SCHWARTZ HANNUM PC
Labor and Employment Lawyers Guiding Management

Labor and Employment Law Update

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IN THIS ISSUE

'Tis The Season For Perfecting Enrollment Agreements

By Sara Goldsmith Schwartz

Now is the perfect time to review and update your independent school's enrollment and re-enrollment agreements for the next academic year. Recently, we have observed a significant increase in the number of tuition disputes. This trend is one of many reasons why we recommend that independent schools review and update their enrollment agreements now.

We have developed detailed checklists to assist schools with reviewing their enrollment agreements and on-line enrollment agreements. If you would like a copy of the checklists or have any questions about the issues discussed in this article, please do not hesitate to contact us at *schwartz@shpclaw.com*. Additional information is also available at the Firm's Education Blog.

Top Three Enrollment Agreement Traps

What are the top three enrollment agreement traps we have seen in the past 12 months?

(1) Inadequately Addressing Behavioral Standards. Too often we see enrollment agreements with missing or poorly written clauses addressing behavioral standards for students and people associated with students (*e.g.*, parents, step-parents, siblings). Well-drafted parental comportment clauses establishing clear behavioral standards provide the school with flexibility to end its relationship with families and students that may be toxic to the school environment. Moreover, clear behavioral standards for those associated with students can be quite helpful in contentious divorce or separation contexts that may place children (and the school) in the middle of a complex and unpleasant situation.

(2) Guaranteeing Or Promising Specific Outcomes. Tuition disputes often arise when there is a discrepancy between the parents' expectations as to their child's likely achievements, due to his/her enrollment at the independent school, and the child's actual achievements. Sometimes the discrepancy in expectations and actual achievements is caused by the promises and/or guarantees offered by the school in its admissions process, website, milestones for each academic year, and/or its enrollment agreement. Committing to specific educational outcomes (*e.g.*, the student will gain admission to a prestigious secondary or post-secondary school or be proficient in a foreign language at the end of 8th grade) is increasingly leading to lawsuits in which schools are forced to defend their programs and teaching methods. While such lawsuits are rarely decided in favor of the parents and the students initiating them, such litigation can be costly to defend (in terms of both legal fees and the administrative brain drain) and can be highly damaging to the school's reputation. Consequently, we urge independent schools to: (a) closely scrutinize any language in their enrollment agreements that could be interpreted as guaranteeing or promising a specific outcome; and (b) add specific language noting that the school does not guarantee the results of its educational offerings, and explaining that the school may not be an ideal fit for each student.

(3) All-Purpose Permission Slips. In an effort to reduce the amount of paperwork to be collected from parents, schools frequently include language in their enrollment agreements that is intended to serve as a permission and release slip for all school-sponsored activities, such as off-campus trips and athletics. The language included in the enrollment agreements, however, may not provide parents with sufficient information about the

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New Law In New Hampshire Will Invalidate Non-Compete And Non-Piracy Agreements Of Unwary Employers

By William E. Hannum III [1]

New Hampshire has enacted legislation requiring employers to provide applicants and employees with any required "non-compete" or "non-piracy" agreement before or at the time an offer of employment or an offer of change in job classification is made to the individual. If such an agreement is not provided to the applicant or employee prior to or in conjunction with the offer, then the agreement will be deemed "void and unenforceable" by operation of law. The legislation took effect on July 14, 2012.

The new statute is brief and does not define any of its terms. As a result, the statute raises a host of issues that will likely need to be resolved by the New Hampshire courts. Until then, employers should interpret the new law broadly to maximize the chances that their future non-compete, non-solicit, and similar agreements will be upheld.

Language Of Statute

The new statute consists of only the following two sentences:

> Prior to or concurrent with making an offer of change in job classification or an offer of employment, every employer shall provide a copy of any non-compete or non-piracy agreement that is part of the employment agreement to the employee or potential employee. Any contract that is not in compliance with this section shall be void and unenforceable.

This language appears to mean that if an applicant or employee must sign a "non-compete" or "non-piracy" agreement as a condition of an offer of employment or an offer of change in job classification, then the employer must give the applicant or employee a copy of the agreement *before or at the time the offer is made.*

Ambiguities In Language

The brevity of the new statute creates numerous ambiguities for New Hampshire employers. In particular, like the other terms used in the statute, the term "non-piracy agreement" is not defined. This term is not commonly used in employment agreements, raising questions as to whether "non-piracy agreement" refers to (i) an agreement restricting solicitation of customers, (ii) an agreement restricting solicitation of employees, (iii) an agreement relating to disclosure of trade secrets or other confidential information, (iv) some combination of the above, or (v) something else altogether.

