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SHPC Legal Update

THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

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IN THIS ISSUE

NLRB Hands Unions Another Victory With Joint Employer Decision

By Brian D. Carlson and Gary D. Finley

In its latest of a long line of pro-union rulings under the Obama Administration, the National Labor Relations Board ("NLRB" or the "Board") has dramatically broadened the circumstances under which an employer may be found to be a "joint employer" of workers employed by another business for purposes of federal labor law.

In *Browning-Ferris Industries ("BFI")*, the Board held that a California waste-management company was a joint employer of workers at its plant who were directly employed by an outside staffing agency. The Board based its decision on a determination that BFI had a contractual right to control certain essential terms and conditions of employment for those workers. In so ruling, the NLRB reversed decades of case precedents holding that an employer must exercise *actual* control over workers' terms and conditions of employment in order to be considered a joint employer.

As a result of the *BFI* decision, employers face a heightened risk of becoming subject to collective bargaining obligations toward workers employed by staffing agencies or other third parties.

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Federal Agencies Announce New Rules For H-2B Visa Program

By Julie A. Galvin

After a tumultuous and uncertain 2015 H-2B visa filing period – which included a temporary suspension of the H-2B program and a quick run on the available visas once the program was reinstated – the U.S. Departments of Labor ("DOL") and Homeland Security ("DHS") have announced a new interim final rule ("IFR") governing the H-2B program. In addition, DOL and DHS have announced a final rule establishing a methodology for determining prevailing wage rates under the program.

The IFR applies to H-2B visa applications with employment start dates on or after October 1, 2015. Thus, employers planning to submit H-2B applications should carefully review the filing and other requirements established by these new rules.

Background

The H-2B visa program was created in 1986 as part of an amendment to the Immigration and Nationality Act. H-2B visas have been used to fill jobs in a variety of temporary circumstances, the most common of which is seasonal employment, making H-2B visas a crucial source of workers for employers that operate seasonally.

H-2B visas are limited to 66,000 per year, with half of the visas allocated starting on October 1, and the second half allocated six months later, starting on April 1. H-2B workers must be employed on a full-time basis.

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NLRB Hands Unions Another Victory With Joint Employer Decision

Background

The *BFI* decision arose from a union election involving workers at a BFI recycling plant in California. The workers were employed by an outside staffing agency, Leadpoint Business Services ("Leadpoint").

BFI and Leadpoint were parties to a written contract under which Leadpoint agreed to provide workers for the BFI facility. The contract provided that Leadpoint would be solely responsible for hiring and firing those employees and for determining their pay, benefits, and other terms and conditions of employment. BFI compensated Leadpoint for the workers' labor costs and also paid a mark-up as a management fee.

In June 2014, a union election was held to determine whether Leadpoint's workers at the BFI facility would be represented by Local 350 of the International Brotherhood of Teamsters. The ballots were impounded pending a determination by the Board as to whether, if the union prevailed in the election, both BFI and Leadpoint would be obligated to bargain with the union over the workers' terms and conditions of employment.

Regional Director's Decision

The NLRB Regional Director ruled in favor of BFI, based on precedents holding that separate entities qualify as joint employers only where they actually codetermine essential terms and conditions of employment, such as hiring, wages, benefits, work hours, work assignments, and discipline.

The union appealed the Regional Director's decision to the full Board, arguing that employers that obtain workers through outside agencies can nonetheless significantly affect those workers' terms and conditions of employment – for instance, by capping the amounts they are willing to pay for workers' labor costs, which potentially may limit the wages paid to the workers. Thus, the union contended, employers that exercise even such indirect control over workers' terms and conditions of employment should be obligated to bargain with the workers.

NLRB's Decision

In a 3-2 decision, the Board ruled in the union's favor and articulated a new standard for determining joint employer status. Under this new standard, if an employer has a right to control essential terms and conditions of employment of workers employed by another business (such as a staffing company), the employer may be considered a joint employer of those employees. This is the case even if the employer does not actually exercise control over such workers, and regardless of whether the right of control is direct or indirect.

