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Labor and Employment Lawyers Guiding Management

# Labor and Employment Law Update

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## Does Your School Have A Risk-Management Strategy For Off-Campus Trips?

By Arabela Thomas

Off-campus trips are not only an exciting and fun part of the educational experience but also risky endeavors that require advance planning. Indeed, a recent lawsuit highlights the importance of having a comprehensive risk-management strategy for these outings.

In the lawsuit, a former high-school student (the "Student") alleges that she was sexually assaulted by a classmate during a school-sponsored trip to Europe three years ago. The Student claims that the teachers who chaperoned the trip failed to (a) supervise and monitor the participating students, (b) report the incident to law enforcement authorities, and (c) obtain medical assistance for her. According to the Student, the teacher-chaperones also humiliated her publicly and tried to silence her about the incident. The Student seeks damages from, among others, the teacher-chaperones, who have been named as defendants in their individual capacities. (Due to the sensitive nature of the allegations, we do not identify the parties in this article.)

This case illustrates that all schools that sponsor off-campus trips should have a risk-management strategy for each outing, whether the destination is a local museum or an exotic overseas location. While it is impossible to anticipate and protect against each and every risk that may be associated with an off-campus trip, it is important to minimize as many of the risks as possible.

We urge all schools to review their policies, procedures and practices relative to off-campus trips to ensure that they contain the following components, which are central to effective risk-management:

- Policies. Each school should review its faculty, staff, volunteer, and student handbooks to ensure that they provide adequate information about off-campus trips. These materials should address the school's expectations concerning the behavior of *all* participants.
- Permission And Release Forms. These forms should be tailored to the trips and the activities associated with them. Full and accurate descriptions of the trips should enable parents and guardians to assess the reasonably foreseeable risks associated with the trips, which, in turn, should bolster the enforceability of these forms. State laws differ widely as to the enforceability of liability waivers and releases, so it is vital for the school's legal counsel to review the permission and release forms to ensure that they will provide the greatest amount of legal protection possible. Significantly, even in those states where liability waivers and releases are routinely enforced, courts may choose to disregard them for a variety of reasons. Therefore, while permission and release forms are one important component of an effective risk-management strategy, schools should not rely on them alone.
- Medical Information And Authorization Forms. Emergency contact and health insurance information should be collected from each participant. It is also important to obtain information about any medications that participants may need to take and, correspondingly, to ensure that the school has an appropriate medication administration policy for both prescription and non-prescription drugs. Just as importantly, the school should obtain medical authorizations *in advance* to ensure that there is no delay in obtaining emergency medical services if an injury or illness occurs during the trip.

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# NLRB Continues Pro-Union Course, Raising Numerous Compliance Challenges For Employers

By Brian D. Carlson

In recent months, the National Labor Relations Board ("NLRB" or "Board") has taken a number of bold – and highly controversial – actions to further its pro-union agenda. Specifically, the Board has:

- Filed a formal complaint alleging that Boeing Corporation unlawfully decided to locate new work in South Carolina in order to punish Boeing employees in Washington state for engaging in strikes;
- Promulgated a new regulation that would require most employers to post a workplace notice informing employees of their rights under federal labor law; and
- Proposed new rules for union elections that would dramatically reduce the time available to employers for challenging voting eligibility and other aspects of the proceedings.

This article summarizes these recent Board actions and makes recommendations on how employers can minimize or eliminate their exposure to liability under the National Labor Relations Act (the "NLRA") in light of them.

## Boeing Complaint

In April, the Board filed a complaint against Boeing Corporation to enjoin Boeing from carrying out new production work in South Carolina rather than Washington. The Board alleges that Boeing's decision was in retaliation for ongoing, costly union activity that has taken place at Boeing's Everett, Washington facility.

In recent years, Boeing's Everett workers have engaged in a number of strikes, which have proved very costly for Boeing. For instance, a 2008 strike in Everett was reported to cost Boeing approximately $1.8 billion.

Subsequently, when Boeing decided to open a second assembly line for its new 787 Dreamliner jet, the company chose to do so in North Charleston, South Carolina, rather than in Everett, where work on the Dreamliner was already being carried out. South Carolina is a right-to-work state without a strong union presence.

The union representing Boeing's Everett workers filed an unfair labor practice ("ULP") charge alleging that Boeing's decision was in retaliation for the Everett strikes. The Board agreed and filed a complaint seeking to force Boeing to shift the new assembly line from South Carolina to Washington.

The Board's complaint has sparked a firestorm of criticism. Employer groups contend that the Board is interfering with an employer's fundamental right to decide where to locate its operations. Indeed, until the dispute is resolved (which may take years), it will be difficult for Boeing to determine if it should invest further in the South Carolina facility.

## Union-Rights Poster

The NLRB has issued a regulation requiring employers to post an oversized notice (11x17 inches) of employee rights under the NLRA. This regulation, which applies to most private-sector employers, becomes effective on January 31, 2012.

This is the first time that the Board has required all employers covered by the NLRA to post and maintain such a notice. Historically, the Board has ordered employers to post such a notice only if found to have committed a ULP—and, then, only for 60 days. (Recently, though, the Obama Administration, via a U.S. Department of Labor regulation, has required federal contractors to post and maintain a similar notice.)