The more familiar term "non-compete agreement" typically refers to an agreement that restricts an employee's right to work for a competitor for a period of time after the termination of his or her employment. Presumably, this is the meaning the Legislature had in mind in using this term. However, because the statute does not actually define "non-compete agreement," the term might encompass not only post-employment non-competes, but also agreements that restrict competitive activities *during* an individual's employment.

Likewise, while the term "change in job classification" was presumably intended to encompass an offer of a promotion to an employee, the term might also apply to reorganizations, horizontal transfers, demotions, or even mere changes in job title. Accordingly, New Hampshire employers should ensure that *any* job change requiring a non-compete or non-piracy agreement complies with the statute.

Implications For Multi-State Employers

For employers doing business in multiple states that include New Hampshire, the new law is another patch in the quilt of increasingly employee-protective state laws on restrictive employment covenants. This growing body of disparate state law is making it more difficult for multi-state employers to use a "one size fits all" non-compete agreement, or to administer their non-compete programs the same way across the board.

For example, in Oregon, applicants must be given two weeks' advance written notice that signing a non-compete is a condition of employment. Additionally, in Oregon, non-compete agreements can be used only with employees properly classified as exempt under the wage-and-hour laws and whose annual gross compensation exceeds a certain threshold. In fact, Oregon non-competes have a maximum duration of two years and generally must provide for the employee to be paid fifty percent of his or her salary during the restrictive period.

Idaho law contains a variation of the requirement that an employee be properly classified as exempt in order to be subject to a non-compete. In Idaho, only "key" employees may be required to sign such agreements. An employee is presumptively "key" if he or she is among the company's highest paid five percent of workers. Similarly, in Colorado, non-competes can generally be used only with "executive" or "management" employees or members of their "professional staff."

Various other unique state-law requirements within this patchwork are Louisiana's mandate to specify the parishes, municipalities, or parts thereof where the restriction will operate; South Dakota's strict two-year maximum restrictive period; and Nebraska's "all or nothing" rule, which prevents courts from reforming or "blue-penciling" non-competes deemed to be overbroad.

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1 *Will gratefully acknowledges Todd A. Newman and Brian D. Carlson of Schwartz Hannum PC for their help in preparing this article. This article previously appeared in the July 2012 edition of* New England In-House (NEIH). *The Firm is also grateful to* NEIH *for its support in publishing this article.*

NLRB Guidance Memorandum Highlights Pitfalls Of Employer Social Media Policies

By Brian D. Carlson [1]

The Acting General Counsel ("AGC") of the National Labor Relations Board ("NLRB" or "Board") has released a new report on employment policies governing the use of social media, including Facebook, Twitter and other social-networking websites. The report (which follows two similar reports previously issued by the AGC) discusses recent cases in which the AGC issued formal complaints against employers upon finding that their social media policies unlawfully chilled employees' rights to engage in protected "concerted activities" under Section 7 of the National Labor Relations Act ("NLRA").

While the AGC's report, unfortunately, does not establish any clear "safe harbor" guidelines for employers in drafting social media policies, it discusses several types of policy provisions that likely *will* be found to violate employees' Section 7 rights. Thus, employers should carefully review the AGC's report and consider whether any of their social media or related policies needs to be revised.

Legal Background

Under the NLRA, when employees act collectively for the purpose of bettering the terms and conditions of their employment, such actions generally constitute protected "concerted activity," for which employees may not be penalized. Significantly, even actions taken by a single employee may be deemed protected concerted activity, if the employee undertakes them with the object of initiating or preparing for group action. Further, the NLRA's protection of such concerted activities applies equally to unionized and non-unionized employees.

The NLRB has held that a work rule (such as a social media policy) violates the NLRA if it "would reasonably tend to chill employees in the exercise of their Section 7 rights." The determination as to whether a rule would have such an effect is made through a two-step inquiry. First, if a work rule *explicitly* restricts protected concerted activities – for instance, by directing employees not to discuss work grievances with one another – the rule will be found unlawful on its face. Second, if a rule does not explicitly limit protected concerted activities, it nonetheless will be deemed to violate the NLRA if (1) employees would reasonably construe its language as prohibiting protected concerted activity, (2) the rule was promulgated in response to protected concerted activity, or (3) the rule has been applied to restrict the exercise of Section 7 rights. In general, if a rule is ambiguous as to whether it restricts protected concerted activity, it is likely to be found unlawful.

