees, including public school teachers. The statute grants public employees the right to bargain collectively over "wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion." In addition, c. 150E makes it a prohibited practice for an employer to "[i]nterfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter," or "[d]ominate, interfere, or assist in the formation, existence, or administration of any employee organization."

Notably, the Massachusetts Labor Relations Commission has interpreted c. 150E as protecting the confidentiality of communications between union members and union officials in the context of labor disputes. *See, e.g., Bristol County Sheriff's Dep't,* 31 M.L.C. 6, 17 (2004); *City of Lawrence & Lawrence Patrolmen's Ass'n,* 15 M.L.C. 1162, 1165-66 (1988). Chadwick argued that, in order to secure the collective bargaining rights enshrined in the statute, c. 150E should be read as implicitly creating a similar union member-union privilege in the context of civil lawsuits.

Rejecting Chadwick's argument, the SJC held that the provisions of c. 150E on which Chadwick based her privilege claim did not apply to a civil action such as Chadwick's discrimination suit against the Duxbury Public Schools. In the SJC's words, Chadwick's dispute had nothing to do with "the formation, existence, or administration of any employee organization." Finding that the "plain and unambiguous language" of c. 150E restricted its application to the collective bargaining context, the SJC concluded that it could not find that the Legislature "contemplated a necessity to protect the confidentiality of union member-union communications in a private lawsuit brought by a union member against the employer."

Having rejected Chadwick's arguments based on c. 150E, the SJC further declined to create a common law privilege shielding communications between a union member and her union. The SJC stated that the Legislature was the appropriate body to decide whether to create such a privilege.

What Does This Mean For Employers?

Employees often seek advice and counsel from their unions on matters that fall outside of the labor relations arena, and through the *Chadwick* decision, the SJC has made clear that those communications are not privileged from discovery. Thus, a Massachusetts employer faced with a lawsuit brought by a union-represented employee, arising outside the context of a labor dispute, should consider tailoring its discovery requests to encompass any relevant communications between the employee and his or her union officials.

Please feel free to contact us if you have any questions about the Chadwick *decision or any related issues.*

Schwartz Hannum Recognized As A *"Best Law Firm"* In U.S. News-Best Lawyers® 2017 Rankings

Schwartz Hannum is pleased to announce it has been ranked in the 2017 "Best Law Firms" list by *U.S. News & World Report* and *Best Lawyers*®. The Firm was recognized in the following areas for the Boston area:

TIER 1

- **Labor Law - Management**

TIER 3

- **Employment Law - Management**
- **Litigation - Labor & Employment**

The 2017 Edition of "Best Law Firms" includes rankings in 74 national practice areas and 122 metropolitan-based practice areas. Ranked firms, presented in tiers, are listed on a national and/or metropolitan scale. Receiving a tier designation reflects the high level of respect a firm has earned among other leading lawyers and clients in the same communities and the same practice areas for its abilities, its professionalism and its integrity.

This is the first year the Firm has been recognized in these prestigious listings. We would like to thank the entire Schwartz Hannum team and our clients for their continued support.

New Vermont Statute Highlights Continued Expansion Of Paid Sick Leave Laws

By Soyoung Yoon[1]

Effective January 1, 2017, Vermont will require employers to provide paid sick leave to their employees. Employees in Vermont will initially be eligible to accrue and use up to 24 hours of paid sick leave annually, and that number will increase to 40 hours annually two years after the statute goes into effect.

Four other states (Connecticut, California, Massachusetts, and Oregon) and numerous municipalities have adopted paid sick leave laws in recent years, and similar measures have been proposed in many other jurisdictions. Employers should monitor these developments closely and ensure that they are in compliance with all applicable paid sick leave laws.

Vermont Paid Sick Leave Law

The most significant provisions of the new Vermont statute are summarized below:

Employer Coverage. All employers doing business in Vermont are covered by the law, regardless of size. However, employers with five or fewer employees working 30 hours or more per week will not be subject to the new mandate until January 1, 2018. In addition, new businesses are exempt from the statute's requirements for a period of one year after they have hired their first employee.