Further, the Board expanded the list of factors that qualify as "essential terms and conditions of employment" for purposes of joint employment status. In addition to matters such as hiring, wages, benefits, and discipline, actions such as "dictating the number of workers to be supplied; controlling scheduling, seniority and overtime; and assigning and determining the manner and method of work performance" may now be considered essential terms and conditions of employment and thereby support a finding of joint employer status.

Implications Of Decision

The NLRB's *BFI* decision holds potentially momentous implications for employers. In particular, employers that, like BFI, secure workers through staffing agencies face an increased risk of being obligated to bargain collectively with those workers.

For instance, contracts between employers and staffing agencies commonly give employers the right to determine the number of workers to be supplied, to set minimum job qualifications for workers, and to reject workers whom they deem unsatisfactory. While, under previous NLRB holdings, such factors would have been insufficient to support a finding of a joint employer relationship, the opposite appears to be the case under the Board's new standard.

Assuming so, if workers obtained through a staffing agency voted to unionize and then asked to meet with the employer operating the facility in order to discuss safety conditions, the employer might well be obligated to bargain with the workers concerning that subject. It is conceivable that an employer could even be required to bargain with workers concerning the financial terms of the employer's arrangement with their staffing agency, since those terms could potentially affect the compensation paid to the workers for their services.

Potentially, the *BFI* decision could be applied to other contexts as well. For example, it is possible that future Board cases could extend the holding to franchisor-franchisee relationships. In that event, franchisors could be deemed joint employers of their franchisees' workers, and thereby be obligated to bargain collectively with them.

Finally, as the Board's two Republican members argued in dissent in the *BFI* case, some observers believe that the Board's new joint employer standard could be applied to further restrict the circumstances under which workers may be classified as independent contractors for purposes of the NLRA.

Recommendations For Employers

In the wake of the Board's *BFI* decision, employers that secure workers from staffing agencies or other third parties should consult experienced labor counsel to determine what steps they might take to limit the risk of a potential finding of a joint employer relationship as to those workers.

Additionally, employers should closely monitor further developments in this area of the law, including future Board decisions applying the *BFI* holding in other contexts.

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Federal Agencies Announce New Rules For H-2B Visa Program

Interim Final Rule

The main intent of the IFR is to strengthen protections for U.S. workers by ensuring (i) that U.S. workers can apply for positions intended to be offered to H-2B workers and (ii) that U.S. workers who perform similar jobs as those held by H-2B workers have the same rights and benefits. In addition, the IFR mandates that H-2B employers follow certain pay practices with regard to their U.S. and foreign workers.

Major Features Of The IFR Include:

- Limiting the duration of "temporary need" H-2B visas to nine months;
- Establishing a national electronic job registry;
- Defining "full-time" employment as at least 35 hours per week;
- Requiring that employers guarantee H-2B workers employment for a total number of work hours equal to at least three-fourths of the workdays in every 12-week period (or, for H-2B job orders lasting less than 120 days, every 6-week period);
- Requiring employers to (i) actively try to recruit U.S. workers after filing an application for labor certification in connection with an H-2B application, and (ii) demonstrate (and not merely attest) that they could not find U.S. workers for the position(s);
- Establishing additional recruitment requirements, including that employers first offer employment to U.S. workers from the previous year;
- Requiring that applications be filed between 75 and 90 days before the date of need, and that the job order remain active until 21 days before the date of need;
- Requiring employers to pay for certain travel and visa-related expenses for H-2B employees and certain U.S. workers in corresponding employment;
- Establishing requirements pertaining to frequency of pay, payroll deductions, and payroll records; and
- Requiring that employers provide a copy of the job order to H-2B employees and U.S. workers in corresponding employment.

Wage Methodology Final Rule

In addition, in a separate Wage Methodology Final Rule ("Wage Final Rule"), the DOL has set forth the methodology for determining prevailing wage rates under the H-2B program. The methodology is similar, though not identical, to the DOL's prior prevailing wage rate methodology, which was challenged through litigation and ultimately vacated by a federal court decision.