Social Media Policy Provisions Discussed In Report

The AGC's report highlights a number of types of social media policy provisions that may raise pitfalls for employers, as summarized below.

Broad confidentiality provisions. In two of the cases discussed in the report, the employment policies, respectively, instructed employees not to "release confidential guest, team member or company information" and not to disclose "material non-public information" on social networking sites. The AGC's report indicates that language of this nature would reasonably be interpreted as unlawfully prohibiting employees from using social media to discuss their terms and conditions of employment.

By contrast, in another case discussed in the report, the AGC concluded that the confidentiality language in the employer's social media policy was lawful because it provided "sufficient examples of prohibited conduct so that, in context, employees would not read the rules to prohibit Section 7 activity." That policy included numerous examples of the types of confidential information sought to be protected – such as trade secrets, product information, technology, and know-how – and, according to the AGC, thus made clear to employees that the policy was not intended to encompass protected communications about terms and condition of employment.

Prohibitions on posting "false" or "misleading" information. One employer's social media policy cautioned employees to ensure that their social media posts were "completely accurate and not misleading." The AGC determined that this language was unlawful, as it could reasonably be interpreted as prohibiting employees from criticizing their employer's personnel policies.

Provisions aimed at discouraging employees from publicizing work issues externally. The AGC found unlawful a policy that encouraged employees to resolve "concerns about work by speaking with co-workers, supervisors, or managers," and that stated that the employer believed that such outlets were more effective than "posting complaints on the Internet" or using "social media or other online forums." The AGC explained that while an employer may legitimately suggest that employees attempt to resolve work

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1 *Brian gratefully acknowledges Michelle-Kim Lee of Schwartz Hannum PC for her assistance in preparing this article. This article previously appeared in the September 2012 edition of* New England In-House (NEIH). *The Firm is also grateful to* NEIH *for its support in publishing this article.*

Employers Need To Be Mindful Of Local Paid Sick Leave Laws

By Julie A. Galvin

As of September 1, 2012, a new ordinance in Seattle, Washington, requires most employers to provide paid sick leave to employees who work in the city. The Seattle ordinance is the latest in a growing number of paid sick leave measures that have been adopted by various localities across the United States. Thus, employers need to monitor these developments closely and ensure that they are in compliance with any applicable paid sick leave laws.

Seattle Ordinance

Under the new Seattle ordinance, all employers–regardless of location–with at least five full-time equivalent ("FTE") employees must offer "paid sick and safe time" ("PSST") to employees who work in Seattle. Sick time includes leave taken because of an employee's own health condition or to care for a family member. Safe time refers to leave taken for certain reasons related to domestic violence, stalking, or sexual assault, or because of the closing of an employee's workplace or a child's school or day-care facility due to a health hazard.

Employees working in Seattle are eligible for PSST after six months of employment, as follows:

- For employers with at least five but fewer than 50 FTEs, employees must be permitted to accrue at least one hour of PSST for each 40 hours worked, and to use up to 40 hours of accrued PSST per calendar year.
- For employers with at least 50 but fewer than 250 FTEs, employees must be permitted to accrue at least one hour of PSST for each 40 hours worked, and to use up to 56 hours of accrued PSST per calendar year.
- For employers with more than 250 FTEs, employees must be permitted to accrue at least one hour of PSST for each 30 hours worked, and to use up to either 72 hours (if an employer maintains separate sick-leave and vacation banks) or 108 hours (if an employer has a combined or universal leave policy) of PSST per calendar year.

Notably, the ordinance does *not* require that an employee's primary work location be within Seattle for the employee to be covered. Employees who perform more than 240 hours of work within the city during a calendar year are covered by the ordinance, even if their primary work location is outside Seattle. Thus, if an employer located outside of Seattle (or, indeed, outside of Washington State) assigns an employee to a long-term project in Seattle, the employer may be required to make PSST available to the employee in accordance with the ordinance.

