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Labor and Employment Law Update

DECEMBER 2009

In This Issue

Sara Schwartz and Will Hannum Are "Massachusetts Super Lawyers" For Sixth Year In A Row

We are pleased to announce that Sara Schwartz and Will Hannum have been selected as Massachusetts Super Lawyers in the area of Labor and Employment Law for the sixth year in a row.

These listings are published in the November 2009 issue of *Boston Magazine* and in *Massachusetts Super Lawyers*. Only five percent of Massachusetts lawyers were named Super Lawyers. Each year, Massachusetts Super Lawyers are selected following a "Blue Ribbon Panel" review of the results of ballots sent to 37,000 lawyers throughout Massachusetts by *Law & Politics*.

The Wage And Hour Audit: *Do It Now, Or Pay Later*

By William E. Hannum III[1]

Now is the time for a wage and hour audit. It is the great idea that everyone seems to agree is a great idea, but that almost no company actually does. Unfortunately, however, procrastination is becoming increasingly risky: the U.S. Department of Labor has recently promised greater enforcement activity; wage and hour claims are increasing significantly; and recent settlements, fines and damages awards are costing companies (*and their executives*) millions upon millions of dollars.

On September 2, 2009, Labor Secretary Hilda L. Solis said, "Beginning this year and into 2010, I am hiring an additional 250 new wage and hour investigators so we can continue to effectively monitor wage and hour violations." True to her word, the U.S. Department of Labor has been hiring additional investigators. As she has made clear, "strong enforcement remains at the top of [her] agenda."

So, companies that have not recently done a wage and hour audit – covering issues from job classifications to overtime, from meal breaks to tip pooling, from donning & doffing to payroll records – need to do it *now*.

And they should protect the confidentiality of the audit to the greatest extent possible, pursuant to the attorney-client privilege, by having experienced counsel involved.

> ***"Beginning this year and into 2010, I am hiring an additional 250 new wage and hour investigators so we can continue to effectively monitor wage and hour violations."***
>
> **- Labor Secretary Hilda L. Solis**

A. The Wage & Hour Audit, Part I: Overtime

The wage and hour audit should address a long list of issues under federal and state law, including the requirement to pay overtime in accordance with federal law and the laws of each state in which the company has employees. This raises myriad issues, most of which are described in the full article – along with a brief summary of recent cases, which shows that the risks of getting it wrong are both real and significant. *(For more detail on these issues, and the recent fines, settlements and damages awards that have resulted, please see the complete article or White Paper.)*

1. **Misclassified As Exempt**
   $22.75 Million. *In August 2009, Cintas Corp. agreed to pay $22.75 million to delivery drivers nationwide, after allegedly misclassifying them as exempt and failing to pay overtime.*

2. **Misclassified As An Independent Contractor**
   $3.5 Million And Four Days In Jail. *In August 2009, a California residential cleaning service company was ordered to pay $3.5 million in back pay, liquidated damages and fines, for improperly classifying 385 of its workers as independent contractors. Further, in October 2009, after failing to comply with the court's order to pay damages, the owners of the company were jailed for four days.*

3. **Exemptions Lost Due To Improper Deductions**
   $25 Million. *In August 2008, a grocery store was found liable for $25 million in back pay (for overtime) after it improperly docked the salaries of approximately 400 managers for hours not worked during the workweek, and therefore lost the exemption.*

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[1]This feature is excerpted from a two-part article that is appearing in *New England In House*, in November 2009 and January 2010. A link to the article can be found on the Firm's website, at www.shpclaw.com. Also, please feel free to contact the Firm to obtain a copy of the White Paper that serves as a basis for this article.

Will gratefully acknowledges *New England In House*, for their support in publishing his article, and also his colleagues, Paul DuBois (an associate) and Carol Morris (a paralegal) of Schwartz Hannum PC, for their help in preparing this article.