Employee Eligibility. In general, employees are eligible to accrue and use paid sick time if they work an average of 18 hours or more per week. Certain categories of employees, however, are excluded from eligibility, including federal employees, some state employees, certain temporary and per diem employees, and employees under the age of 18.

Accrual And Use Of Paid Sick Time. Eligible employees must be allowed to accrue one hour of paid sick time for every 52 hours worked. Between January 1, 2017 and December 31, 2018, employers may limit an employee's accrual and use of paid sick time to 24 hours in a 12-month period. After December 31, 2018, that annual cap will rise to 40 hours.

> "In general, employees are eligible to accrue and use paid sick time if they work an average of 18 hours or more per week."

Waiting Period. Employers may require newly hired employees to wait for up to one year before using accrued paid sick time. However, eligible employees are entitled to begin accruing paid sick time immediately upon commencing employment.

Use Of Paid Sick Time. An eligible employee may use accrued paid sick time for any of the following purposes:

- To address the employee's own illness, injury, or other need for professional diagnostic, preventive, routine, or therapeutic health care.
- To assist a close relative in obtaining treatment from a health-care provider, or to attend an appointment relating to the relative's long-term care. (The statute specifies which relatives are covered by each of these requirements.)
- To assist a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child who is a victim of domestic violence, sexual assault, or stalking, or who is relocating for one of those reasons.
- To care for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, if the school or business where the relative is normally located during the employee's workday is closed for public health or safety reasons.

Increments Of Use. Employees generally must be allowed to use accrued sick time in the smallest increments that the employer's payroll system uses to account for other absences. However, employees need not be permitted to use accrued sick time in increments shorter than one hour.

Notice. Employers may require employees to provide notice as soon as practicable of their intent to take sick time and the expected duration of their absence. In addition, employers may require employees to make "reasonable efforts" to avoid scheduling routine or preventative health care during regular work hours.

Carryover/Payout. Employers may either pay out accrued, unused sick time to employees annually, or permit employees to carry over accrued, unused sick time from one year to the next. However, an employer need not permit employees to use more than 40 hours of accrued sick time in any 12-month period. Employers are not required to pay employees for accrued, unused sick time upon separation from employment.

Notice Of Rights. Employers will be required to post a notice summarizing the law's requirements, in a form to be provided by the Vermont Commissioner of Labor. Employers will also be required to notify new employees of their sick leave rights upon hire.

continued on page 7

1. *A previous version of this article appeared in* New England In-House ("NEIH"). *The Firm is grateful to* NEIH *for its support.*

continued from page 6

New Vermont Statute Highlights Continued Expansion Of Paid Sick Leave Laws

Paid Time Off Policies. Preexisting policies (*e.g.*, sick time, vacation, or similar paid time off policies) may satisfy the new Vermont law, provided that such policies allow employees to accrue and use paid time off for sick leave purposes to at least the same extent as under the new statute.

Other State And Local Laws

In addition to Vermont, paid sick leave laws have been enacted in Connecticut, Massachusetts, California, and Oregon.

Connecticut. Employers with 50 or more employees in Connecticut must allow specified "service workers" to accrue and use up to 40 hours of paid sick time per year.

Massachusetts. Massachusetts employers with eleven or more employees are required to permit all employees to accrue and use up to 40 hours of paid sick time per year. Employees are entitled to accrue a minimum of one hour of paid sick time for each 30 hours worked. For employers with fewer than eleven employees, these same requirements apply, except that sick time may be unpaid.

California. California employers must permit employees who work at least 30 days within a year to accrue one hour of paid sick time for each 30 hours worked. An employer may cap an employee's sick time accrual at 48 hours, and limit the use of paid sick time in a year to 24 hours.

Oregon. Oregon requires employers to permit employees to accrue and use one hour of sick time for each 30 hours worked, up to 40 hours of sick time per year. For employers with ten or more employees, sick time must be paid; smaller employers may provide unpaid sick time.

