SCHWARTZ HANNUM PC
Guiding Employers & Educators

Labor and Employment Law Update

DECEMBER 2014

IN THIS ISSUE

EEOC Ramps Up Enforcement Of Pregnancy Discrimination Laws

By Sarah H. Fay

The United States Equal Employment Opportunity Commission ("EEOC") has issued enforcement guidance on pregnancy discrimination and related issues (the "Enforcement Guidance"), interpreting the Pregnancy Discrimination Act ("PDA") and the Americans with Disabilities Act ("ADA") to give broad and sweeping protections to pregnant workers.

EEOC investigators will use the Enforcement Guidance to assess charges and determine whether to bring litigation, and courts are expected to give the Enforcement Guidance substantial weight. Thus, employers should carefully review the Enforcement Guidance and consider whether their policies and practices regarding pregnancy-related issues may need to be revised.

This is especially important given that pregnancy discrimination claims have increased 26 percent in recent years – and that the EEOC is making pregnancy discrimination an enforcement priority.

Indeed, as this Legal Update was going to press, a federal jury in California awarded a whopping *$186 million* in damages to a plaintiff who proved pregnancy discrimination against her former employer.

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Employers Beware: Harassment By Third Parties Can Create Exposure

By Hillary J. Massey[1]

A recent decision by the U.S. Court of Appeals for the Fourth Circuit, *Freeman v. Dal-Tile Corp.*, serves as a reminder that employers can potentially be held liable not only for sexual or other harassment perpetrated by their own employees, but also for harassment carried out by third parties, such as employees of customers, vendors, or other business associates.

In *Freeman,* the plaintiff claimed that she was subjected to a sexually and racially hostile work environment due to the actions of an employee of one of her employer's distributors. Reversing a grant of summary judgment for the employer, the Fourth Circuit concluded that a jury could reasonably find that the company knew or should have known about the harassment and failed to respond appropriately.

Other courts, including the First Circuit and the Massachusetts Supreme Judicial Court, have similarly recognized third-party harassment claims. Thus, employers need to be vigilant for potential instances of third-party harassment and ensure that they respond promptly and appropriately to any such issues.

1 *A previous version of this article appeared in* Massachusetts Lawyers Weekly ("MLW"). *The Firm is grateful to* MLW *for its support in publishing this article.*

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LABOR AND EMPLOYMENT LAW UPDATE DECEMBER 2014

Graduating To Public Transportation: Policies And Best Practices For Independent Schools

By Sara Goldsmith Schwartz and Sarah H. Fay

So a third grader wants to take the subway to school? Or a 6th grader wants to take the commuter rail? When is independent travel on public transportation okay?

By offering incentives like free services and reduced rates, cities across the nation are encouraging students to use public transportation as a means to travel to and from school. The shift from *school bus* to *local bus*, however, raises new challenges for independent schools. The threshold issue is the appropriate age for a student to travel on public transportation unaccompanied by an adult.

Little legal guidance exists on this particular issue. There are few federal, state or municipal laws establishing a minimum age at which a child may travel on public transportation alone. And only a few transit carriers – primarily those that offer interstate travel – have adopted rules regulating minor travel requirements.

In the absence of rules or regulations, independent schools should consider implementing best practices by adopting policies and protocols that address independent student travel requests.

Students' safety is, of course, a paramount concern for independent schools. In light of the myriad risks associated with unaccompanied minor travel, a school may want to deny all parental requests for permission for unaccompanied travel. However, whether for medical, financial, personal or other reasons, the reality is that families may have to rely on students taking public transportation to and from school alone. Thus, an absolute ban may be too restrictive.

If a school chooses to approve parents' requests for unaccompanied travel, we recommend that the school adopt protocols and guidelines. For example, a school may want to impose a minimum age or grade requirement. Yet, the maturity of the student may be more relevant than biological age or grade. Indeed, delays and cancellations are often associated with public transportation. The ability of a student to handle unexpected situations will be critical to safe and reliable travel. Therefore, adopting a policy that considers parents' requests on a case-by-case basis by weighing various factors, such as maturity, may be an appropriate way to manage the various interests at stake.