Employer groups have challenged the new regulation in court, contending that the Board cannot order an employer to do anything unless and until the employer is found, after formal proceedings, to have violated the NLRA. In December, the presiding court will hear oral argument on whether to enjoin this regulation from going into effect. Meanwhile, employers should prepare to comply with it by January 31, 2012.

## Union Election Rules

The Board has issued proposed rules that would alter its procedures for conducting union elections by:

- Requiring Board hearings on union representation issues (*e.g.*, which employees should be included in a proposed bargaining unit) to begin no later than seven days after a petition for a union election is filed;
- Reducing the employer's deadline for furnishing the union with the names and addresses of employees eligible to vote in the election from seven days after the Board grants the union's election petition to two days thereafter. In addition, employers would be required for the first time to include employees' work locations, shifts, job classifications and e-mail addresses; and
- Permitting the Board to proceed with a union election even where the voting eligibility of up to 20% of the proposed bargaining unit has not yet been resolved. Traditionally, disputes concerning voting eligibility have had to be resolved before the election could take place.

These proposed changes have prompted literally thousands of comments from employer groups, which contend that employers would not have sufficient time to respond to election petitions under such a regulatory scheme. The Board is now determining whether to rescind, modify or implement these proposed changes. If the changes are implemented as proposed or in substantially similar form, then legal challenges by employer groups will be likely.

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# New Social Security "No-Match" Guidance

By William E. Hannum III [1]

After a three-and-a-half year hiatus, the Social Security Administration ("SSA") has resumed sending "no-match" letters to employers when employees' social security numbers do not correspond with the SSA's records. The current version of the no-match letter is different from the letter that the SSA discontinued. Most noticeably, the current version does not contain the Department of Homeland Security Immigration and Customs Enforcement ("ICE") insert stating that an employer's failure to act upon receipt of the letter could be construed as constructive knowledge of its continuing to employ unauthorized workers.

*Any* employer with an employee whose social security number does not correspond with the SSA's records may receive this current no-match letter. The letter states that the discrepancy prevents the SSA from crediting the employee with correct wages, and advises that there can be many reasons for the no-match, such as typographical errors, name changes, and incomplete information.

The letter includes the statement, "We may give this information to the Internal Revenue Service for tax administration purposes or to the Department of Justice for investigating and prosecuting violations of the Social Security Act." The letter also provides: "The letter does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the individual."

When an employer receives a no-match letter, it should proceed with caution. On the one hand, if the employer ignores it, and there are other circumstances indicating that the employee is unauthorized to work in the United States, the employer could face liability for knowingly employing an illegal alien. On the other, if the employer acts too zealously and jumps to conclusions about an employee's legal status, it could face liability for unlawful discrimination against the employee.

What, then, should an employer do if it receives a no-match letter from the SSA? The SSA has issued guidance for employers who receive a no-match letter. Below, we summarize the guidance and provide recommendations regarding employment verification issues.

## How Best To Respond To A No-Match Letter

Employers should take the no-match letter seriously, and proceed with caution. Generally, after receiving a no-match letter, an employer should first check its records to determine if they match documentation submitted to the government, and ask the employee to check his or her records to ensure that the employee has accurately reported his or her name and social security number to the employer. This will eliminate discrepancies due to incorrect data entry by the employee or employer. If the employer finds an error, it should inform the SSA of the error, correct the Form I-9, and contact a tax professional to amend wage and tax statements. In making any corrections to the Form I-9, the employer should take care to ensure that it follows the strict rules for such corrections. If the employer is unaware of the corrections rules, it should seek guidance from experienced legal counsel.

If the employer's records match the employee's (and there does not appear to be a data-entry error by the employer), then the employer should instruct the affected employee to contact a local SSA office to correct and/or update his or her SSA records. Then, the employer should regularly check in with the employee, over a reasonable period of time, to determine whether the employee has corrected the discrepancy. Although the SSA does not define a "reasonable period of time," the SSA has acknowledged, through its E-Verify program, that it may take up to 120 days to correct a discrepancy in its database.

It is important that the employer follow the same procedures regardless of the employee's race, national origin or citizenship status.

The employer should carefully and consistently document all actions that it takes to resolve the no-match issue. For instance, if the employer advises the employee to resolve the issue by contacting a local SSA office, the employer should document this advice and memorialize each follow-up communication with the employee.

If the employee is unable to produce a social security card, or if the employee no longer works for the employer, then the employer should document its efforts to obtain the correct information and retain the documentation for four years.

*What, then, should an employer do if it receives a no-match letter from the Social Security Administration?*

## Authorization To Work In The United States

If the employer has a properly completed Form I-9 on file for the employee, the employer should not ask the employee to

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1 *Will gratefully acknowledges the efforts of Frances S. P. Barbieri, an Associate at Schwartz Hannum PC, who assisted in drafting this article. This article previously appeared in the May 2011 edition of* New England In-House *(NEIH). Will gratefully acknowledges NEIH for its support in publishing this article.*

# Form I-9 Violations Cost Employer $173,250 In Penalties Even Though No Illegal Aliens Employed

By Sara Goldsmith Schwartz [1]

*The United States Department of Justice ("DOJ") recently imposed a $173,250 fine on a contractor of drywall services for violations of the federal Form I-9 reporting requirements. This is a stark reminder that failure to implement and maintain a compliant Form I-9 program can be* very *costly to employers.*

The employer in this proceeding was Ketchikan Drywall Services, Inc. ("KDSI"), a seasonal, project-oriented business employing crews of between three and forty workers on projects lasting from a few days to a month. KDSI hired workers for specific projects and laid them off when the projects ended. KDSI recalled workers for other projects if their work was satisfactory.