Further, numerous localities across the United States have enacted paid sick leave measures over the past several years. While this is not an exhaustive list, these include:

Montgomery County, Md. As of October 1, 2016, most employers in Montgomery County, Maryland (just outside of Washington, D.C.) are required to provide employees with one hour of paid sick time for every 30 hours worked, up to 56 hours in a calendar year.

Oakland, Cal. Oakland employers must provide employees with one hour of paid sick leave for every 30 hours worked. Businesses with fewer than ten employees may cap accrued sick leave at 40 hours, while larger employers must allow employees to accrue up to 72 hours. Employers are not permitted to limit employees' use of accrued sick time within a given year.

New York City, Ny. Employers with five or more employees (or with one or more domestic workers) must provide up to 40 hours of paid sick time annually to employees who work in the city at least 80 hours in a year. Eligible employees must be allowed to accrue at least one hour of paid sick time for each 30 hours worked.

Portland, Ore. Employers with six or more employees must provide up to 40 hours of paid sick leave annually to employees who work at least 240 hours within Portland in a year.

Washington, D.C. All employers located within the District of Columbia must provide employees with paid sick time ranging from three to seven days annually, depending on how many employees an employer has.

Seattle, Wash. Seattle employers with at least five full-time equivalent employees must offer paid sick and safe time to employees who work more than 240 hours within the city during a calendar year. ("Safe time" refers to leave related to domestic violence, stalking, or sexual assault, or because of the closing of a workplace, school or day-care facility due to a health hazard.) Depending on the size of an employer's workforce, employees must be allowed to accrue up to 72 hours of paid sick and safe time annually.

Philadelphia, Pa. Under a Philadelphia ordinance, certain categories of employers must provide employees with up to 32 or 56 hours of paid sick leave per year, depending on how many employees they have.

San Francisco, Cal. A San Francisco ordinance requires all employers to provide employees with at least one hour of paid sick leave for each 30 hours worked within the city, up to a limit of either 40 or 72 hours annually, depending on an employer's headcount.

> "Employers should monitor these developments closely and ensure that they are in compliance with all applicable paid sick leave laws."

Recommendations For Employers

In light of the new Vermont paid sick leave statute and the continuing trend of similar laws elsewhere, we recommend that employers carefully review all applicable sick leave laws and ensure that their operations and written policies are compliant.

Employers should also provide appropriate training to managers, HR employees, and payroll/benefits personnel.

Finally, employers should remain alert for similar legislative developments in the localities in which they operate.

Federal Contractor's Costly Settlement Underscores Hazards Of Pre-Employment Tests

By Brian D. Carlson

A Michigan-based food service distributor, Gordon Food Service, Inc., recently came under fire from the U.S. Department of Labor ("DOL"), based on allegations that a pre-employment strength and agility test used at four of Gordon's warehouse facilities improperly discriminated against female applicants. Following the conclusion of the DOL's investigation, Gordon agreed to pay nearly $2 million to settle the matter.

This costly lesson for Gordon serves as a warning to employers to tread carefully in formulating and carrying out pre-employment tests, to ensure that they do not impermissibly discriminate against applicants based on a protected classification.

Background And DOL's Investigation

Gordon is a party to approximately $4.5 million in federal contracts with various government agencies. As such, Gordon is subject to the oversight of the DOL's Office of Federal Contract Compliance Programs ("OFCCP"), which enforces laws prohibiting federal contractors and subcontractors from discriminating in employment on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran.

In the course of a routine review of Gordon's records, DOL investigators noticed a significant disparity in hiring statistics for female and male applicants for laborer positions in four of Gordon's warehouses, located in Brighton, Michigan; Grand Rapids, Michigan; Kenosha, Wisconsin; and Shepherdsville, Kentucky. For instance, between January 2010 and September 2012, Gordon hired only 6 women for laborer positions at those facilities, out of an overall pool of 926 female applicants. By contrast, during that same time period, Gordon hired approximately 300 men who had applied for the same positions.