Under the Wage Final Rule, the default prevailing wage rate for an H-2B position is as defined by the Bureau of Labor Statistics' Occupational Employment Statistics ("OES") survey, based on the position and geographic area. The Wage Final Rule does not permit prevailing wage rates to be established based on the Service Contract Act or the Davis-Bacon Act. However, prevailing wage rates may be set based on collective bargaining agreements negotiated at arms' length.

In addition, the Wage Final Rule permits prevailing wage rates to be established based on an employer-provided survey if the OES survey does not include data for the relevant geographic area or job description, or if the survey is independently conducted and issued by a state.

Filing Process

Obtaining an H-2B visa is a multi-step process, with very tight filing timeframes. Under the new rules, an employer must proceed as follows:

- First, between 120 and 150 days prior to the date of need, the employer must register with the DOL.
- Subsequently, the employer must (i) file the H-2B application between 75 and 90 days prior to the date of need, and, concurrently, (ii) submit a job order to the appropriate State Workforce Agency (which must remain open until 21 days prior to the date of need).
- The employer must obtain a prevailing wage determination from the DOL at least 60 days prior to when the determination is needed.

Under these timeframes, an employer with a date of need of April 1, for example, would need to (a) submit the prevailing wage determination request by early November, (b) register with the DOL by December 3, and (c) submit the job order and H-2B application in early to mid-January. The job order would need to remain active until early to mid-March.

Recommendations For Employers

In light of these new rules, we recommend that employers that rely on or are interested in hiring H-2B workers:

- Be sure to plan ahead appropriately. As timing and recruitment requirements have changed, it is crucial that employers familiarize themselves with the necessary steps and timing requirements in light of their date of need, to ensure that they start the H-2B application process at the proper time;
- Carefully document their need for H-2B workers, in light of the IFR's requirement that employers demonstrate a legitimate need for such workers; and
- Contact experienced employment counsel with any questions about the new H-2B rules.

If you have questions regarding the H-2B visa program or any other employment-related immigration matter, please feel free to contact us.

Tips For Effectively Dealing With *Pro Se* Litigants

By Jaimie A. McKean

In bringing or defending a lawsuit, a person may choose not to hire a lawyer, and instead to represent himself or herself. Such unrepresented parties are known as *pro se* litigants.

Given that most *pro se* litigants are not lawyers and do not understand court rules or the workings of courtrooms and litigation matters, litigating a case against a *pro se* litigant can be difficult and costly. However, an awareness of the unique challenges posed by *pro se* proceedings can help attorneys minimize such difficulties and associated litigation costs. A number of strategies that attorneys may find helpful in accomplishing this goal are discussed below.

Make Your Role Clear

In the course of a lawsuit involving a *pro se* litigant, there will likely come a time when the individual asks the opposing lawyer what he or she should do next. For instance, a *pro se* litigant may ask the lawyer how to respond to a motion or discovery request, or about court rules.

In responding to such questions, a lawyer must be very careful not to run afoul of the ethical rules. For instance, Rule 4.3 of the Massachusetts Rules of Professional Conduct provides that in dealing with an unrepresented individual, a lawyer must not state or imply that he or she is disinterested, and that the lawyer must make reasonable efforts to correct any misunderstanding an unrepresented person has about the lawyer's role in the matter. Rule 4.3 also prohibits a lawyer from giving advice to an unrepresented person (except a recommendation to hire counsel) when the person's interests reasonably might be in conflict with the interest of the lawyer's client.

In light of Rule 4.3 (and similar ethical rules in other jurisdictions), a lawyer should be sure to explain to a *pro se* litigant, at the very beginning of a case, that the lawyer owes a duty to his or her client to zealously represent the client and, therefore, that the lawyer will always be acting in the best interests of the lawyer's client. Further, if asked a legal question by a *pro se* litigant, the lawyer should refrain from giving legal advice or recommending to the individual what action to take in the litigation.