The United States Department of Homeland Security, Immigration and Customs Enforcement ("ICE" or the "Government") demanded that KDSI produce the original Form I-9 for each employee who worked for KDSI during the preceding three years. The Government then sought $286,624.25 in penalties for 271 alleged Form I-9 violations, as follows:

- $45,581.25 for KDSI's alleged failure to prepare a Form I-9 for 43 employees;
- $69,377.00 for KDSI's alleged failure to ensure that 65 employees properly completed Section 1 of the Form I-9 (in this section, the employee must attest to his or her status in the United States);
- $115,192.00 for KDSI's alleged failure to properly complete Section 2 of the Form I-9 for 110 employees (in this section, the employer must attest that specific documents were examined to establish the individual's identity and eligibility for employment in the United States); and
- $56,474.00 for KDSI's alleged failure to properly complete both Section 1 and Section 2 of the Form I-9 for 53 employees.

KDSI requested and obtained a hearing before the DOJ, admitting 130 of the alleged 271 violations and contesting the remainder. KDSI also challenged as unreasonable the penalty sought by the Government.

Upon review of the matter, the DOJ determined that KDSI committed 225 of the alleged 271 violations and that an appropriate penalty was $770 per violation, totaling $173,250. Acknowledging that the permissible penalties in this case ranged from only $24,750 ($110 per violation) to $247,500 ($1,100 per violation), the DOJ concluded that KDSI's penalty belonged in the higher end of this range, *even though no workers were actually found to be unauthorized aliens, and KDSI had no history of previous violations.*

In explaining its decision to award such a large penalty, the DOJ stated that KDSI "[did] not demonstrate a good faith effort to ascertain what the law requires or conform its conduct to it," given that KDSI had delegated its Form I-9 functions "to employees who were not qualified to perform the task." The DOJ also emphasized that failure to properly complete Section 1 and Section 2 of the Form I-9 "is always a serious violation" and that failure to prepare a Form I-9 at all "is among the most serious of paperwork violations."

As this case illustrates, the Government is casting a wide net in its search for Form I-9 violations and levying heavy penalties against employers. Accordingly *all* employers should be sure to:

- Complete a Form I-9 for each new employee within three business days of hire;
- Oversee proper completion of both the employee attestation and the employer attestation sections of the Form I-9;
- Keep, with the Form I-9, copies of any documents that the employee produces to establish identity and eligibility to work in the United States (employers are not required to copy the documents they examine, but, if they do, must keep them with the Form I-9);
- Retain the original signed Form I-9 for either three years after the date of hire or one year after the employee's employment is terminated, whichever is later;
- Satisfy the detailed federal regulations covering electronic preparation and storage of Form I-9, if applicable; and
- Maintain the ability to make these forms available to ICE for inspection on three days' notice, as failure to do so is an independent violation of federal law.

*As this case illustrates, the Government is casting a wide net in its search for Form I-9 violations and levying heavy penalties against employers.*

An excellent way to get started, or to maintain an existing compliant Form I-9 program, is to provide on- or off-site training to those supervisors, managers and human resources officials involved in the Form I-9 function.

*Please feel free to contact us if you have any questions about Form I-9, would like to discuss Form I-9 training for your organization, or need assistance in responding to a Form I-9 audit.*

1 *Sara Goldsmith Schwartz is President and Managing Partner of Schwartz Hannum PC. Sara gratefully acknowledges the efforts of Todd A. Newman, a Partner at Schwartz Hannum PC, who assisted in drafting this article.*

# Connecticut Enacts Paid Sick Leave Law: Effective January 1, 2012

By Michelle-Kim Lee

Connecticut has become the first state to require employers to provide paid sick leave. Public Act No. 11-52 generally requires employers with fifty (50) or more employees in Connecticut during any quarter of the prior year to provide up to forty (40) hours per calendar year of paid sick leave to "service workers" for specified absences. Because this law will become effective on January 1, 2012, we encourage all Connecticut employers to review its requirements now to prepare for implementation.

## Affected Employers

Employers covered by the new law include "any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company or other entity" that employs fifty (50) or more individuals in Connecticut in any one quarter of the prior year.

Notably, the law exempts (1) manufacturers classified in sectors 31, 32 and 33 of the North American Industrial Classification System, and (2) any nationally chartered 501(c)(3) non-profit organization that provides recreation, child care *and* education (*i.e.*, all three services), an exemption understood to include only the YMCA, which lobbied against the bill. Connecticut employers should consult with counsel to determine if they fall under one of the statute's exemptions.

## Affected Employees

Only "service workers" are entitled to paid leave under this new law. Service workers include *hourly and non-exempt employees,* as classified by the federal Bureau of Labor Statistics in a long list of occupation code numbers and titles. The list includes the following occupations, among others:

- Retail salespersons;
- Social workers and home health aides;
- Nurses and pharmacists;
- Physician assistants, medical assistants and dental assistants;
- Librarians, hairdressers and cosmetologists;
- Secretaries, administrative assistants, receptionists and office clerks;
- Food service workers and hotel workers;
- Janitors and security guards;
- Child care workers; and
- Data entry and information processing workers.