Looking more closely into the issue, DOL investigators found that, as part of the hiring process, Gordon required applicants to take a strength and agility test, purportedly to determine an individual's risk for injury. The DOL determined that very few female applicants had passed the strength portion of the test, which used isokinetic testing technology.

Because of the test's disparate impact upon female applicants, Gordon was required to demonstrate that the test was job-related and consistent with business necessity. The DOL concluded that Gordon could not make such a showing. In particular, the test was not administered or interpreted by an appropriate health care professional, Gordon had not thoroughly analyzed the validity of the test, and the criteria used to determine whether an applicant met the required strength standard were formulated for workers in the coal mining industry, rather than warehouse workers.

Thus, the DOL concluded, by maintaining the strength and agility test at the four facilities, Gordon unlawfully discriminated against female applicants.

Details Of Settlement

Without admitting wrongdoing, Gordon agreed to settle the DOL's allegations by (1) paying a total of $1.85 million to affected female applicants; (2) hiring 37 women from the original pool of 926 applicants to warehouse positions; and (3) discontinuing the strength and agility test that was the subject of the investigation.

In a press release discussing the settlement agreement, the OFCCP's Director, Patricia A. Shiu, stated that as a result of Gordon's use of the strength and agility test, "women were denied good-paying jobs" and that, in the DOL's view, pre-employment tests like the one used by Gordon often "exclude workers from jobs that they can in fact perform."

Recommendations For Employers

While this investigation and settlement arose specifically from Gordon's status as a federal contractor, virtually all employers are bound by the types of anti-discrimination prohibitions that brought Gordon under scrutiny. Thus, employers risk similarly expensive consequences if they rely on pre-hiring tests that impermissibly discriminate on the basis of protected categories.

Accordingly, we recommend that employers:

- Thoroughly evaluate, with the assistance of experienced employment counsel, any pre-employment tests administered to applicants, to ensure that such tests are legitimately job-related and do not have an impermissible discriminatory effect;
- Regularly update their employee handbooks, policy statements, application forms and other employment documents as necessary in light of continuing developments in the anti-discrimination laws; and
- Ensure that all managers, supervisors and HR personnel are thoroughly familiar with their legal responsibilities in this area.

Please feel free to contact us if you have any questions about the Gordon settlement or any related issues.

Schwartz Hannum *Welcomes* Three New Attorneys

Schwartz Hannum PC is thrilled to announce that **Brian B. Garrett, Catherine Morrissey-Bickerton,** and **Jacqueline M. Robarge** have joined the Firm.

Brian B. Garrett is a member of the Firm's Labor & Employment Practice Group. He has extensive experience in a broad range of employment and complex commercial litigation disputes in state and federal courts throughout the country, in alternative resolution processes, and before various administrative agencies.

Brian advises and represents institutional and individual clients in a wide range of industries, including technology, finance, and health care, on various matters, including employment disputes, restrictive covenant and trade secrets violations, business and partnership disputes, intellectual property, and securities violations. Brian also brings significant experience in managing comprehensive internal investigations.

Brian received his B.A. from Boston College, his M.A. in Higher Education from Boston College, and his J.D., *cum laude,* from Fordham Law School.

Catherine Morrissey-Bickerton is a member of the Firm's Education Practice Group and works on a variety of general legal areas covering student and parent issues, employment matters, non-profit governance and crisis management.

Prior to joining the Firm, Catherine was a trial lawyer with the Youth Advocacy Division of Committee for Public Council Services in Lowell, MA, where she worked within a multi-disciplinary team to protect due process rights and provide holistic representation to juveniles. Prior to becoming a trial lawyer, Catherine worked as a high school special education teacher with Teach for America at the Williamsburg Charter High School in Brooklyn, NY.

Catherine received her B.A. from Georgetown University, her M.S. in Special Education from Hunter College, and her J.D. from Boston College School of Law.