Notably, a child without proper parental care or supervision may raise concerns of neglect. We recommend that a school take into account the state-specific definition of neglect when evaluating all parental requests for unaccompanied student travel. In sum, the policy should balance the parent's request against the risks associated with the child's safety.

As a best practice, we strongly encourage all schools (that permit students to travel unaccompanied to and from school) to obtain written authorization and a release of liability from legal guardians via a Transportation Permission Form. Written authorization should be required even in a one-time situation. The release might include language that the parent's permission for the child to travel unaccompanied is based upon the parent's personal belief that the child has the maturity and self-confidence to respond appropriately to any challenges that the child may encounter during the travel. We recommend that the Transportation Permission Form specify the modes of transportation permitted, and be signed by both legal guardians.

In addition, we recommend that schools educate parents to follow these protocols:

- Require the student to sit as close as possible to the bus operator or in the first rail car, where the operator's cab is located;
- Confirm that the student feels comfortable traveling alone and is familiar with the route;
- Verify that the student understands where to wait for the bus/train, the protocol for boarding and exiting the bus/train, and pedestrian safety; and
- Establish a plan for what to do in the event that the student misses the stop and in the case of an emergency.

It might not occur to a school to develop an unaccompanied minor travel policy until an issue arises. However, a well-thought out policy and carefully-drafted protocols will diminish the risks associated with students traveling alone to and from school.

Please feel free to contact a member of the Firm's Education Practice Group if you have any questions about any state-specific or municipal-specific requirements, and best practices for unaccompanied minor travel request release forms, policies and practices.

Mandated Paid Sick Leave For Employees: NYC And Beyond

By Soyoung Yoon

Employers should be aware that many jurisdictions have enacted measures requiring certain employers to provide employees with paid sick time, and similar laws have been proposed elsewhere. For example, under an ordinance that went into effect this past April, most employees working in New York City are entitled to paid sick leave. The ordinance requires that eligible employees be provided at least 40 hours of paid sick time per year.

Similarly, in last month's election, Massachusetts voters approved a new law under which, beginning next July, employers with eleven or more employees will need to provide all employees with up to 40 hours of paid sick time annually, while smaller employers will need to provide the same amount of sick time on an unpaid basis. (A recent article by Schwartz Hannum summarizing the new Massachusetts law can be found here: *http://shpclaw.com/Schwartz-Resources/mandatory-paid-sick-time-coming-soon-to-massachusetts/.*)

Thus, employers should carefully monitor these developments and ensure that they are in compliance with all applicable laws.

Summary Of New York City Ordinance

The most significant portions of the New York City paid sick leave ordinance are summarized below:

Eligibility. Employers with five or more employees (or with one or more domestic workers) must provide up to 40 hours of paid sick time annually to employees who work in the city at least 80 hours in a year. Eligible employees must be allowed to accrue at least one hour of paid sick time for each 30 hours worked. Eligible employees are entitled to accrue paid sick time immediately upon commencing employment, but need not be permitted to take paid sick time until they have been employed for 120 days.

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

- For the employee's own mental or physical illness, injury or health condition, or for preventive medical care for the employee;
- To assist a family member (defined as a child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of an employee's spouse or domestic partner) who needs care for a mental or physical illness, injury or health condition, or preventive medical care; or
- When an employee's place of business has been closed by order of a public official due to a public health emergency, or when an employee needs to care for a child whose school or day-care facility has been closed due to such an order.

Notice. An employer may require reasonable notice of an employee's intention to use paid sick time, including up to seven days' notice when the need for leave is foreseeable. Further, an employer may require reasonable documentation (*e.g.*, a doctor's note) to confirm that paid sick leave is being taken for an appropriate reason. However, an employer may not require an employee to disclose the nature of the illness, injury or condition for which leave is being taken.

Carryover/Payout. Employers may either (i) pay out accrued, unused sick time to their employees annually, or (ii) permit employees to carry over accrued, unused sick time from year to year. Carryover from year to year may be capped at 40 hours. Employers are not required to pay employees for accrued, unused sick time upon separation from employment.

Notice Of Rights. Employers must distribute a written notice to employees detailing their rights under the ordinance. The New York City Department of Consumer Affairs has published the required notice on its website.

Recordkeeping. Employers are required to keep records documenting their compliance with the ordinance for at least three years.