Other Paid Sick Leave Laws

In addition to Seattle, various other localities across the United States have enacted paid sick leave laws within the past few years:

- San Francisco. A San Francisco ordinance requires that employees who work in the city be permitted to accrue at least one hour of paid sick leave for each 30 hours worked. The San Francisco ordinance applies irrespective of where an employer is located, but the time must be worked within the city in order to be included in the calculation. Employers with fewer than ten employees must permit employees to have at least 40 hours of accrued time in their sick leave banks at any time. For employers with at least ten employees, this number increases to 72 hours.
- Philadelphia. Under a Philadelphia ordinance, various categories of employers – including the City of Philadelphia, certain city contractors, certain employers that receive funding or aid from the city, and employers with more than 25 employees that obtain city leases, concessions or franchises – are obligated to provide paid sick leave to employees. Employers with between five and 11 employees must offer employees up to 32 hours of paid sick leave per year, while employers with more than 11 employees must provide up to 56 hours of paid sick leave annually. Employers with fewer than five employees are not covered by the ordinance.
- Washington, D.C. A District of Columbia law requires all employers located within D.C. to provide paid sick leave to employees. Employers with fewer than 25 employees must provide up to three paid sick days per year. Employers with at least 25 but fewer than 100 employees must provide up to five paid sick days per year. Finally, employers with at least 100 employees must provide up to seven paid sick days per year.
- Connecticut. A Connecticut statute requires most employers with 50 or more employees in the state to allow "service workers" to accrue up to 40 hours of paid sick leave per year.

Recommendations For Employers

In light of the new Seattle paid sick leave ordinance and similar laws in other localities, it is important that employers:

- Ensure that they are in compliance with all applicable paid sick leave requirements;
- In consultation with counsel, update their written policies, employee handbooks and other personnel documents as necessary to comply with such laws; and
- Continue to monitor future developments in this area. In this regard, similar paid sick leave laws have been proposed in New York City and in several other states, including Massachusetts.

Please contact us if you have any questions regarding the Seattle ordinance, other paid sick leave laws, or any other leave issue. We regularly counsel employers on such matters, and we would welcome the opportunity to assist you.

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New Law In New Hampshire Will Invalidate Non-Compete And Non-Piracy Agreements Of Unwary Employers

In this larger context, New Hampshire's new law raises more than just a local compliance issue. It also raises the bar for employers seeking to use a uniform non-compete agreement and/or to administer a uniform non-compete program in a collection of states that includes New Hampshire.

Recommendations For Employers

In light of the new statute, New Hampshire employers should ensure that if an applicant or employee will be asked to sign any type of restrictive employment covenant — whether styled as a non-compete, non-solicit, non-disclosure, assignment-of-inventions, or other kind of agreement — in connection with an offer of employment or an offer of change in job classification, he or she be given a copy of the agreement at or before the time the offer is made. Otherwise, the agreement, even if freely signed, may be deemed "void and unenforceable."

Employers with employees in New Hampshire also should construe the term "change in job classification" as applying broadly to any type of promotion, demotion, transfer, reassignment, change in title, or other change in job status, if execution of a non-compete or non-piracy agreement will be required as part of this change. Otherwise, the employer will run the risk that some or all of the restrictive covenants signed by employees in such circumstances will be found "void and unenforceable" by a reviewing court.

Finally, New Hampshire employers should remember that, even without this new law, non-compete, non-solicit, and similar agreements will be enforced only if found to be reasonable temporally, geographically, and relative to the scope of the activity sought to be restricted. Accordingly, it is advisable to consult with experienced employment counsel when drafting, administering, and seeking to enforce non-compete agreements and similar kinds of restrictive employment covenants, in New Hampshire and elsewhere.

Schwartz Hannum PC Honored As A "Top 100" Woman-Led Business For The Third Year In A Row

We are thrilled to announce that Schwartz Hannum PC was honored as a Top 100 Woman-Led Business in the region for the third year in a row by the ***Boston Business Journal*** and ***The Commonwealth Institute.*** This select list was published in the November 5th issue of the *Boston Business Journal.* Congratulations to Sara and the entire team at Schwartz Hannum.

Schwartz Hannum PC Is Pleased To Announce That **Hillary Joy Massey** Has Joined The Firm As An Associate

Hillary Joy Massey received her Bachelor of Science Degree in Biology and Child Development, *cum laude,* from Tufts University. She received her Juris Doctor Degree, *magna cum laude,* from Boston College Law School, where she served as Articles Editor and Staff Writer for the Boston College Law Review. After receiving her law degree, Hillary clerked for the Honorable William G. Young, U.S. District Court for the District of Massachusetts, and for Chief Justice Margaret H. Marshall of the Massachusetts Supreme Judicial Court. Prior to joining the Firm, Hillary was an associate at Libby O'Brien Kingsley & Champion, LLC, in Kennebunk, Maine, where she represented clients in a wide variety of general litigation matters in both state and federal court.