This is an illustrative but not exhaustive list of covered employees. Please note, however, that the new law does not apply to "day and temporary" workers, defined as individuals who perform work for another on a *per diem* basis, or on an occasional or irregular basis, for only the time required to complete such work. Accordingly, Connecticut employers should also consult with counsel to determine which of their employees are covered by the new law and which are excluded.

## Qualified Paid Sick Leave

A covered employee may take paid sick leave for the employee's own: (1) mental or physical illness, injury or health condition; (2) medical diagnosis, care or treatment of the mental or physical illness, injury or health condition; or (3) preventative medical care.

A covered employee may also take paid sick leave to care for the employee's spouse or child.

If the covered employee is a victim of family violence or sexual assault, paid sick leave also may be taken: (1) for medical care or counseling; (2) to obtain services from a victim services organization; (3) to relocate due to the family violence or sexual assault; and (4) to participate in legal proceedings related to the family violence or sexual assault.

The employer can require advance notice of up to seven (7) days if the leave is foreseeable. When the leave is not foreseeable, employees must give notice as soon as practicable. For leaves of three (3) or more consecutive days, employers may ask for "reasonable documentation," such as a signed letter from a health care provider.

## Accrual And Payment Of Sick Leave

Beginning January 1, 2012, covered employees will accrue one (1) hour of paid sick leave for every forty (40) hours worked, up to a maximum of forty (40) hours, or five (5) days, of paid sick leave per calendar year. Up to forty (40) hours of accrued sick leave may be carried over from one calendar year to the next, but no more than forty (40) hours of accrued leave may be used in any calendar year.

Covered employees will begin to accrue paid sick leave on January 1, 2012, or their hire date, whichever is later. To be covered, an employee must have worked for the employer (a) for at least six hundred eighty (680) hours, and (b) an average of ten (10) hours or more per week in the most recent complete calendar quarter. Thus, even part-time service workers may be eligible.

Sick leave must be paid at the state minimum wage rate or the employee's normal hourly wage rate, whichever is greater. For employees whose wage rates vary, sick leave must be paid at the average hourly rate earned in the pay period immediately preceding the pay period in which leave is taken. Unless an employer's policy or collective bargaining agreement provides otherwise, the employer is *not* required to pay out accrued but unused sick leave upon termination of employment.

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# FLSA Retaliation Protection May Be Triggered By Oral Complaints, Rules Supreme Court

By William E. Hannum III [1]

*The U.S. Supreme Court has ruled that mere* oral *complaints of alleged violations of the Fair Labor Standards Act ("FLSA") may trigger the FLSA's protections against retaliation. Consequently, employers that discipline or discharge an employee after the employee has complained orally about such issues as failure to pay the minimum wage, failure to pay for all hours worked, or failure to pay overtime may be exposed to potential liability for retaliation*—even if the employer did not, in fact, violate the FLSA.

In *Kasten v. Saint-Gobain Performance Plastics Corporation*, the Court decided that an oral complaint triggers the FLSA's retaliation protections when it is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the [FLSA] and a call for their protection."

The upshot of this ruling is that employers must become attuned to oral complaints about pay issues so that these complaints can be dealt with promptly and appropriately, and so that measures can be taken to ensure that any subsequent discipline or discharge of the complaining employee is founded on a clear and well-documented legitimate business reason.

In light of *Kasten*, employers that discount such oral complaints as "mere griping" – or that fail to train supervisors, managers and human resources personnel to identify oral FLSA complaints – may set themselves up for a retaliation claim if the employee later is subject to an adverse employment action.

## Factual Background

Kevin Kasten ("Kasten") was an hourly employee of Saint-Gobain Performance Plastics Corporation ("Saint-Gobain"). Kasten complained to his supervisor about the location of the time clocks that employees were required to use for punching in and out of work. The time clocks were located between the area where employees put on and took off their work-related protective gear and the area where they performed their assigned tasks. According to Kasten, this prevented workers from receiving credit for the time they spent changing in and out of their work gear and walking to and from their work areas.

Following company policy, which encouraged and required employees to internally report suspected or known legal violations, Kasten repeatedly brought the time-clock issue to Saint-Gobain's attention. Specifically, Kasten:

- "raised a concern" with his shift supervisor that "it was illegal for the time clocks to be where they were" because of Saint-Gobain's exclusion of "the time you come in and start doing stuff";
- told a human resources employee that "if they were to get challenged on" the location of the time clocks in court, "they would lose";
- told his lead operator that the location was illegal and that he "was thinking about starting a lawsuit about the placement of the time clocks"; and
- told the human resources manager and the operations manager that he thought the location of the time clocks was illegal and that Saint-Gobain would "lose" in court.

Subsequently, Saint-Gobain disciplined Kasten and ultimately terminated his employment. Kasten contended that these adverse employment actions were in retaliation for his complaints about the time clocks. Saint-Gobain denied this, contending that it disciplined and discharged Kasten because, after being repeatedly warned, Kasten failed to record his comings and goings on the time clocks.