Penalties. Employers violating the ordinance may be subject to civil penalties, damages, and equitable relief.

Other Paid Sick Leave Laws

In addition to New York City, a number of other jurisdictions across the United States have enacted paid sick leave laws over the past several years. For instance:

- Massachusetts. Under the new Massachusetts law, which becomes effective July 1, 2015, employers with eleven or more employees will be required to permit all employees (including part-time, temporary, occasional, and seasonal workers) to accrue and use up to 40 hours of paid sick time per calendar year. Employees will be entitled to accrue a minimum of one hour of paid sick time for each 30 hours worked. For employers with fewer than eleven employees, these same requirements will apply, except that employers will be permitted to provide sick time on an unpaid basis.
- Newark, N.J. Under an ordinance enacted earlier this year, most private-sector employers are required to provide paid sick leave to employees who work in Newark for at least 80 hours in a calendar year. Depending on how many employees they have, employers must provide employees with up to either 24 or 40 hours of paid sick leave annually.
- Jersey City, N.J. Employers with at least ten employees are required to provide up to 40 hours of paid sick leave annually to employees who work at least 80 hours within Jersey City in a year.
- Portland, Ore. Employers with six or more employees must provide up to 40 hours of paid sick leave annually to employees who

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USCIS Expands Hunt For Fraud: Site Visit Program Now Includes L-1 Visa Petitioners

By Julie A. Galvin

Earlier this year, U.S. Citizenship and Immigration Services ("USCIS") announced that it is expanding its Fraud Detection and National Security Division's ("FDNS") Site Inspection Program to L-1 visa petitioners, in addition to H-1B petitioners, thereby subjecting those employers to unannounced site visits. This announcement comes on the heels of a report released by the Department of Homeland Security's Office of Inspector General ("OIG"), which found that the L-1 visa program is vulnerable to potential fraud and abuse.

L-1 Visas

L-1 visas are filed by multinational employers that wish to transfer to U.S. branch offices, parent companies, subsidiaries or affiliates current employees who either (i) are at the management or executive level, or (ii) possess specialized knowledge. L-1 visas are granted for up to seven years for employees at the management or executive level, and for up to five years for employees who possess specialized knowledge.

L-1 visas can also be obtained for employees of a foreign company that wants to set up a new office in the United States. A "new office" L-1 visa is initially limited to one year, but can be extended upon a showing that the company has experienced significant growth.

FDNS Site Inspection Program

Under its Site Inspection Program, FDNS has been conducting random, unannounced site visits to employers that have filed H-1B petitions on behalf of foreign employees. The purpose of the program is to root out fraudulent visa petitions and ensure that employers are complying with immigration laws and regulations.

According to FDNS, its expansion of the Site Inspection Program to include L-1 visa petitioners is aimed at eliminating potential fraud in that visa program. In this regard, the OIG report found that "new office" L-1 petitions are particularly susceptible to abuse.

Under its Site Inspection Program, FDNS has been conducting random, unannounced site visits to employers that have filed H-1B petitions on behalf of foreign employees.

While the OIG report specifically emphasized the fraud risks associated with "new office" L-1 petitions, it is not yet clear whether the expansion of the Site Inspection Program will be limited to employers filing "new office" petitions and extension requests or, rather, will encompass *all* employers that submit L-1 visas. However, FDNS has stated that employers of individuals who enter the United States under "blanket" L-1 petitions (which are available to certain employers with over $25 million in combined U.S. sales) will not be subject to site visits.

The purpose of the program is to root out fraudulent visa petitions and ensure that employers are complying with immigration laws and regulations.

Recommendations For Employers

In light of this announcement, employers that file L-1 and/or H-1B petitions should be sure to do the following:

- Prepare for a potential FDNS site visit.
  - For example, FDNS officers may ask about specific employment details included in visa petitions. Therefore, key personnel need to be familiar with this information.
  - Ensure that the relevant employees understand what to do – and what not to do – in the event of an FDNS site visit.
  - Establish a relationship with experienced immigration counsel, and have a coordinated plan in place, before receiving a surprise FDNS site visit.
- Consult with experienced immigration counsel before making any changes to a visa beneficiary's terms of employment.