Calmly Explain The Actions Being Taken

Dealing with a *pro se* litigant can be frustrating. Many *pro se* litigants are not aware of court and procedural rules and do not bother to take time to learn the rules. Others think they know the court rules better than the opposing lawyer and accuse the lawyer of not following the rules. Some go as far as to file motions with the court based on trivial or nonsensical arguments, insisting the court sanction the opposing lawyer for allegedly not following the rules.

Such actions by *pro se* litigants can be annoying for lawyers and cause their clients to incur unnecessary litigation costs. Nonetheless, in dealing with such situations, it is important that a lawyer stay calm and carefully consider how best to respond. For instance, it might be helpful for the lawyer to explain to the *pro se* litigant the actions the lawyer is taking, the rules that allow the lawyer to take such actions, and why the lawyer is taking those actions.

While the lawyer must avoid giving the *pro se* litigant legal advice, by calmly explaining his or her actions to the individual, the lawyer may be able to make the litigation process less mysterious for the person, and thereby reduce the chances that the *pro se* litigant will file an unnecessary and costly motion based on a misguided argument that the lawyer did not follow the court rules.

Be Polite And Professional

When dealing with a *pro se* litigant, it is important that a lawyer remain professional and not be rude to the individual, regardless of how upset or confrontational the *pro se* litigant may become. Being polite can be difficult when a *pro se* litigant is yelling and calling the lawyer names. The lawyer, however, must remember that most *pro se* litigants do not understand the system and take every decision in the case personally. As a result, their emotions can run high, and they are more likely to lose their tempers in dealing with opposing lawyers.

While it may be tempting for a lawyer to respond to such behavior with a rude comment, the lawyer should recognize that such actions are not likely to help his or her client's case. Potentially, a *pro se* litigant might retaliate by filing a motion for sanctions, or even a complaint with the state bar. At a minimum, responding to such a complaint will entail unnecessary cost and distraction for the lawyer and, potentially, his or her client.

Moreover, if the lawyer allows his or her personal dislike for a *pro se* litigant to influence his or her actions, the lawyer's ability to represent his or her client effectively could be compromised. Thus, it is critical that a lawyer remain composed and professional when dealing with a *pro se* litigant, even if the individual acts rudely.

Try To Resolve Issues With A *Pro Se* Litigant Before Seeking The Court's Help

In a contentious litigation involving a *pro se* litigant, an attorney may be tempted to file a motion asking the court to sanction the *pro se* litigant for failing to comply with court rules. However, before filing such a motion, an attorney should carefully consider whether it is the most effective means of resolving the issue.

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Tips For Effectively Dealing With *Pro Se* Litigants

While *pro se* litigants are supposed to be held to the same standards as lawyers, in practice, many courts give *pro se* litigants a good deal of leeway and rarely sanction them for violating court rules, unless the violations are egregious or repeated. Thus, a more cost-effective strategy for an attorney may be to attempt to work through such issues directly with a *pro se* litigant, with a potential motion for sanctions reserved as a last resort.

Never Take A *Pro Se* Litigant Lightly

While many *pro se* litigants have little or no experience with the law or court procedures, others do have litigation experience or spend substantial amounts of time researching matters that they believe could be helpful to them in the litigation. A *pro se* litigant who was represented by counsel in an earlier lawsuit may even have pleadings from those matters, which the *pro se* litigant may revise and then file in the present litigation. Such pleadings may include well-supported arguments and persuasive case law, and should not be taken lightly by a lawyer simply because they were submitted by a *pro se* litigant.

In addition, unlike lawyers, who typically handle multiple cases at one time, *pro se* litigants are usually navigating only their one case. As a result, a *pro se* litigant may have a great deal of time to dedicate to researching and understanding issues relevant to his or her case.

Thus, a lawyer should not simply assume that a *pro se* litigant will be incapable of representing himself or herself competently. Rather, the lawyer should be prepared for the possibility that the individual will prove to be an effective advocate for his or her case.