Hillary's experience includes counseling employers on a broad range of employment-related matters, including race and age discrimination, retaliation, and wage-and-hour claims. Hillary has also represented employers in breach-of-contract matters, defended employers against administrative charges of discrimination, advised health-care organizations and county governments on various matters, and developed a special interest in compliance issues under the Stark Act and other laws prohibiting kickbacks and self-dealing in government-funded programs.

Hillary has prepared many briefs and participated in oral arguments before appellate courts. She has extensive experience in negotiating settlements and participating in mediations.

Hillary served in the United States Army Reserve from 1994 to 2006, during which time she worked as a medic and later as an Assistant Operations Officer in a medical brigade. Hillary also served as a volunteer with the United States Peace Corps in Zambia, Africa, for two years.

Hillary is a member of the bars of the Commonwealth of Massachusetts and the State of Maine. She is also a member of the Boston Bar Association and the Maine State Bar Association.

USCIS Now Accepts I-129 Petitions For Initial TN Classification

By Julie A. Galvin

On October 1, 2012, U.S. Citizenship and Immigration Services ("USCIS") began accepting Form I-129, Petition for Nonimmigrant Worker, relative to Canadian citizens who reside outside the U.S. and seek *initial* classification as TN nonimmigrants. Traditionally, USCIS had accepted such petitions only for *extensions* of TN status, requiring those seeking initial TN status to apply in person at a port of entry, such as a border crossing or airport.

A product of the North American Free Trade Agreement ("NAFTA"), TN status, which stands for "Trade NAFTA" status, allows qualified citizens of Canada and Mexico to engage in professional activities for specified employers in the U.S. Qualifying occupations include, but are not limited to, accountants, engineers, scientists, certain allied medical professionals, and teachers. TN designations are not subject to an annual quota and are renewable indefinitely (for maximum periods of three years each), as long as the petitioner demonstrates an intention to return home when the TN period expires.

Despite this change, Canadian citizens still may petition for TN status at a port of entry. But, of course, obtaining prior approval from USCIS would spare petitioners the inconvenience of traveling to the border only to have their petitions denied. While ports of entry typically grant deference to USCIS's approval notices, petitioners should nonetheless be prepared to demonstrate at the time of crossing that they are admissible to the U.S. and meet the requirements for TN status.

Recommendations For Employers

In light of this development, employers interested in hiring Canadian citizens in TN status should:

- Weigh the pros and cons of having the petitioner file with USCIS instead of at the port of entry. Filing with USCIS may reduce unnecessary travel to a border crossing but will require a filing fee, $325 per petition, and result in a longer processing time, approximately two months (although petitioners may obtain expedited processing for an additional fee of $1,225); and
- Ensure that any Form I-129 filed with USCIS is properly completed and filed at the Vermont Service Center to avoid any delays in processing.

Please contact us if you have any questions regarding this change in filing procedures for Canadian citizens seeking TN nonimmigrant status. We regularly prepare and file such petitions and would welcome the opportunity to assist you.

Recognized By Super Lawyers®

Schwartz Hannum PC is thrilled to announce that **William E. Hannum III** was selected for inclusion in *2012 Massachusetts Super Lawyers* list in the area of Employment & Labor Law for the ninth consecutive year.

This recognition is published in the November 2012 issue of *Boston* magazine and *New England Super Lawyers* magazine. *Massachusetts Super Lawyers* were selected following a "Blue Ribbon Panel" review of the results of ballots sent to lawyers throughout Massachusetts. Lawyers were scored based on the number and types of votes received. Only five percent of Massachusetts lawyers were named for inclusion in 2012 *Super Lawyers.*

The Firm is also thrilled to announce that, for the fourth year in a row, **Michelle-Kim Lee** has been selected for inclusion in *2012 Massachusetts Rising Stars* list in the area of Employment Litigation Defense.

This recognition is published in the November 2012 issue of *Boston* magazine and *New England Super Lawyers* magazine. Only two and one-half percent of Massachusetts lawyers were named for inclusion in 2012 *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.