It is important to prepare in advance for a potential surprise audit, because the stakes are high. If an FDNS officer finds that a beneficiary's employment terms are not in accord with the provisions of his or her visa, USCIS could potentially revoke the visa or, in the event that it suspects fraud, refer the case to Immigration and Customs Enforcement ("ICE") for a criminal investigation.

Please feel free to contact us if you have any questions regarding the FDNS Site Inspection Program or any other issue related to employment visas. The Firm regularly assists employers in these matters and would be happy to help.

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Employers Beware: Harassment By Third Parties Can Create Exposure

Factual Background

The plaintiff, Lori Freeman, a black female, worked as a customer service representative for Dal-Tile Corporation. As part of her duties, Freeman regularly interacted with Timothy Koester, a sales representative for one of Dal-Tile's distributors. In the course of their interactions, Koester allegedly showed Freeman pictures of naked women on his cell phone and used racial and sexual epithets, including referring to black women as "black b****s" and using the "n" word.

Freeman repeatedly discussed Koester's conduct with her supervisor, who also witnessed some of the offensive incidents. The supervisor expressed disapproval of Koester's actions but failed to take any concrete steps to address them.

After three years of enduring Koester's behavior, Freeman complained to Dal-Tile's HR department. In response, Dal-Tile initially banned Koester from its facility but later allowed him to return, on the condition that he not communicate with Freeman and coordinate his on-site meetings through Freeman's supervisor.

After taking a two-month medical leave of absence for anxiety and depression, Freeman resigned from Dal-Tile. She later filed suit in the U.S. District Court for the Eastern District of North Carolina, alleging, in part, that Dal-Tile had violated Title VII of the Civil Rights Act of 1964 by tolerating a racially and sexually hostile work environment created by Koester's actions.

District Court's Decision

The district court granted Dal-Tile's motion for summary judgment on Freeman's harassment claims, concluding that the alleged harassment was not sufficiently severe or pervasive to violate Title VII. In addition, the district court ruled that Dal-Tile did not have actual or constructive knowledge of the harassment prior to Freeman's notifying the company's HR department, because "no reasonable fact-finder could conclude that the plaintiff's statement[s] to [her supervisor] constituted a complaint." Finally, the district court concluded that, upon being informed of the alleged harassment, Dal-Tile responded promptly and appropriately.

Fourth Circuit's Decision

On Freeman's appeal, the Fourth Circuit reversed and remanded the district court's grant of summary judgment. As a threshold matter, the Fourth Circuit held, in disagreement with the district court, that Koester's conduct was sufficiently severe and pervasive to constitute actionable harassment under Title VII.

The Fourth Circuit then proceeded to consider whether Dal-Tile could be held liable for harassment as a result of the actions of Koester, a third party. The court answered this question in the affirmative. Adopting a negligence standard, the court held that an employer is liable under Title VII for a hostile work environment created by a third party's actions if the employer (i) knew or should have known of the harassment, and (ii) failed to take prompt remedial action reasonably calculated to end the harassment.

As to the first of these prongs, the Fourth Circuit concluded that Freeman's supervisor had "actual knowledge" of Koester's harassment because she had witnessed some of the incidents and was notified of others by Freeman. Further, based on Freeman's reaction to these incidents, the court found that the supervisor clearly knew or should have known that Freeman was offended by Koester's actions.

In addition, the Fourth Circuit held that a jury could reasonably conclude that Dal-Tile's response to Freeman's complaints was inadequate. The court emphasized that for three years, Freeman's supervisor effectively did nothing in response to Freeman's complaints or those incidents that the supervisor herself witnessed. For instance, upon hearing one of Freeman's complaints, the supervisor "scoffed and shook her head and put her head back down and continued on with trying to pick the nail polish off of her nails." After another incident, the supervisor "simply rolled her eyes and went on talking to a co-worker." It was only after Freeman complained to HR that Dal-Tile finally directed Koester not to have further contact with Freeman. The court concluded that while this "may have been an adequate response had it been put into place sooner," Dal-Tile waited far too long to take such a step and, accordingly, could be found liable for Koester's harassment of Freeman.