## Kasten's Lawsuit

Kasten commenced a lawsuit against Saint-Gobain in the U.S. District Court for the Western District of Wisconsin, alleging that his discipline and discharge constituted unlawful retaliation under the FLSA for his complaints about Saint-Gobain's time-clock practices. The District Court entered summary judgment in Saint-Gobain's favor, ruling that the FLSA's anti-retaliation provision does not cover *oral* complaints of wage-and-hour violations. The U.S. Court of Appeals for the Seventh Circuit agreed. Kasten then petitioned to the U.S. Supreme Court, which agreed to hear Kasten's appeal in order to resolve a split among the federal appeals courts on this issue.

Note: in a separate lawsuit, Kasten prevailed on his claim that Saint-Gobain violated the FLSA by not paying workers for time spent donning and doffing their required protective gear and walking to their work areas. That ruling was not appealed.

## The Supreme Court's Decision

The Supreme Court ruled in Kasten's favor, determining that oral complaints of alleged FLSA violations are, in fact, covered by the FLSA's anti-retaliation provision. This provision protects employees who have "filed any complaint" about alleged FLSA violations. Accordingly, the Court's ruling, technically speaking, was that a complaint is "filed" for purposes of this provision when it is merely made orally.

The Court began its analysis by focusing on the text of the anti-retaliation provision,

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# FLSA Retaliation Protection May Be Triggered By Oral Complaints, Rules Supreme Court

specifically on the word "filed." Based on a review of dictionary definitions and usage of the word "filed" in state statutes, federal regulations, judicial decisions and other sources, the Court determined that "the text, taken alone, cannot provide a conclusive answer to our interpretive question," as "[t]he phrase 'filed any complaint' might, or might not, encompass oral complaints."

The Court then took into account various "functional considerations." In this regard, the Court determined that limiting the provision's coverage to written complaints would:

- "undermine the Act's basic objectives" by inhibiting "those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers," the very demographic determined to be "most in need of the Act's help" at the time of the FLSA's enactment;
- "take needed flexibility from those charged with the Act's enforcement," as this could "prevent Government agencies from using hotlines, interviews, and other oral methods of receiving complaints";
- "discourage the use of desirable workplace grievance procedures [by employers] to secure compliance with the Act"; and
- be inconsistent with the Court's broad interpretation of the anti-retaliation provision contained in the National Labor Relations Act.

The Court also noted that the U.S. Department of Labor, which generally enforces the FLSA, and the Equal Employment Opportunity Commission, which enforces the FLSA's anti-retaliation provision as part of its Equal Pay Act enforcement responsibilities, have consistently taken the position that the words "filed any complaint" cover oral, as well as written, complaints. In the Court's view, this interpretation is reasonable and entitled to deference.

Based on this analysis, as well as on its determination that "filing" a complaint "is a serious occasion, rather than a triviality," the Court ruled as follows:

> To fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as written ones.

In turn, the Court vacated the Seventh Circuit's decision and remanded the case to the trial court for a decision on whether Kasten's oral complaints satisfied this standard.

Note: the Court declined to rule on an argument that Saint-Gobain raised in an untimely fashion, namely, whether the FLSA's anti-retaliation provision applies only to complaints filed with the Government, and not to private employers.

*In light of* Kasten, *employers that discount such oral complaints as "mere griping" … may set themselves up for a retaliation claim if the employee later is subject to an adverse employment action.*

## Recommendations For Employers

In light of *Kasten*, employers should take the following measures to protect themselves against FLSA retaliation claims based on oral complaints and other types of liability that may arise from similar circumstances:

- Ensure that procedures are in place for documenting, investigating, and responding to both oral and written FLSA complaints;
- Update existing policies, procedures, and guides regarding the handling of internal FLSA complaints. This is especially important because prior to this decision, the law in some federal judicial circuits was that FLSA complaints needed to be in writing;
- Review timekeeping practices for compliance with applicable wage-and-hour laws;
- Train managers to be alert to oral, as well as written, FLSA complaints;
- Ensure that a system is in place for confirming that any proposed employment action relative to an employee who has raised an FLSA complaint (or any other employment complaint) is based on a legitimate business reason that is clear, capable of substantiation, and, under the circumstances, sufficient to withstand a claim that it is a pretext for retaliation; and
- Ensure that employment practices are actually consistent with the corresponding policies.

FLSA and wage-and-hour issues are among the most challenging issues that face employers today. This is especially true where damages resulting from wage-and-hour violations may be cost-prohibitive to continuing the employer's business. Remember that an employer may be found liable for retaliation even if the employee's FLSA wage complaint is without merit. Therefore employers should take all such complaints seriously, even those that appear on their face to lack merit.

1 *Will gratefully acknowledges the assistance of Todd A. Newman and Christian Zinn in the preparation of this article. This article previously appeared in the September 2011 edition of* New England In-House *(NEIH). Will gratefully acknowledges NEIH for its support in publishing this article.*

# Massachusetts Wage Act May Extend To Out-Of-State Employees, Rules Superior Court

By Todd A. Newman and Frances S. P. Barbieri

The Massachusetts Superior Court has ruled that the Massachusetts Wage Act ("Wage Act") may protect out-of-state employees. In *Dow v. Casale,* Superior Court Judge Peter A. Lauriat granted summary judgment for the out-of-state employee, a Florida resident who reported directly to his Massachusetts employer from a home office, rejecting the employer's argument that the Wage Act extends only to employees who are physically based in the Commonwealth.