The Wage And Hour Audit: *Do It Now, Or Pay Later*

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4. **Failure To Pay OT**
$4 Million. *In January 2009, several television networks (including Fox Broadcasting, American Broadcasting Company Inc. and CBS Broadcasting) and producers agreed to pay $4 million total to settle claims that they failed to pay overtime and provide required break periods.*

5. **Joint Employer OT**
$2.7 Million. *In July 2009, Partners Healthcare agreed to pay $2.7 million in back pay for overtime to 700 employees who were working for more than one Partners-affiliated hospital during the same week. Partners brought the issue to the attention of the DOL after recognizing that it may have violated the FLSA.*

6. **Miscalculation Of Regular Rate Of Pay**
$562,901. *In October 2009, the DOL recovered $562,901 in back wages, for 1,411 construction workers, from an employer that failed to include the value of retention and daily bonuses in the regular rate for overtime purposes.*

B. The Wage And Hour Audit, Part II: State Law "Traps"

While overtime is perhaps the most significant wage and hour problem area, it is by no means the only one. In fact, there are numerous other trouble spots, most of which arise under state law – and which (maddeningly for employers) can vary dramatically from one state to the next. And as the cases show, failure to comply with these miscellaneous wage and hour laws (from meal breaks to tip pooling) can be costly – to both the employer and its senior officers. The state law traps listed below are not an exhaustive list – just a list of the traps that have caught some large damages awards in the past few months.

1. **Meal Breaks**
$54 Million. *In June 2009, Wal-Mart agreed to pay up to $54.25 million for allegedly failing to provide breaks, maintain proper work records, pay for employee breaks, and pay for training for thousands of workers in Minnesota.*

2. **Off-The-Clock Donning / Doffing**
$5.1 Million. *In January 2009, Nestle Prepared Foods Co. paid $5.1 million in back wages to more than 6,000 employees for failing to pay for time spent donning and doffing required equipment and clothing. The company subsequently identified additional back wages due to employees in Kentucky, Ohio and South Carolina.*

3. **Tip Pooling**
$2.5 Million. *In February 2009, hundreds of wait staff at three New York City restaurants requested the court's approval of a $2.5 million settlement of claims that they were unlawfully required to share tips with management and sushi chefs (in violation of the FLSA and state law). One third of the settlement ($833,333) is designated for attorneys' fees.*

4. **Record Keeping Violations**
$90,000. *In August 2009, American East Painting, Inc. and its president were cited and fined $90,000 by the Massachusetts Attorney General for record keeping violations and failure to pay wages as required by Massachusetts law.*

5. **Failure To Pay In Timely Manner**
$410,000. *In May 2009, the Massachusetts Attorney General cited MicroLogic, Inc. and its president for failing to pay employees in a timely manner. The citation included approximately $378,000 in back pay to seven employees, and $31,000 in fines.*

6. **Frequency Of Payments**
$35,000. *In September 2009, Delta Airlines was fined $35,000 for paying its hourly, non-exempt employees on a semi-monthly, rather than bi-weekly, basis. (There was no allegation that its employees had not been paid; only that payment was delayed.)*

7. **Vacation Pay**
$11 Million. *In October 2009, Kelly Services Inc. agreed to pay $11 million to settle claims that it failed to pay accrued vacation time (the company allegedly had an unlawful "use it or lose it" policy under Illinois law), and gave employees improper (vague) pay stubs. Of this $11 million, $3.3 million was reserved for attorneys' fees.*

8. **Final Pay**
$62,649.46. *In January 2009, Iris Media Group LLC, the CEO and the "company manager" reached agreement with the Massachusetts Attorney General to pay over $62,000 in back pay to 39 employees who were terminated without receiving their final paycheck.*

9. **Child Labor Laws**
$40,000. *In June 2009, Boston Sports Club paid a $40,000 fine to the Massachusetts Attorney General for allowing minors to work before and after permissible hours; allowing minors to work in excess of the maximum daily and weekly hours permissible; and employing minors without the required work permits.*

10. **Sunday/Holiday Pay**
$90,000. *In June 2009, GOL Foods, Inc. and its president reached an agreement with the Massachusetts Attorney General to pay $90,000 in back pay and fines for failing to pay 30 employees overtime, Sunday pay and holiday pay.*

C. Next Steps: The To Do List

Hopefully, the need and value of conducting a wage and hour audit is self-evident. The odds are increasing that every company will be the target of some kind of wage and hour claim. And it seems clear that the back pay, fines, penalties, and attorneys' fees incurred in resolving those claims will be far greater than the cost of a properly conducted audit.