We are extremely proud of Will and Michelle, and congratulate them on receiving these well-deserved recognitions.

Employers Must Begin Using New FCRA Forms As Of January 1, 2013

By Jessica L. Herbster [1]

The Consumer Financial Protection Board ("CFPB") recently issued regulations modifying three of the forms required under the federal Fair Credit Reporting Act ("FCRA") to reflect that the CFPB, rather than the Federal Trade Commission ("FTC"), is the agency from which consumers may obtain information about their rights under the FCRA. Accordingly, employers that use consumer reporting agencies ("CRAs") or other third parties to conduct background screenings of applicants or employees need to ensure that the modified FCRA forms are implemented by no later than January 1, 2013.

FCRA Litigation

In recent years, many employers have been faced with expensive litigation, including class-action lawsuits, based on alleged technical violations of the FCRA. For example, in *Singleton v. Domino's Pizza, LLC,* No. DKC 11-1823 (D. Md. Jan. 25, 2012), a federal district court denied the employer's motion to dismiss a class action alleging that the employer violated the FCRA by providing FCRA disclosures as part of an overall application packet, rather than separately. As this case illustrates, it is critical that employers ensure that they meet all technical and procedural requirements imposed by the FCRA, and that CRAs and any other third parties used to conduct background checks are in compliance with the FCRA.

In recent years, many employers have been faced with expensive litigation, including class-action lawsuits, based on alleged technical violations of the FCRA.

Modifications To Forms

Under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, rulemaking responsibility under the FCRA was transferred from the FTC to the CFPB. Since then, the CFPB has published in the Federal Register an interim final rule establishing a new regulation. The new regulation does not implement any substantive changes to the existing regulations, but includes technical changes to reflect this transfer of authority.

To that end, the new regulations modify the following three FCRA forms to indicate that consumers may obtain further information about their rights under the FCRA from the CFPB, rather than the FTC.

(1) Summary Of Consumer Rights. Employers must provide this notice to applicants and employees in various situations, including when an applicant or employee will be the subject of an investigative consumer report, or is receiving a pre-adverse action notice.

(2) Notice To Furnishers Of Information Regarding Their FCRA Obligations. CRAs are required to provide this notice to furnishers of information in certain situations (*e.g.,* when an applicant or employee disputes information contained in a credit report).

(3) Notice To Users Of Consumer Reports Of FCRA Obligations. CRAs are obligated to provide this notice to all users of their services, including employers.

The new regulations, which include sample copies of the modified FCRA forms, can be accessed through the following links:

- *http://www.gpo.gov/fdsys/pkg/CFR-2012-title12-vol8/pdf/CFR-2012-title12-vol8-part1022-appK.pdf*
- *http://www.gpo.gov/fdsys/pkg/CFR-2012-title12-vol8/pdf/CFR-2012-title12-vol8-part1022-appM.pdf*
- *http://www.gpo.gov/fdsys/pkg/CFR-2012-title12-vol8/pdf/CFR-2012-title12-vol8-part1022-appN.pdf*

Recommendations For Employers

As a result of the modification of these FCRA forms, we recommend that employers take the following steps:

- Ensure that the revised FCRA forms are implemented by no later than January 1, 2013, for all background screenings carried out by CRAs or other third parties;
- Carefully review, in consultation with counsel, their background-check procedures to ensure strict compliance with all of the requirements of the FCRA; and
- Continue monitoring developments under the FCRA, including any further regulations that may be issued by the CFPB.

Please contact us if you have any questions regarding these revised FCRA forms or any other background-check issues. We regularly assist employers with such matters, and we would be happy to assist you.

1 *Jessica gratefully acknowledges the efforts of Soyoung Yoon, an associate at Schwartz Hannum PC, who assisted in drafting this article.*

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school-sponsored activities in which the student may participate. Therefore, it is important for the school to review such language carefully and provide parents with detailed information about the school-sponsored activities in which children may participate. Any release language included in the enrollment agreement should also be closely scrutinized, because the enforceability of pre-injury releases varies from state-to-state.

Top Three On-Line Agreement Traps

Independent schools are increasingly converting to on-line enrollment agreements. If your school has already converted to an on-line enrollment agreement process or would like to do so in the future, below are three traps you may wish to avoid.