## Factual Background

Plaintiff Russell Dow ("Dow") was the sole salesperson for Starbak Communications, Inc. ("Starbak"), a small Massachusetts company that produced videoconferencing technology. His title was director of sales.

Dow was a Florida resident during his employment with Starbak, working from a home office. Dow had customers in more than 30 states, including Massachusetts, and traveled to at least 20 of those states in the course of his work. Dow traveled to Massachusetts to visit customers approximately 20 times in 2008 and 2009.

Dow's business card identified Starbak's Massachusetts address, telephone number and fax number as Dow's contact information. All paperwork related to Dow's sales was generated and processed by the Starbak office in Massachusetts. Dow's customers likewise sent payments directly to Starbak's Massachusetts office.

Dow was employed by Starbak from March 2007 to February 2010, when Starbak ceased operations and discharged all employees. Dow claimed that he was owed more than $138,000 in commissions, expenses and accrued vacation time at the time of his discharge.

Dow commenced a civil action in the Massachusetts Superior Court against Starback's chief executive officer, Starbak's chief operating officer, and an individual who held the combined position of president, chairman, secretary and treasurer. In this lawsuit, Dow sought to recover damages under the Wage Act.

## Superior Court's Ruling

The Court ruled that the Wage Act does in fact apply to Dow. The Court first noted that the text of the Wage Act neither restricts its coverage to employees who live or work in Massachusetts nor specifies whether it is the location of the employer, the employee, or the work performed that determines whether the Wage Act applies. In this regard, the Court stated: "Even assuming that the applicability of the Wage Act turns on the situs of the work rather than on that of the employer, the Court could conclude that Dow worked in any or all of the states, including Massachusetts and Florida, where his customers were located and where he visited. If the court were to consider applying the wage acts of all those jurisdictions, the result would be not only impractical but virtually impossible."

The Court similarly reasoned: "[I]n this age of the ubiquitous Blackberry, iPad and smart phone, any person can work in any location that has internet access. Were the court to adopt [the defendant's] argument, the Wage Act would afford no protection to an employee who conducted the employer's business anywhere but in Massachusetts. This is hardly consonant with the purpose of the Wage Act, since an employer could escape potential liability simply by requiring an employee to work, for example, across the border in New Hampshire."

In the absence of any guidance on this issue from the Massachusetts appellate courts, the court decided to "fall back" on a personal jurisdiction analysis. The test for whether a Court may assert personal jurisdiction over an individual turns on whether the individual had sufficient contacts with the state so as to reasonably expect to be subject to a lawsuit there. Applying this concept to Dow's situation, the Court concluded that Dow "had more than sufficient contacts with Massachusetts to afford him the protection of the Wage Act."

Significantly, the Court noted that "if Dow should assert a claim under Florida law, there is no evidence in the record that would support a Florida court's exercise of personal jurisdiction over the defendants." This, together with the fact that Starbak had no assets in Florida that Dow could attach to secure a judgment, may have persuaded the Court that, absent the ability to sue the individual defendants under the Wage Act in Massachusetts, Dow may have been left without any avenue for relief.

## Implications And Recommendations

It is difficult to draw a general conclusion about the implications of *Dow* for Massachusetts employers, particularly as Superior Court decisions are not binding (*i.e.*, the various judges of the Superior Court are not required to follow each other's decisions). At a minimum, though, *Dow* suggests that Superior Court judges will consider extending the Wage Act to out-of-state employees on a case-by-case basis, particularly where, as here, the equities weigh in favor of the unpaid employee. To the extent that *Dow* may be applied more broadly, a conservative approach for multi-state employers based in Massachusetts would be to conform their pay practices to the Wage Act in all states that have less-protective wage laws.

Under the Wage Act, awards of *treble damages* and reasonable *attorneys' fees* are *mandatory* for prevailing plaintiffs. Accordingly, Massachusetts employers should consult with experienced employ-

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## Massachusetts Wage Act May Extend To Out-Of-State Employees, Rules Superior Court

ment counsel to determine if the Wage Act may apply to any of their employees in any jurisdiction. Key components of the Wage Act are as follows:

- Non-exempt employees must be paid weekly or bi-weekly;
- For most employees, wages must be paid within six days after the end of the pay period in which wages are earned;
- Commissions are deemed to be wages when they are "definitely determined" and "due and payable"; and
- Any employee who is discharged must be paid on the date of discharge for all earned wages and accrued but unused vacation time.

*If you have questions about the potential implications of* Dow *for your business, or about the Wage Act generally, please do not hesitate to contact us, as understanding your organization's compliance obligations under this statute is critical.*

*continued from page 1*

## Does Your School Have A Risk-Management Strategy For Off-Campus Trips?

- Screening Of Vendors And Volunteers. Schools frequently hire vendors to provide services during off-campus trips and permit parents or other volunteers to serve as chaperones. It is critical to conduct appropriate background checks on all such vendors and volunteers. For example, if the school hires an outside transportation company, then appropriate driver record checks, criminal background checks, and sex offender registry checks should be conducted on the drivers. Background checks should always be required of volunteers for off-campus trips, even when the volunteers are the parents of current students.
- Chaperone Training. All chaperones should be trained in how to appropriately respond to various situations that may arise during the off-campus trips. Depending on the school and the types of trips it offers, such training might address how to appropriately respond in cases of medical emergencies, significant transportation delays, accusations of sexual assault or harassment, and evidence of alcohol or drug use by a student or fellow chaperone. Chaperones should also be provided with a copy of any policies, procedures, or guidelines that refer or relate to their duties and responsibilities.
- Insurance Coverage. The school should ensure that it has appropriate insurance coverage for all off-campus trips and related activities it offers. Similarly, the school should ensure that each participant has health insurance that would provide coverage during the trip. Depending on the nature of the trip, the school might also encourage or require participants to purchase their own travel insurance. In the event of an overseas trip, the school should consider an international travel insurance plan to provide another layer of protection for emergencies and medical needs that may arise.