Decisions By Other Courts

The Fourth Circuit's *Freeman* decision is consistent with rulings by other courts that have considered whether employers may be held liable under Title VII for workplace harassment perpetrated by third parties. In particular, like the Fourth Circuit, the Seventh, Ninth, Tenth, and Eleventh Circuits have applied a negligence standard to such claims, holding that an employer is liable for a hostile environment created by a third party's harassment if the employer knew or should of known of the harassment and failed to take prompt, effective remedial action.

On the state court level, the Massachusetts Supreme Judicial Court ("SJC") has likewise adopted a negligence standard for third-party harassment claims under Mass. Gen. L. c. 151B. *See Modern Cont'l/Obayashi v. Massachusetts Comm'n Against Discrimination*, 445 Mass. 96, 105 (2005).

Further, the First Circuit, as well, has recognized claims of third-party harassment, while adopting a somewhat different legal standard. In *Rodriguez-Hernandez v. Miranda-Velez,* 132 F.3d 848 (1st Cir. 1998), a client of the defendant employer solicited sex from the plaintiff. When the plaintiff com-

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EEOC Ramps Up Enforcement Of Pregnancy Discrimination Laws

Overview

A. Pregnancy Discrimination Act

As interpreted by the EEOC, the PDA has two fundamental requirements. First, an employer may not discriminate "on the basis of pregnancy, childbirth, or related medical conditions." Second, women affected by pregnancy, childbirth, or related medical conditions "must be treated the same as other persons not so affected but similar in their ability or inability to work."

1. Discrimination "On The Basis Of" Pregnancy

The EEOC construes "pregnancy" broadly. In the agency's view, an employer may not make decisions based on stereotypes or assumptions about the effect of a current, past, potential, or intended pregnancy on the employee's ability to perform or commitment to the job. Similarly, except in narrow circumstances involving a "bona fide occupational qualification," the EEOC prohibits employment decisions based on concerns about potential health risks of a pregnancy.

As construed by the EEOC in the Enforcement Guidance, the PDA gives breastfeeding and lactating protected status. The EEOC reasons that lactating is a pregnancy-related medical condition, as it is a physiological response to childbirth. Thus, an employment policy or practice that singles out lactating employees – such as a policy permitting employees to take paid breaks to drink coffee but not to express breast milk – would constitute unlawful pregnancy discrimination under this view of the PDA.

The EEOC also sees the PDA as protecting a woman's right to use contraceptives. The Enforcement Guidance explains that because contraceptives are a means by which a woman can control her capacity to become pregnant, the PDA prohibits discrimination based on their use. In fact, the EEOC takes the position that "an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy."

Not all courts have endorsed the EEOC's view of the PDA as to contraceptives. Similarly, while the Affordable Care Act (a/k/a "Obamacare") requires employers to include prescription contraceptives in their health insurance coverage, the United States Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores* opens the door to potential exemptions based on the Religious Freedom Restoration Act. Nonetheless, the EEOC appears poised to assert its position on contraceptives in its enforcement activity and is likely reviewing new filings for potential "test cases" – *i.e.*, cases likely to result in court victories for the EEOC based on the specific circumstances involved.

2. Dissimilar Treatment Vis-à-vis Others

The PDA's second chief requirement – to treat pregnant employees the same as similarly situated co-workers – is construed in the Enforcement Guidance to apply to *all* employment-related decisions, including those relating to job modifications, alternative assignments, leaves, and fringe benefits.

Under this interpretation:

- Employers may not exclude employees from eligibility for particular employee benefits on the basis of pregnancy;
- If an employer offers light-duty work to employees who have temporary restrictions resulting from non-work-related injuries, then the employer must offer such work on the same terms to employees who have temporary work restrictions resulting from pregnancy; and
- Employers may not restrict pregnancy-related disability leaves to shorter durations than other types of disability leaves.

Finally, while the PDA does not prohibit employment decisions based on an employee's caregiving responsibilities to a child, the EEOC cautions that employers may not treat women with caregiving responsibilities differently than similarly situated men, as this would violate Title VII's prohibition on sex discrimination.

B. Americans With Disabilities Act

While pregnancy, in and of itself, is not a disability under the ADA, the EEOC takes the position that a pregnancy-related impairment may constitute a disability under the statute if it substantially limits one or more major life activities, has substantially limited a major life activity in the past, or is regarded by an employer as a disability.