For companies that are serious about auditing their wage and hour practices, here are the steps to take:

1. Give audit responsibility to the appropriate person for the company – the VP of Human Resources, the General Counsel, or perhaps outside counsel.

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Client's Request For Injunction Granted!

Beverly National Bank v. Stephen F. Curran et al.
Civil Action No. 09-4616-BLS2 (Suffolk Superior Court)

The Firm successfully represented Beverly National Bank (the "Bank") in obtaining an order (a) requiring a former employee and his new employer to immediately return confidential customer information that was misappropriated, (b) prohibiting them from using or disclosing any of the misappropriated information that they may have reviewed, and (c) establishing that any violation of the order shall constitute and be punishable as a contempt of Court. Attorneys for the Bank were Sara Goldsmith Schwartz and Todd A. Newman.◆

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2. Be sure experienced counsel is involved, (a) to help navigate the nuances of applicable wage and hour laws, and (b) to protect the audit under the attorney-client privilege.

3. Assemble and (if necessary) train the Audit Team (which may include paralegals, junior attorneys, and/or Human Resources professionals).

4. Have the Audit Team work methodically through the relevant wage and hour issues, including those listed in Parts A and B of this article, above:

   (a) Counsel will need to provide guidance on the relevant legal issues, under federal and applicable state laws, depending upon the nature of the workforce and compensation practices.

   (b) The Human Resources and Payroll Departments will need to provide the Audit Team with documents and information ranging from job descriptions to payroll records.

   (c) Managers throughout the company may need to be available to clarify relevant facts, such as job duties actually performed, or practices actually followed (as opposed to duties in the job description that are not performed, or written policies that are not followed).

   (d) Together, the Audit Team will collect and review policies, handbooks, and job descriptions.

5. After the fact-gathering is complete, the Audit Team should report to the General Counsel's office regarding its preliminary findings, and map out plans for follow-up investigations and addressing any problem areas.

6. Generally speaking, a thorough audit will turn up non-compliant practices, and generally non-compliant practices should be remedied as soon as possible. But there are often several options available for doing so. Therefore, before any remedy is implemented, the company should consult with experienced counsel to determine the most appropriate remedy under the circumstances.

7. When correcting problem areas, be sure to revise policies, the employee handbook and job descriptions, as necessary.

One last reminder: be sure to protect the audit under the attorney-client privilege to the greatest extent possible. Don't allow the hard work of identifying and fixing any errors to become someone else's road map to treble damages and attorneys' fees. ◆

Agreements To Arbitrate Statutory Discrimination Claims Must Be "Clear And Unmistakable" To Be Enforced In Massachusetts

By Jessica L. Herbster

The Supreme Judicial Court of Massachusetts has decided that an employer cannot compel arbitration of an employee's statutory discrimination claims unless the agreement to arbitrate is "clear and unmistakable." The ruling sends a strong message to employers to carefully review the language of any contract that purports to waive or limit an employee's right to pursue statutory discrimination claims.

The plaintiff in that case, *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, was an anesthesiologist on the medical staff of Beth Israel Deaconess Medical Center, Inc. ("BIDMC"). In 2000, the plaintiff entered into an employment agreement with BIDMC and her employer, Harvard Medical Faculty Physicians ("HMFP"), when she became chief of the anesthesiology department. A clause in her agreement provided that "any claim, controversy or dispute arising out of or in connection with [the agreement] or its negotiations shall be settled by arbitration."

The plaintiff alleged that during the years following her appointment to chief of anesthesiology, the chief of surgery at BIDMC subjected her to a pattern of gender discrimination. The plaintiff also claimed that she complained about this to the president and chief executive officer of BIDMC (the "CEO") but that no or insufficient action was taken. When in 2007 BIDMC terminated the plaintiff's appointment as chief of anesthesiology, she contended that the decision was discriminatory, retaliatory, and defaming.

Following the requisite filing with the Massachusetts Commission Against Discrimination (the "MCAD"), the plaintiff pursued multiple claims against BIDMC, HMFP, the chief of surgery, and the CEO in the Massachusetts Superior Court. [Note: The MCAD is not bound by an arbitration agreement to which it is not a party, and thus the MCAD has discretion to pursue an employee's discrimination claim despite an agreement by the employee to submit such claims to arbitration.]