(1) Inadequate Planning. Often we find that schools have not developed a comprehensive plan for the on-line conversion process. For example, a school may not perform adequate glitch testing or allow sufficient lead time for glitch testing to be implemented. This planning failure may reflect poorly on the school if parents experience difficulty accessing, reviewing or signing the on-line enrollment agreement.

(2) Insufficient Security Measures. In order for an on-line enrollment agreement to be legally enforceable, the school must generally be able to show that the electronic signature on the enrollment agreement is attributable to a specific person. Schools often lack appropriate security measures to ensure that an electronic signature can be attributed to a particular person. For example, schools that provide a generic log-in to a family may experience challenges in proving that an electronic signature on an enrollment agreement is attributable to a particular parent, because anyone else who knew the generic log-in could have signed the agreement.

(3) Lack Of Legal Review. When converting to an on-line enrollment system, it is essential to ensure that the on-line enrollment process results in a legally enforceable enrollment agreement. State laws vary. For example, in a number of states, the signatories of on-line enrollment agreements must be able to store or print the electronic enrollment agreement. Otherwise, the agreement may not be legally enforceable. Each school should therefore consult legal counsel to ensure that its on-line enrollment process complies with all applicable state laws and the federal Electronic Signatures in Global and National Commerce Act (the "E-Sign Act"), to the extent that it applies.

Compliance With The Truth In Lending Act

During the enrollment agreement season, we recommend that each independent school assess whether it is covered by the mandates of the federal Truth In Lending Act ("TILA"), and if covered, ensure that it is fully in compliance, including by providing the required disclosures. Further information regarding TILA is available at the Firm's Education Blog.

Recommendations For Schools: Next Steps

We recommend that independent schools:

- Review enrollment and re-enrollment agreements for legal compliance and best practices;
- Review any on-line enrollment process for legal compliance and best practices or prepare a comprehensive plan for on-line conversion, if not yet converted to an on-line enrollment system; and
- Carefully assess whether the school is subject to the disclosure requirements imposed by TILA and, if so, comply with such mandates.

For up-to-date news that impacts independent schools, please follow us on twitter at @sgs_shpclaw and subscribe to our Education Blog. If you would like a copy of the checklists referenced above, or have any questions about the issues discussed in this article, please do not hesitate to contact us at schwartz@shpclaw.com. Additional information is also available at the Firm's Education Blog.

SUCCESS STORY:

Schwartz Hannum Wins On Appeal: Employer Did *Not* Commit Disability Discrimination, Rules First Circuit

Schwartz Hannum successfully represented an employer in a lawsuit by a former sales manager alleging disability discrimination under Mass. Gen. Laws ch. 151B ("Chapter 151B") and the Americans with Disabilities Act ("ADA"). Sara Goldsmith Schwartz and Jessica L. Herbster successfully argued that the plaintiff was lawfully discharged for failing to obtain a license required for his job after having received ample notice that his employment would be terminated if he failed to obtain the license.

In affirming summary judgment for the employer, the United States Court of Appeals for the First Circuit rejected the plaintiff's arguments that the employer failed to provide a "reasonable accommodation" and to engage in the "interactive process," as required by the disability laws. The requested accommodation, an opportunity to retake the examination, was found unreasonable because the request came too late – after the plaintiff knew his employment would be terminated for failure to perform an essential function of the job – and because there was no evidence that the plaintiff would have passed the examination if given another opportunity. The Court also found no evidence that prolonging the interactive process would have uncovered an accommodation enabling the plaintiff to perform the essential functions of his job. This appeals-level victory for the employer will be used as precedent in other federal-court cases involving similar issues.

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NLRB Guidance Memorandum Highlights Pitfalls Of Employer Social Media Policies

issues internally, if the employer's policy affirmatively discourages employees from discussing such issues online, it will have the likely effect of chilling protected concerted activity, and thus will be found to violate the NLRA.

Instructions concerning the tone of online postings. The AGC found unlawful two social media policies that, respectively, stated that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline" and that employees should "communicate in a professional tone" online, and not "pick fights." In the AGC's view, provisions of this nature, without further clarification, would reasonably be construed by employees "to prohibit robust but protected discussions about working conditions or unionism."

Restrictions on materials that may be posted online. Another policy cautioned employees to "[g]et permission before posting photos, video, quotes or personal information of anyone other than you online," and not to "incorporate [the employer's] logos, trademarks or other assets in your posts." The AGC determined that these provisions violated the NLRA because "employees would reasonably interpret [them] as proscribing the use of photos and videos of employees engaging in Section 7 activities, including photos of picket signs containing the Employer's logo."