While the above items are core components of off-campus risk-management, each school should assess whether any particular trip warrants additional safeguards. In this regard, each school's risk-management program will vary depending on the types of trips and activities it offers to its students.

*Please contact any of the attorneys in the Firm's Education Practice if you have questions or need assistance in developing a risk-management strategy for off-campus trips and activities.*

## Lunchtime Webinar Series For Independent Schools

**December 1, 2011** 12:00 to 1:30 p.m.
Tips And Traps For Drafting An Ideal Enrollment Agreement

**January 12, 2012** 12:00 to 1:30 p.m.
Protecting Confidential Information: Complying With Data Security Laws And The Red Flags Identity Theft Regulations

**February 9, 2012** 12:00 to 1:30 p.m.
Best Practices For School Trips, Overnight Trips, Extended Stays And International Trips

**March 6, 2012** 12:00 to 1:30 p.m.
Getting It Write:
Drafting An Employee Handbook For The School Environment

**April 9, 2012** 12:00 to 1:30 p.m.
Technology And Acceptable Use Agreements:
Where To Draw The Lines For Faculty, Staff And Students?

**May 7, 2012** 12:00 to 1:30 p.m.
Applicants And Students With Disabilities:
Is Your School Prepared To Lawfully Accommodate And To Know Where To Draw The Line?

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.

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# New Social Security "No-Match" Guidance

resubmit proof of work authorization. However, if an employee admits to a supervisor or manager, without being asked, that he or she is not legally authorized to work in the United States, then the employer should terminate the employment of the employee immediately, regardless of whether the employer has received a no-match letter for the employee. If an employer continues to knowingly employ an individual who is not authorized to work in the United States, the employer could face civil fines and criminal fines and charges, which could result in jail time.

It is essential that employers understand that the receipt of a no-match letter, on its own, is not an indication of an employee's work authorization status, and is not a sufficient basis to terminate or take any other adverse action against an employee.

## Practical Tips

Even those employers that have not received a no-match letter can minimize the risk of no-match letters and similar problems by taking steps now to ensure compliance. For example, employers should establish procedures to eliminate the kinds of typographical errors that lead to no-match letters. Additionally, if, during a compliance audit, or at any other time, an employee voluntarily admits, without being asked, that he or she is not legally authorized to work in the United States, the employer must terminate his or her employment immediately.

Employers should keep the process of responding to SSA no-match letters separate from the process of Form I-9 compliance. In this regard, ICE has dramatically increased its Form I-9 audits of employers over the past few years. Thus, the utmost care should be taken to complete and store Form I-9 properly. Employers should conduct training for supervisors, managers, and human resources employees involved in the Form I-9 process.

Although no-match letters are separate from the Form I-9 compliance process, ICE may still try to claim that an employer's receipt of a no-match letter is evidence of unauthorized work. By keeping accurate records of its responses to no-match letters, and by properly completing each and every Form I-9, an employer can strengthen its defenses to a potential claim that it knowingly employed individuals not authorized to work in the United States.

Whether responding to no-match letters or to a Form I-9 audit, employers should seek experienced legal guidance, as the rules governing which documents may be used to complete the Form I-9, and how the Form I-9 may be stored electronically, have recently changed.

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# Connecticut Enacts Paid Sick Leave Law: Effective January 1, 2012

## Additional Compliance Requirements

The employer must notify each covered employee at the time of hire of his/her entitlement to paid sick leave, the amount of paid sick leave provided, and the terms under which such leave may be used. The employer also must notify covered employees of their rights to be free from retaliation for taking paid sick leave and to file a complaint with the state Labor Commissioner for violations of the law. Employers may satisfy these notice requirements by displaying a poster in English and Spanish in a conspicuous, accessible place.

An employer will be deemed to be in compliance if it offers "any other paid leave" (*i.e.*, paid vacation, personal days, paid time off or any combination of paid leave) that can be used for the purposes specified in the new law and that accrues at the same or a faster rate than required by the new law. Accordingly, by instituting an appropriately tailored paid time off policy, Connecticut employers could potentially satisfy their compliance burdens under the new law while simplifying leave administration. (Please note, however, that the new law's notice requirements will apply even in this scenario.)