The Superior Court complaint contained the following counts: gender discrimination and retaliation under the Massachusetts anti-discrimination statute, Chapter 151B of the Massachusetts General Laws, against all the defendants; tortious interference with advantageous or contractual relations against BIDMC and the individual defendants; and defamation against BIDMC and the individual defendants. The defendants moved to dismiss the complaint and compel arbitration on the ground that the plaintiff's employment agreement mandated arbitration of all her claims. The Superior Court denied the motions.

On appeal, the Supreme Judicial Court held that the plaintiff's statutory discrimination claims did not fall within the scope of the arbitration clause contained in the employment agreement, and that the plaintiff could proceed with her discrimination action in Superior Court. The Supreme Judicial Court reasoned that in light of the strong public policy against workplace discrimination, "an employment contract containing an agreement by the employee to limit or waive any of the rights or remedies conferred by c. 151B is enforceable only if such an agreement is stated in clear and unmistakable terms." While the Court acknowledged that parties to an employment contract may agree to arbitrate statutory discrimination claims, it now requires that the parties "state clearly and specifically that such claims are covered by the contract's arbitration clause." This ruling qualifies the longstanding presumption that a dispute is covered by an arbitration clause that is broad in reach.

The Court also ruled that the plaintiff could proceed in Superior Court with her common-law claims of tortious interference and defamation, even though the "clear and unmistakable" requirement set forth in its ruling appears to generally apply only to statutory discrimination claims. Relying on the principle of judicial economy, the Court concluded that it would be more efficient to proceed in one forum because the common-law claims arose from the same set of facts as the statutory claims and were "intertwined" with them.

As illustrated above, if an employer wishes to submit all potential employment disputes to arbitration, then the employer should carefully draft an arbitration clause that expressly includes all relevant discrimination statutes. This is so regardless of whether the arbitration clause is contained in an employment agreement, an employee handbook, a separation agreement, or in any other employment document.

The Firm's attorneys are experienced in negotiating, drafting, reviewing, and enforcing contractual arbitration provisions. We would be happy to answer any questions that you may have about the *Warfield* case or employment arbitration in general. ◆

Misclassification Of Workers As Independent Contractors Carries High Costs For Employers

By Brian D. Carlson

Two recent Massachusetts court rulings highlight the hazards of misclassifying workers as independent contractors rather than employees. As these decisions illustrate, the Massachusetts independent contractor statute, Mass. Gen. Laws ch. 149, § 148B ("Section 148B"), severely limits the circumstances in which workers may be treated as independent contractors—and imposes substantial liability on employers that err.

Superior Court Decision

In the first of these cases, *Chaves v. King Arthur's Lounge, Inc.*, the Superior Court ruled that an adult-entertainment club violated Section 148B by classifying an exotic dancer as an independent contractor rather than an employee.

The plaintiff, Lucienne Chaves, worked at King Arthur's from January 2005 until May 2007. Like the club's other exotic dancers, Chaves was classified as an independent contractor, and her compensation consisted solely of tips from patrons. After the club terminated her services, Chaves filed suit against King Arthur's. She claimed that she should have been treated as an employee rather than an independent contractor and sought damages resulting from the misclassification.

In ruling on summary judgment motions by the parties, the Superior Court noted that, under Section 148B, King Arthur's was required to establish *all* of the following criteria in order to demonstrate that it had appropriately classified Chaves as an independent contractor:

- Chaves had been "free from control and direction" in performing her services;
- Chaves's services had been performed "outside the usual course of the business" of the club; and
- Chaves had been "customarily engaged in an independently established trade, occupation, profession or business of the same nature" as her exotic dancing at the club.

The court declined to decide whether the first of these factors had been satisfied but concluded that King Arthur's could not meet either of the latter two prongs of the test.

As to the second of these criteria, the Superior Court determined that the plaintiff's work fell squarely within the club's usual course of business. On this issue, King Arthur's argued that its main business was the sale of alcoholic drinks and that the exotic dancing at the club was tangential to this—like television sets exhibiting professional sports in a bar. The court rejected this claim, stating that "[t]he sale of alcohol and the exotic dancing, together and intertwined, both clearly comprise the adult entertainment portfolio of King Arthur's," and that a court "would need to be blind to human instinct" not to recognize the essential role of exotic dancers to the club's business.