Jacqueline M. Robarge is a member of the Firm's Labor & Employment Practice Group and works in a variety of general legal areas covering complex class action litigation, individual discrimination cases, labor and employment issues, and crisis management.

Jacqueline assists clients with employment litigation matters in state and federal court, and also advises a variety of clients regarding federal and state labor and employment laws.

Jacqueline received her B.S. from Suffolk University and her J.D. from Massachusetts School of Law.

Federal Trade Secrets Statute Offers New Remedies For Employers

By Brian D. Carlson and Gary D. Finley

This past May, President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA"). This new statute provides for a broad range of claims and remedies under federal law for misappropriation of trade secrets, an area that largely had been governed solely by state law.

Background

In recent years, the topic of trade secret protection has been in the national spotlight, due in part to a number of high-profile cyber security breaches that have resulted in the theft of companies' trade secrets. Businesses can face potential breaches on multiple fronts, as trade secrets can be stolen through highly technical or relatively simple means, and by parties ranging from huge foreign companies to single, low-level employees.

Typically, a trade secret is defined as a formula, practice, design, pattern, or compilation of information that is not generally known or reasonably ascertainable by competitors (or the public), and that has economic value due to its confidential nature. Unlike a patent, a trade secret need not be registered with any government agency in order to be protected, and the owner of a trade secret retains a legally protectable interest in it for as long as the information remains secret.

Trade secrets have historically been recognized as protectable intellectual property under the common law, and state courts have developed their own legal frameworks defining trade secrets and creating avenues for their protection. While most states have adopted legislation based on the Uniform Trade Secrets Act ("UTSA"), thereby providing some predictability in this area, prior to the enactment of the DTSA, there was no single, nationwide mechanism available for claims of misappropriation of trade secrets (apart from specialized types, such as patents).

Key Provisions Of The DTSA

Definitions.

Consistent with traditional common law definitions, the DTSA defines a trade secret as information (i) that the owner has taken "reasonable measures" to keep secret, and (ii) that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information . . ."

A claim for misappropriation may be brought under the DTSA on the basis of wrongful acquisition, use, or disclosure of a trade secret, including through "improper means" such as theft, bribery, espionage, misrepresentation, or breach of a duty to maintain secrecy. However, reverse engineering and independent derivation expressly do not constitute "improper means" under the statute.

Remedies.

Under the DTSA, parties seeking redress for misappropriation of trade secrets may obtain actual damages, restitution, punitive damages (up to two times the award of actual damages), and attorneys' fees.

In addition, the DTSA provides that, in certain circumstances, a party may ask the court to issue an *ex parte* order directing the seizure of misappropriated trade secrets, without prior notice to the alleged offender. Given the due-process concerns raised by such seizures, the statute includes several protections designed to limit their use and scope. For example, the court may place limits on the timing of any potential seizure and may dictate whether government officials may forcibly enter locked areas to enforce a court-ordered seizure. Further, a party seeking an *ex parte* seizure must establish that less intrusive equitable remedies - such as a preliminary injunction - would be inadequate.

Statute Of Limitations.

A civil action may be brought under the DTSA for up to three years after the date the alleged misappropriation occurred or reasonably could have been discovered.

Protections For Employees And Whistleblowers.

The DTSA offers some protection to individuals privy to an employer's trade secrets who are seeking employment with a new business. Under the statute, a court may not issue an injunction that entirely precludes a defendant from accepting new employment based on threatened or actual misappropriation of trade secrets. However, where evidence of threatened misappropriation is shown, a court may place appropriate limits on the new employment relationship. Any such order must rest on actual evidence of threatened misappropriation, and not on an individual's mere possession of trade secrets. In other words, under the DTSA, a court will not limit an employment relationship based on a theory of "inevitable disclosure."

Further, insofar as an individual discloses a trade secret to a government official or an attorney for the purpose of reporting a violation of law, the DTSA grants such whistleblowers immunity from criminal prosecution or civil liability for the disclosure.

continued on page 11

continued from page 10

Federal Trade Secrets Statute Offers New Remedies For Employers

Confidentiality Agreements.