According to the EEOC, examples of pregnancy-related conditions that may constitute a disability under the ADA include: impairments to the reproductive system that make a pregnancy more difficult and require physical restrictions or limitations; impairments to musculoskeletal functions, such as pregnancy-related sciatica; impairments to digestive or genitourinary functions, such as severe dehydration caused by nausea; and impairments affecting endocrine functions, such as gestational diabetes.

The Enforcement Guidance also notes that the ADA may cover conditions that result from the interaction of a pregnancy with an underlying disability. To illustrate, the EEOC posits an employee who controls a neurological disability with medication, becomes pregnant, is unable to continue taking the medication on account of her pregnancy and, as a result, experiences a worsening of her neurological condition.

Employees with pregnancy-related disabilities – like employees with other types

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EEOC Ramps Up Enforcement Of Pregnancy Discrimination Laws

of disabilities – may be entitled under the ADA to a reasonable accommodation. The Enforcement Guidance states that such reasonable accommodations may include modifications to work equipment or devices, temporary reassignments to light duty work, and adjustments to an employee's work schedule.

Recommendations

In light of the EEOC's focus on pregnancy discrimination, as reflected in Enforcement Guidance that gives broad and sweeping protections to pregnant workers, we recommend that employers:

- Review the Enforcement Guidance carefully with human resources professionals, managers, and supervisors;
- Review and, as necessary, revise practices and policies relating to pregnancy and disability issues to ensure compliance with the PDA and the ADA; and
- Provide training on the PDA and the ADA to managers and supervisors, with a focus on such issues as avoiding unequal treatment based on pregnancy and accommodating pregnancy-related disabilities.

If you have any questions about the EEOC's Enforcement Guidance or need assistance with any PDA- or ADA-related issues, please don't hesitate to contact us.

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Mandated Paid Sick Leave For Employees: NYC And Beyond

work at least 240 hours within Portland in a year.

- Washington, D.C. Under an ordinance enacted in 2008, all employers located within the District of Columbia must provide employees with paid sick leave. The amount of paid sick leave that must be provided annually ranges from three to seven days, depending on how many employees an employer has. Notably, under a 2014 amendment to the ordinance, employees no longer need to be employed for a certain period of time or work a minimum number of hours in order to be covered.
- Seattle, Wash. Under a Seattle ordinance, employers with at least five full-time equivalent employees must offer paid sick and safe time to employees who work more than 240 hours within the city during a calendar year. ("Safe time" refers to leave 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.) Depending on the size of an employer's workforce, employees must be allowed to accrue up to 72 hours of paid sick and safe time annually.
- Connecticut. A Connecticut statute requires most employers that have 50 or more employees in the state to allow "service workers" to accrue up to 40 hours of paid sick leave per year.
- Philadelphia, Pa. Under a Philadelphia ordinance, certain categories of employers must provide employees with up to either 32 or 56 hours of paid sick leave per year, depending on how many employees they have.
- San Francisco, Cal. Finally, a San Francisco ordinance requires all employers to provide employees with at least one hour of paid sick leave for each 30 hours worked within the city, up to a limit of either 40 or 72 hours, depending on the size of an employer's workforce.

Please note that the laws summarized above are not intended to be a comprehensive listing of all paid sick leave laws currently in effect in the United States. Employers should determine, in consultation with counsel, whether any other such laws apply to them.

Recommendations For Employers

In light of the New York City paid sick leave ordinance and the recent trend of similar laws in other jurisdictions, there are a number of important steps we recommend employers take:

- Consult with counsel to ensure your organization is in compliance with all applicable paid sick leave requirements;
- Provide training to managers, HR employees, and payroll personnel regarding any such requirements;
- Work with counsel to review, and update as necessary, your organization's written policies, employee handbooks, and other personnel documents to comply with such laws; and
- Closely monitor changes in the law for further developments in this area.

Please contact us if you have any questions regarding the New York City paid sick leave ordinance or similar requirements in other jurisdictions. We regularly counsel employers on such matters, and we would welcome the opportunity to assist you.