Turning to the third criteria required by Section 148B, the Superior Court concluded that there was insufficient evidence that Chaves was "engaged in an independently established trade, occupation, profession or business." Specifically, the court noted that Chavez had never engaged in exotic dancing before joining King Arthur's and that opportunities for her to perform outside the club were limited.

Because King Arthur's could not meet its burden of establishing each of the three statutory criteria, the court concluded that Chaves should have been classified as an employee. This ruling permitted Chaves to proceed with her claims that King Arthur's failed to pay her the minimum wage, overtime, and service charges required by law – claims that require payment of mandatory treble damages and attorneys' fees to a prevailing plaintiff.

SJC Decision

In the other decision, *Somers v. Converged Access, Inc.*, the Supreme Judicial Court ("SJC") ruled that an employer cannot defend itself against a violation of the independent contractor statute by asserting that the plaintiff was paid more as a contractor than he or she would have been paid as an employee.

The plaintiff, Robert Somers, was hired by Converged Access, Inc. ("CAI") as a software engineer on an independent contractor basis after he twice had unsuccessfully applied for employment with the company. Somers was engaged for a 60-day period, which subsequently was extended for an additional 90 days. At the end of this time period, CAI terminated Somers's services and turned down a third application for employment from him. Somers then filed suit against CAI, contending that he should have been classified as an employee during his five-month tenure with the company and, accordingly, was entitled to damages for the overtime, vacation pay, holiday pay, and employee benefits that he would have received as an employee.

In response, CAI raised a novel defense. CAI asserted that even if Somers should have been treated as an employee, he should not be awarded damages because his compensation as an independent contractor exceeded what he would have earned as an employee. According to CAI, this demonstrated that the misclassification was made in good faith and thereby absolved it of any liability. The SJC entirely rejected this argument, noting that Section 148B is a "strict liability" statute, meaning that whether an employer acts in good or bad faith in violating the statute is irrelevant.

Accordingly, the SJC sent the case back to the trial court with instructions to determine, based on the criteria specified in Section 148B, whether Somers in fact should have been treated as an employee rather than an independent contractor. If the trial court agrees with Somers, then Somers may proceed with his various wage claims. If Somers ultimately prevails on any of those claims, then he will receive an award of mandatory treble damages, attorneys' fees, and court costs.

Implications For Employers

The *Chaves* and *Somers* decisions underscore that Massachusetts employers should exercise extreme caution before treating workers as independent contractors rather than employees. Specifically, an employer must be prepared to demonstrate how each of the three criteria set forth in Section 148B is satisfied. Otherwise, the employer will be exposed to significant liability, including treble damages for lost wages and benefits, as well as attorneys' fees and court costs.

In addition, as the *Chaves* case demonstrates, the independent contractor statute applies to *all* individuals performing services in Massachusetts, including those in seemingly fringe industries, such as the adult-entertainment industry.

We recommend that employers conduct an independent contractor audit immediately so that any required changes can be implemented as early as possible in 2010.

* * *

If you have any questions about the implications of these decisions or worker classification issues generally, please do not hesitate to contact us. We regularly assist employers with independent contractor issues and would be happy to help. ◆

SAVE THE DATE

Employment Law Boot Camp

April 6 and 7, 2010

8:30 a.m. to 4:30 p.m.

Schwartz Hannum PC has developed a fourteen-hour intensive human resources skills development program in response to the growing challenges confronting our clients. Presented in an interactive seminar format, Employment Law Boot Camp reinforces participants' existing knowledge of fundamental employment laws and personnel practices by exploring major risk areas and problem-solving strategies. Expert attorney instructors will provide extensive written resources, engaging real-life role-plays, and valuable networking opportunities for participants. Participants will receive a comprehensive Tool Kit containing essential compliance forms, checklists and guidance.