A corollary to the DTSA's whistleblower provision carries potentially important implications for employers. The statute provides that an employer should include a notice of the whistleblower provision in "any contract or agreement with an employee that governs the use of a trade secret or other confidential information." The directive applies to agreements entered into or amended after the statute's effective date, and also encompasses agreements with independent contractors and consultants. If an alleged misappropriator's agreement does not include the required whistleblower notice, the employer may still seek relief under the DTSA but will be barred from recovering punitive damages or attorneys' fees.

No Preemption.

Potential plaintiffs in trade secret actions may still pursue claims under applicable state laws, as the DTSA does not preempt the UTSA or other state trade secrets statutes.

Recommendations For Employers

With the enactment of the DTSA, we suggest that employers take a number of steps to enhance protections for their trade secrets:

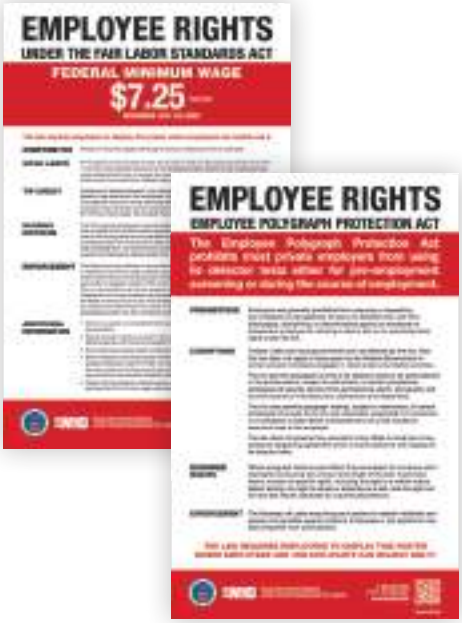
- Conduct a trade secret audit. Each business should consider whether it has valuable, confidential information that may be entitled to trade secret protection under the DTSA and/or similar state laws. Businesses should ensure that they are adequately protecting all trade secrets, including in their technical operations and in their relationships and agreements with employees, consultants, vendors, business partners, and other third parties.
- Be mindful of the DTSA's whistleblower provisions. In drafting future agreements with employees and consultants relating to trade secrets, businesses should take note of the whistleblower immunity language required for punitive damages and attorneys' fees claims under the DTSA. Such agreements may include confidentiality, non-disclosure and inventions agreements, as well as broader agreements (such as employment and severance agreements) that contain trade secret provisions. Businesses may want to discuss with legal counsel the potential advantages and disadvantages of including the immunity language in their agreements with employees and independent contractors. In some cases, businesses may decide to omit the immunity language and forego potential DTSA punitive damages and attorneys' fees claims, concluding that other potential remedies are adequate and that it is preferable not to advise employees that disclosure of trade secrets is sometimes legally protected.
- Contact counsel if improper disclosure of trade secrets occurs or is threatened. Finally, upon discovering any apparent misappropriation or wrongful disclosure of its trade secrets, a business should promptly confer with counsel as to the most appropriate means of addressing the matter.

Please feel free to contact us with any questions about the DTSA or any related issues. We routinely assist employers with agreements and issues relating to trade secrets, and we would be happy to help.

continued from page 12

Heads Up, Employers! New Workplace Posters Are Out

These are, of course, just two of the many workplace posting requirements with which employers must comply. Numerous other federal and state laws - including the federal Family and Medical Leave Act and Occupational Safety and Health Act, as well as the Massachusetts Earned Sick Time Law - provide for similar posting obligations.



If you have questions as to which specific posting requirements apply to your organization, which version of a notice you are obligated to post, or any related matter, please contact any of our experienced employment attorneys.

Heads Up, Employers! New Workplace Posters Are Out

By Gary D. Finley

As most employers are intimately aware, various federal and state (and, less frequently, municipal) employment laws carry with them workplace posting requirements. Employers are required to post official notices, designed by government agencies, informing employees of their rights under these laws.