Five SHPC Lawyers Recognized By Super Lawyers®



Schwartz Hannum PC is thrilled to announce that **Sara Goldsmith Schwartz, William E. Hannum III** and **Jaimie A. McKean** were selected for inclusion in 2014 **Massachusetts Super Lawyers** in the area of **Employment & Labor Law.**

Sara, Will and Jaimie's listings have been published in the November issues of New England *Super Lawyers Magazine* and *Boston* magazine. 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 2014 Super Lawyers.

Additionally, Schwartz Hannum PC has been listed in the 2014 *Super Lawyers Business Edition,* also published in November of this year.


The Firm is also thrilled to announce that **Hillary J. Massey** and **Susan E. Schorr** were selected for inclusion in 2014 **Massachusetts Rising Stars** in the areas of **Employment & Labor Law and Schools & Education,** respectively.

Hillary and Susan's recognition also has been published in the November issues of New England *Super Lawyers Magazine* and *Boston* magazine. Only two and one-half percent of Massachusetts lawyers were named for inclusion in 2014 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.

Sara, Jaimie, Hillary, and **Susan** will also be featured in **The Top Women Attorneys in Massachusetts**, a special section of the April 2015 issue of *Boston* magazine.

We are extremely proud of these five individuals and congratulate them on receiving their well-deserved recognition, and we also extend our thanks to the entire Schwartz Hannum team.

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Employers Beware: Harassment By Third Parties Can Create Exposure

plained to the employer's president, the president told her to respond to the client's advances "as a woman." The plaintiff was later terminated for allegedly misusing company property, and she subsequently filed a sexual-harassment lawsuit. The First Circuit affirmed a jury verdict for the plaintiff, concluding that "[e]mployers can be liable for a customer's unwanted sexual advances, if the employer ratifies or acquiesces in the customer's demands."

Thus, while the U.S. Supreme Court has not yet ruled on this issue, the *Freeman* decision is in line with other court decisions recognizing claims of third-party harassment.

Recommendations For Employers

In light of *Freeman* and other cases in this area, there are a number of steps that employers are advised to take.

First, in consultation with employment counsel, employers should review and revise their anti-harassment policies as necessary to ensure that their policies expressly prohibit harassment by third parties and detail how employees can submit complaints about such issues.

Second, employers should train all supervisors and HR personnel in recognizing and responding appropriately to incidents of third-party harassment.

Third, upon becoming aware of a complaint of third-party harassment, employers should immediately and thoroughly investigate the matter, just as they would a complaint of harassment by an employee.

Finally, if an investigation substantiates a complaint of third-party harassment, an employer should promptly take appropriate steps to end and remedy the harassment. Depending on the circumstances, this may include, for instance, banning the harasser from the employer's workplace or otherwise ensuring that the harasser will not have further contact with the complainant. By promptly taking such remedial action, an employer can maximize its chances of protecting itself from liability in connection with a potential claim of third-party harassment.

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New Hampshire Bans Hand-Held Electronics Behind The Wheel, Reflecting Nationwide Proliferation Of "Distracted Driving" Laws

In light of this risk, employers should take stock of the districted driving laws in the states where they do business and ensure that their policies and *actual practices* strictly prohibit all unlawful uses of electronic devices while driving on company time (and while engaging in company business, such as conference calls, while commuting or otherwise driving outside of normal business hours).

House Bill 1360

The New Hampshire law prohibits the use of any hand-held mobile device while driving or temporarily halted in traffic. "Use" is defined broadly and includes, but is not limited to: "reading, composing, viewing, or posting any electronic message; or initiating, receiving, or conducting a conversation; or initiating a command or request to access the Internet; or inputting information into a global positioning system or navigation device; or manually typing data into any other portable electronic device."

Under the law, adult drivers are permitted to (i) use a hand-held device to call 911, a law enforcement agency, a fire department, or an emergency medical provider; (ii) use one hand to transmit or receive messages on any non-cellular two-way radio; and (iii) use hands-free devices while driving, "provided the driver does not have to divert his or her attention from the road ahead." Minors, however, are prohibited from *any* use of a cell phone while driving, even hands-free, except to call 911.

Violators will be fined $100 plus penalty assessment for a first offense; $250 plus penalty assessment for a second offense; and $500 plus penalty assessment for any subsequent offense within a 24-month period. Minors violating the statute also will be subject to license suspension or revocation.