Topics will include:

- Hiring Traps And Strategies
- Background Checks And Substance Abuse Testing For The Uninitiated
- Managing And Documenting Employee Performance: Discipline And Discharge
- Limiting Exposure To A Wage And Hour Complaint
- Mastering An Effective Investigation Of Alleged Workplace Misconduct
- Risk Factors That Cause Discrimination Claims
- Harassment – It's Not Just About Sex Anymore
- Critical Employment Policies – Limit Liability And Exposure While Serving Your Business Needs
- Employee Rights And Responsibilities Related To Family, Medical And Other Leaves Of Absence
- Employment, Severance, Non-Competition And Non-Disclosure Agreement Basics

Early Bird Tuition is $850 prior to March 1, 2010. Tuition is $950 on or after March 1, 2010. Registration is limited to 12 participants.

To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.

If you prefer to receive a copy of the Firm's Labor and Employment Law Update by e-mail in pdf (portable document format), please contact Kathie Duffy at kduffy@shpclaw.com or (978) 623-0900 to let us know and to provide us with your correct e-mail address. (As you may know, you must have Adobe Acrobat Reader to view the Update in pdf.)

A searchable archive of past Update Articles and E-Alerts is available on the Firm's website, www.shpclaw.com.

Recent Litigation Success: Case Closed!

Hamilton v. Artel Video Systems, Inc. et al.
Civil Action No. 08-1560 (Middlesex Superior Court)

The Firm successfully represented Artel Video Systems, Inc. ("Artel") and three Artel executives in obtaining dismissal of all of Plaintiff's claims against all four Defendants. Plaintiff's Complaint alleged, among other things: pregnancy discrimination; disability discrimination; failure to reasonably accommodate Plaintiff's pregnancy; violation of the Massachusetts Civil Rights Act ("MCRA"); and claims of individual liability against the three named individuals for aiding and abetting the alleged discrimination. The Court granted Defendants' motion to dismiss the MCRA claim and Defendants' motion for summary judgment on all remaining claims, thereby disposing of the case. Attorneys for Artel were Sara Goldsmith Schwartz and Shannon M. Lynch. ◆

Recent Litigation Success: Injunction Denied & Attachments Granted!

Forman, Conklin, Doherty & Farrar, P.C. v. Stephen J. Farrar et al.
Civil Action No. 09-924C (Essex Superior Court)

The Firm successfully represented individual Stephen J. Farrar, two of his business partners, and two of his business entities ("Defendants") in obtaining an order denying Plaintiffs' motion for a preliminary injunction that would have effectively shut down Defendants' accounting and investment-advisory businesses. The Firm subsequently obtained an order permitting attachments on Plaintiffs' real estate and bank accounts to secure Defendants' likely award of damages on their various counterclaims. Attorneys for Defendants were Todd A. Newman and Mary Pat Hagan. ◆

Grievances Denied!

New England Health Care Employees Union v. West River Health Care Center
Case No. 12-300-00304-08 (American Arbitration Association)

The Firm successfully represented West River Health Care Center ("West River") in this labor arbitration by obtaining a ruling that West River's three-day suspension of a certified nursing assistant for providing improper care to a resident was for just cause. Attorneys for West River were Todd A. Newman and Brian D. Carlson.

New England Health Care Employees Union v. West River Health Care Center
Case No. 12-300-00665-08 (American Arbitration Association)

The Firm successfully represented West River Health Care Center ("West River") in this labor arbitration by obtaining a ruling that West River's termination of employment of a certified nursing assistant for failing to hook up safety equipment for a resident was for just cause. Attorneys for the employer were Todd A. Newman and Brian D. Carlson. ◆

Massachusetts Data Security Regulations Finalized: *Compliance Deadline Remains March 1, 2010*

By Heather E. Davies

On October 30, 2009, the Massachusetts Office of Consumer Affairs and Business Regulation ("OCABR") filed with the Secretary of the Commonwealth final regulations implementing the Massachusetts Data Security Law (the "Final Regulations"). Significantly, the compliance deadline was ***not*** extended, as it had been in previous rounds of revisions. Accordingly, the compliance deadline remains ***March 1, 2010***, leaving covered entities with much to do in a short time frame. The substantive amendments contained in the Final Regulations are summarized below.