"Savings" clauses. Significantly, the report indicates that the AGC will not uphold an overly broad social media policy simply because the policy includes a "savings" clause stating that the policy is meant to comply with the law. In two cases, the AGC found social media policies unlawful despite the fact that one of the policies specified that it was intended to be "administered in compliance with applicable laws and regulations (including Section 7 of the [NLRA])," and the other policy stated that it was not to be "construed or applied in a manner that improperly interferes with employees' rights under the [NLRA]." The report concludes that the inclusion of such a savings clause "does not cure the ambiguities in [a] policy's overbroad rules."

Recommendations For Employers

In light of the AGC's report, and the NLRB's focus on social media cases, there are a number of steps that employers should consider taking.

First, employers should thoroughly review all existing personnel policies that potentially relate to protected concerted activities. In addition to social media policies, such policies may include e-mail, confidentiality, privacy, and business ethics policies, as well as codes of conduct.

Second, employers should consider, in consultation with labor counsel, whether existing social media or similar policies need to be revised to avoid running afoul of the NLRA. As the AGC's report underscores, it is crucial that such policies be worded with extreme care so that it is clear that they are not intended to restrict protected concerted activities.

Additionally, before terminating or otherwise disciplining an employee for violating a social media or similar policy, an employer should confer with counsel to consider whether the policy at issue is lawful. If the policy is overly broad, the proposed discipline could well spark an unfair labor practice charge.

Finally, employers should continue to monitor the Board's and the AGC's pronouncements on social media and related policies. In this regard, while the standards for determining whether such policies violate the NLRA remain less than clear, it seems likely that the Board will, at some point, issue a formal decision that will provide greater clarity on these matters.

Schwartz Hannum PC Is Pleased To Announce That **Jaimie A. McKean** Has Joined The Firm As An Associate

We are delighted to welcome Jaimie A. McKean to the Firm as an Associate Attorney. Jaimie received a Bachelor of Arts degree, *cum laude,* in Politics from Framingham State University. She received a Juris Doctor degree, *magna cum laude,* from Suffolk University Law School. Jaimie practiced for the past eight years at Cooley Manion Jones LLP, where she managed business litigation cases from inception to resolution. She is an experienced trial attorney in various areas of law, including labor and employment law (discrimination, wage and hour, restrictive covenants, and other employment claims), contract disputes, trademark and copyright disputes, consumer protection, insurance coverage disputes, and internal business disputes.

Jaimie is a member of the Massachusetts and New York State Bars, the Bar of the U.S. District Court for the District of Massachusetts, and the Bar of the U.S. Court of Appeals for the First Circuit. She is a member of the Massachusetts and American Bar Associations, the Women's Bar of Massachusetts, the Massachusetts Academy of Trial Lawyers, and the American Association for Justice.

Jaimie has been a *New England Super Lawyers Rising Star* from 2008 to 2012.

Winter Webinar Schedule

January 7, 2013
Annual Labor And Employment Law Update: Overview Of Important Legal And Legislative Changes In 2012
12:00 p.m. – 1:30 p.m.

January 10, 2013
Health Care Reform
12:00 p.m. - 1:30 p.m.

February 5, 2013
Solutions To Legal Challenges Presented By The Digital Era: Tips And Traps For Surviving And Thriving In The BYOD (Bring Your Own Device) Revolution
12:00 p.m. - 1:30 p.m.

Please visit the Firm's website for further details.

Winter Webinar Schedule For Independent Schools

Each webinar will be for 90 minutes, from 12:00 to 1:30 p.m. Please visit the Firm's website for further details.

January 15, 2013
Hot Topics For School Administrators: A Risk Management To-Do List For 2013

January 31, 2013
Hot Topics For School Administrators: A 2013 To-Do List For Employee Risk Management

February 19, 2013
Best Practices For Preventing And Responding To Allegations Of Sex Abuse

March 7, 2013
Hot Topics For School Administrators: Challenging Student, Parent And Alumnae Issues And Creative Solutions

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 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 represents hundreds of clients in industries that include financial services, healthcare, hospitality, manufacturing, non-profit, and technology, as well as handling the full spectrum of issues facing educational institutions. Small organizations and Fortune 100 companies alike rely on Schwartz Hannum for thoughtful legal solutions that help achieve their broader goals and objectives.

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