Liability Risks For Employers

Significantly, the risks of such laws for employers and their employees far exceed the relatively modest fines that may be assessed for violations. In most, if not all, states, when a person violates a statute without an adequate excuse and causes the harm that the statute was created to prevent, the violation is considered to be "negligence per se." Thus, when violations of distracted driving laws result in accidents causing personal injury or property damage, the driver could be held automatically liable if the injured party sues.

This, in turn, means that when the driver's violation involved using the electronic device for work-related purposes, the employer may be vicariously liable for the resulting harm.

This, in turn, means that when the driver's violation involved using the electronic device for work-related purposes, the employer may be vicariously liable for the resulting harm. To illustrate, vicarious liability could arise from accidents occurring when the employee was engaged in a work-related conference call while commuting to the office; typing an address into a navigation device while making a delivery; or text messaging with a manager, co-worker, or client while driving to a company function.

In lawsuits seeking to hold employers vicariously liable, the defense ideally would be able to show that the employer had policies against the offending conduct; provided employee-drivers with adequate notice of the policies and corresponding training; and strictly enforced the policies as a matter of practice. Even with such safeguards, though, evidence that an employer "turned a blind eye" to distracted driving could be difficult to overcome, heightening the need for training and compliance at all levels of the organization.

Recommendations For Employers

In light of the nationwide emergence of distracted driving laws, and the potential for vicarious liability when violations result in traffic accidents, we recommend that employers operating in New Hampshire and elsewhere:

- Review the distracted driving laws in the states where they operate to gain a clear understanding of what is and what is not permissible;
- Review and as necessary revise company policies to ensure compliance with all such applicable laws;
- Provide employees with notice and periodic training in the appropriate – and prohibited – uses of cell phones, navigation devices, and other electronic devices while on the road;
- Implement measures to strictly and consistently enforce these policies to ensure that they reflect actual company practice; and
- Continue to monitor developments in this area of the law and, in turn, to update policies and practices as necessary.

Please contact us if you have any questions about the distracted driving laws of New Hampshire or any other state. We regularly counsel employers on such matters and would welcome the opportunity to assist you.

New Hampshire Bans Hand-Held Electronics Behind The Wheel, Reflecting Nationwide Proliferation Of "Distracted Driving" Laws

By Todd A. Newman and Hillary J. Massey


Businesses whose employees drive in New Hampshire may be liable for accidents resulting from texting with, talking on, and otherwise using hand-held electronic devices behind the wheel. This is the upshot of a new state law, House Bill 1360, which expands New Hampshire's prohibition on texting while driving to cover virtually all non-emergency uses of a hand-held electronic device. The new law goes into effect July 1, 2015.

This development reflects a dramatic recent rise in "distracted driving" laws in New England and elsewhere. For instance, forty-three states and the District of Columbia now ban texting while driving, and twelve states and the District of Columbia now prohibit all drivers from using hand-held cell phones. For employers, this means that potential vicarious liability for distracted driving accidents exists on essentially a nationwide basis.

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Winter Webinar Schedule For Independent Schools

January 7, 2015
Contracts And Compensation For The Head Of School: Tips, Traps And Best Practices
3:00 p.m. – 4:30 p.m.

January 14, 2015
Risk Management For Off-Campus Trips And Activities
3:00 p.m. – 4:30 p.m.

January 19, 2015
Legal Adventures And Hot Topics In Independent Schools
12:00 p.m. – 1:30 p.m.

February 5, 2015
Accommodating Applicants And Students With Disabilities
12:00 p.m. – 1:30 p.m.

February 18, 2015
GLBTQ Students And Employees In Independent Schools: Best Practices Related To Gender Identity And Expression
3:00 p.m. – 4:30 p.m.

Winter Webinar Schedule

January 13, 2015
Legal Adventures And Hot Topics In Employment Law
12:00 p.m. – 1:30 p.m.

February 4, 2015
Getting It Write: Employee Handbooks
12:00 p.m. – 1:30 p.m.

February 19, 2015
The Nuts And Bolts Of Compliance With The Family And Medical Leave Act
12:00 p.m. – 1:30 p.m.

February 26, 2015
Conducting An I-9 Audit: Tips, Traps And Best Practices
12:00 p.m. – 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 webinars and/or to register for one or more of these programs.

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

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