The Final Regulations apply to entities that own, license, store, maintain, process or otherwise have access to records containing "personal information" of Massachusetts residents in connection with the provision of goods or services or in connection with employment. Personal information means a Massachusetts resident's first and last name, or first initial and last name, combined with a financial account number, a credit or debit card number, a Social Security number, a driver's license number and/or a state-issued identification number. In practice, the Final Regulations will apply to nearly all entities and individuals that employ or conduct business with Massachusetts residents, regardless of whether the entity is physically located in Massachusetts.

Under the key features of the Final Regulations, covered entities must by March 1, 2010:

a. implement certain information technology security requirements, such as, to the extent technically feasible, using strong password and user-authentication protocols, firewalls, security system monitoring, and encryption of electronically stored or transmitted personal information, in order to protect the security of personal information;

b. develop and implement a Comprehensive Written Information Security Program ("WISP"), *i.e.*, a detailed policy that sets forth the covered entity's security, technical and administrative protocols for safeguarding personal information;

c. conduct employee training in the WISP; and

d. contractually require third-party service providers to implement and maintain appropriate security measures to protect personal information (except with respect to preexisting contracts, which are subject to a two-year grace period, as discussed below).

The Final Regulations clarify that coverage extends not only to entities that own or license personal information but also to those that "store" personal information. Accordingly, a business that "owns and licenses" personal information is now defined as one that "receives, *stores*, maintains, processes, or otherwise has access to personal information in connection with the provision of goods or services or in connection with employment." The definition of "service provider" was also amended to include the term "stores," so that a covered "service provider" is now defined as "any person that receives, *stores*, maintains, processes, or otherwise is permitted access to personal information through its provision of services directly to a person that is subject to this regulation."

The Final Regulations also clarify that the two-year grace period for contractually requiring third-party service providers to implement and maintain appropriate security measures applies only to contracts that are already in effect as of March 1, 2010. All contracts executed after the March 1, 2010 effective date must immediately satisfy this contractual requirement. In this regard, the Final Regulations state that covered entities must require "third-party service providers by contract to implement and maintain such appropriate security measures for personal information; provided, however, that until March 1, 2012, a contract a person has entered into with a third-party service provider to perform services for said person or functions on said person's behalf satisfies the provisions of 17.03(f)(2) even if the contract does not include a requirement that the third-party service provider maintain such appropriate safeguards, as long as said person entered into the contract no later than March 1, 2010."

We encourage covered entities that have not yet taken steps to achieve compliance with the new Massachusetts Data Security Law to begin immediately. In this regard, the Firm has developed a data security compliance package to assist covered entities with their compliance efforts. In addition, the Firm's "Practical Tips and Strategies for Complying with the Massachusetts Data Security Law and Regulations" seminar provides our suggested strategy for achieving compliance by the March 1, 2010 deadline. The seminar is being offered on Thursday, January 7, 2010 and Friday, January 15, 2010 from 8:30 a.m. to 10:00 a.m. at our office in Andover. (A special version of the seminar for law firms is being offered on Friday, January 22, 2010.) For more information or to register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com, or complete and return the registration form provided on our website. ◆

NLRB Finds In Favor Of Firm Client On Multiple Unfair Labor Practice ("ULP") Charges

Hospital v. 1199SEIU United Healthcare Workers East
Case No. 1-CB-11* (National Labor Relations Board)**

The Firm successfully represented a Hospital client in obtaining a settlement agreement requiring 1199SEIU United Healthcare Workers East (the "Union") to bargain in good faith with the Hospital over the terms of a successor collective bargaining agreement. The settlement agreement resulted from an unfair labor practice ("ULP") charge alleging that the Union was violating federal labor law by refusing to bargain with the Hospital. Attorneys for the Hospital were William E. Hannum III, Brian D. Carlson and Heather E. Davies.◆

Hospital v. 1199SEIU United Healthcare Workers East
Case No. 1-CB-11* (National Labor Relations Board)**

The Firm successfully represented a Hospital client in persuading the National Labor Relations Board to issue a complaint against 1199SEIU United Healthcare Workers East (the "Union") for threatening employees with discharge if they failed to obtain union membership or otherwise contribute financial support to the union. In addition, the Board rejected the Union's companion ULP charge (in which the Union accused the Hospital of unlawfully failing to abide by a non-existent union security clause), and dismissed the Union's appeal. Attorneys for the Hospital were William E. Hannum III, Brian D. Carlson and Heather E. Davies.◆