Recently, revised posters were issued under two federal employment statutes:

- FLSA Poster - As of August 1, 2016, every organization with employees covered by the Fair Labor Standards Act ("FLSA") must post, in conspicuous places in each of its establishments, a newly revised notice detailing employees' rights under the FLSA. The new poster, which is available on the U.S. Department of Labor's ("DOL") website, informs employees of the FLSA's minimum wage, overtime, child labor, and enforcement provisions.
- EPPA Poster - Also as of August 1, 2016, employers covered by the Employee Polygraph Protection Act ("EPPA") must post a newly revised notice summarizing employees' rights under the statute. The new poster addresses such matters as employer conduct prohibited under the EPPA, the types of employers exempted from coverage under the statute, and enforcement provisions under the EPPA. This poster is also available on the DOL's website.

continued on page 11

Webinar Schedule For Independent Schools

January 10, 2017
12:00 p.m. to 1:30 p.m. (EST)
Understanding And Implementing The New Overtime Rules

January 17, 2017
12:00 p.m. to 1:30 p.m. (EST)
Risk Management For Off-Campus Trips And Activities

February 23, 2017
12:00 p.m. to 1:30 p.m. (EST)
Getting It Write: Student Handbooks

March 29, 2017
3:00 p.m. to 4:30 p.m. (EST)
Drawing The Lines: Exploring Disciplinary Policies And Protocols

April 6, 2017
12:00 p.m. to 1:30 p.m. (EST)
Getting It Write: Employee Handbooks

Labor And Employment Seminar/Webinar Schedule

January 12, 2017
8:30 a.m. – 10:30 a.m.
Post-Election Panel: How A Trump Presidency May Impact Employers

January 24, 2017
12:00 p.m. – 1:30 p.m. (EST)
Getting It Write: Employee Handbooks (Webinar)

February 1, 2017
8:00 a.m.– 11:30 a.m.
Hot Topics In Employment Law

February 2, 2017
12:00 p.m. – 1:30 p.m. (EST)
Conducting An I-9 Audit: Tips, Traps And Best Practices (Webinar)

February 24, 2017
3:00 p.m. – 4:30 p.m. (EST)
Sex And Gender In The Workplace: Rights And Obligations Under Employment Laws (Webinar)

March 8, 2017
8:30 a.m. – 10:30 a.m.
Mastering An Effective Investigation Of Alleged Employee Misconduct

March 21, 2017
8:30 a.m. – 10:30 a.m.
Engaging In The Process: Effectively Working With Employees Who Seek Accommodations

April 7, 2017
8:30 a.m. – 10:30 a.m.
Avoiding A Discrimination Claim; Or Preparing Your Best Defense

April 26 & 27, 2017
April 26: 8:30 a.m. – 4:00 p.m.
April 27: 8:30 a.m. – 4:30 p.m.
Employment Law Boot Camp (Two-Day Seminar)

Please see the Firm's website at **www.shpclaw.com** or contact the Firm's Seminar Coordinator, **Kathie Duffy**, at **kduffy@shpclaw.com** or **(978) 623-0900** for more detailed information on these seminars and/or to register for one or more of these programs.

Schwartz Hannum PC focuses exclusively on labor and employment counsel and litigation, together with business immigration and education law. The Firm develops innovative strategies that help prevent and resolve workplace issues skillfully and sensibly. As a management-side firm with a national presence, Schwartz Hannum PC represents hundreds of clients in industries that include financial services, healthcare, hospitality, manufacturing, non-profit, and technology, and handles the full spectrum of issues facing educational institutions. Small organizations and Fortune 100 companies alike rely on Schwartz Hannum PC for thoughtful legal solutions that help achieve their broader goals and objectives.

11 CHESTNUT STREET
ANDOVER, MA 01810
E-MAIL: shpc@shpclaw.com
TEL: 978.623.0900
www.shpclaw.com