## Recommendations For Employers

The enactment of Connecticut's new paid sick leave law provides a compelling reason for all employers in Connecticut to review their leave of absence practices and policies, as well as other paid time off practices and policies. Estimates are that some 200,000 to 400,000 workers in Connecticut will be affected by this new law. As such, we recommend that all Connecticut employers:

- Carefully determine whether they are covered and, if so, which of their employees are covered, under the new paid sick leave law;
- Examine current leave of absence practices and programs to determine whether an already-existing paid time off policy is in compliance with the new law, and/or whether to revise existing leave policies to ensure compliance;
- Ensure that managers, supervisors and human resources personnel are trained to understand and comply with the new paid sick leave requirements by the time the new law takes effect next year; and
- Ensure that the required poster is displayed in the workplace.

*Please let us know if you have any questions about the new Connecticut paid sick leave law or how best to revise your current paid leave policies to ensure compliance with its requirements.*

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# NLRB Continues Pro-Union Course, Raising Numerous Compliance Challenges For Employers

## Recommendations For Employers

In light of these recent significant and controversial Board actions, employers are encouraged to:

- *Consult with labor counsel before transferring or subcontracting work carried out by unionized employees.* As the Boeing complaint suggests, in some cases the Board may argue that such a decision was unlawfully motivated and, therefore, a violation of the NLRA.
- *Gain a thorough understanding of the requirements that the NLRA imposes on unionized and non-unionized employers alike.* Some employers may be surprised to learn that even non-unionized employees generally have a right to act collectively to seek improvements in their wages or other terms and conditions of employment.
- *Begin preparations for a potential union election as soon as an employer suspects it is a target of union organizing.* As the Board's proposed election rules would dramatically increase the pace of union elections, employers need to be prepared to immediately raise any and all challenges to the proposed vote.
- *Take active steps to minimize the risk that employees will vote to unionize.* These steps should include adopting and enforcing written policies that (i) specify when employees are permitted to engage in workplace solicitation and distribution of literature, and (ii) prohibit non-employees from gaining unauthorized access to the premises. (Note: these policies are governed by complex legal standards, so they should always be reviewed by labor counsel.) Also, employers should provide training to assist managers in identifying workplace issues that may lead to union organizing or ULP charges.

*Please do not hesitate to contact us if you have questions about these recent developments, or if we can assist your organization with labor issues or in any Board proceeding.*

## Boston Bar Association Welcomes Schwartz Hannum As Sponsor Firm

Emphasizing the importance of building mutually beneficial relationships with law firms of all sizes in the Greater Boston community, Boston Bar Association President Lisa C. Goodheart recently welcomed Schwartz Hannum PC to its growing list of sponsor firms.

"The Boston Bar Association is thrilled to have this leading law firm join our ranks," said President Goodheart. "We are delighted that Schwartz Hannum, in choosing to become a sponsor firm, has demonstrated its support of BBA's mission of advancing professional excellence, access to justice, and service to the community."

"Both the BBA and Schwartz Hannum are demonstrably committed to excellence," said President and Managing Partner Sara Goldsmith Schwartz, who founded the firm in 1995. "I have seen our core values represented at the BBA in the programming, section activity, continuing legal education programs, its weekly newsletter and every time I enter the building."

## Recognized By *Super Lawyers*®

Schwartz Hannum PC is thrilled to announce that **William E. Hannum III** was selected for inclusion in 2011 *New England Super Lawyers* in the area of Employment & Labor Law for the eighth consecutive year.

These listings are being published in the November issue of *Boston Magazine* and *Super Lawyers Business Edition 2011.* Massachusetts Super Lawyers were selected following a "Blue Ribbon Panel" review of the results of ballots sent to 37,000 lawyers throughout Massachusetts by *Law & Politics.* Lawyers were scored based on the number and types of votes received. Only five percent of Massachusetts lawyers were named for inclusion in 2011 *Super Lawyers.*

The Firm is also thrilled to announce that, for the third year in a row, **Michelle-Kim Lee** has been selected for inclusion in *2011 New England Rising Stars* in the areas of Employment Litigation Defense and Employment & Labor Law.

This recognition is published in the 2011 issue of *Massachusetts Super Lawyers – Rising Stars Edition.* Only two and one-half percent of Massachusetts lawyers were named for inclusion in 2011 Rising Stars. Each year, Massachusetts lawyers are asked to nominate the best up-and-coming attorneys whom they have personally observed "in action." Massachusetts Rising Stars are then evaluated and selected based on twelve indicators of peer recognition and professional achievement.

# Winter Webinar Schedule

DECEMBER 2, 2011

**Annual Labor And Employment Update:** Overview of Significant Legal Decisions And Legislative Changes
12:00 to 1:30 p.m.

JANUARY 17, 2012

**Getting It Write:** Drafting An Ideal Employee Handbook
12:00 to 1:30 p.m.

FEBRUARY 6, 2012

**The Nuts And Bolts Of Compliance With The Amended Family And Medical Leave Act**
12:00 to 1:30 p.m.

MARCH 29, 2012

**Facebook Terminations And Other Social Media Issues**
12:00 to 1:30 p.m.

APRIL 24, 2012

**ADA/ADAAA:** Teaching Old Dogs New Tricks
12:00 to 1:30 p.m.

MAY 15, 2012

**The High Price of Misclassification:**
Are You Properly Classifying Independent Contractors, Temps, Interns And Volunteers?
12:00 to 1:30 p.m.

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 is an experienced labor and employment law firm guiding businesses and non-profit organizations throughout New England and nationally. Located outside of Boston, the Firm represents hundreds of clients, from small New England-based businesses to Fortune 100 and 500 companies.

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