Understand The Risks Of Negotiating With A *Pro Se* Litigant

Finally, settlement negotiations with *pro se* litigants can raise special pitfalls for attorneys. In the course of settlement negotiations, there is always a risk that an opponent may mischaracterize proposals or promises made by the other party. When both parties are represented by counsel, those risks are diminished to some extent, as attorneys are generally experienced with settlement negotiations, and the ethical rules prohibit attorneys from deliberately misrepresenting statements made by one another.

By contrast, *pro se* litigants are not bound by those ethical restrictions. Moreover, a *pro se* litigant typically has an inherent mistrust of the opposing lawyer. As a result, whenever possible, an attorney should have another person present as a witness to settlement negotiations with a *pro se* litigant.

Further, after a settlement has been reached with a *pro se* litigant, the individual may later claim – honestly or not – that there was a misunderstanding as to the terms of the settlement and, accordingly, that no agreement was reached. To minimize such risks, an attorney should ensure that any agreed-upon settlement terms are promptly memorialized in writing and signed by both parties. For instance, if a settlement is reached through a mediation, both parties should sign a written summary of the settlement terms before the mediation concludes. Alternatively, if a court hearing results in a settlement, an attorney may ask to have the settlement terms put orally on the court record.

Please contact us if you have any questions about the issues explored in this article, or if we can assist with any other litigation matter. The Firm has extensive experience in litigation involving pro se *and represented parties alike, and we would be happy to help.*

Schwartz Hannum PC Is Thrilled To Announce That **Brian D. Carlson** Has Been Named *Partner*

The Firm is thrilled to announce that Brian D. Carlson has been named Partner.

Brian's practice involves representing clients in the full gamut of labor and employment matters, including discrimination, harassment and contract claims, union election campaigns, collective bargaining issues, unfair labor practice charges, labor arbitrations, and ERISA claims. In addition, Brian counsels employers regarding compensation issues, employment-related agreements, corporate downsizings, employment issues arising from corporate mergers and acquisitions, and compliance with federal and state employment statutes.

Additionally, Brian regularly assists independent schools and other educational institutions with matters such as employment agreements, compensation benchmarking, employee and student handbooks, benefits issues, and litigation involving all types of claims. Brian previously served as Of Counsel at the Firm.

Please join us in welcoming him into this new role and extending a most sincere congratulations to Brian!

DOL Poised To Expand Overtime Eligibility Dramatically Through New FLSA Regulations

By Gary D. Finley

The U.S. Department of Labor ("DOL") has issued proposed regulations that, if adopted, would significantly expand the number of employees eligible for overtime pay under the federal Fair Labor Standards Act ("FLSA").

Specifically, the proposed regulations would:

- Raise to $970 per week – more than twice the current amount – the minimum salary that an employee must receive in order to fall within one of the "white collar" exemptions from overtime eligibility;
- Increase from $100,000 to approximately $122,000 the total annual compensation necessary for an employee to qualify as an overtime-exempt "highly compensated" employee; and
- Establish a mechanism by which those weekly and annual figures would be automatically adjusted each year, in accordance with changes in overall salary levels.

The DOL has estimated that the proposed new FLSA regulations would extend overtime eligibility to nearly five million additional workers within the first year of their implementation. Thus, employers need to consider carefully how their operations may be affected if and when the regulations go into effect.

FLSA's Overtime Requirements

The FLSA governs, among other things, which employees are eligible for overtime pay under federal law. Under the FLSA, unless an employee falls within one or more overtime exemptions, an employee is entitled to be paid at a rate of at least one and one-half times his or her regular hourly rate of pay for all hours worked over forty (40) during any workweek.

The most significant overtime exemptions are known as the "white collar exemptions," including, for example, the executive, administrative, and professional exemptions. Each of these exemptions has its own specific requirements. In general, however, to fall within one of the white collar exemptions, an employee must (1) hold job duties that meet certain criteria (generally, involving the exercise of independence and discretion and/or decision-making authority with regard to other employees); and (2) be paid a minimum weekly salary.

The minimum weekly salary required for the white collar exemptions – currently $455 – has been increased only twice during the past 40 years, most recently in 2004. Thus, due to the effects of inflation, many employees compensated at a fairly modest level have been excluded from eligibility for overtime pay.

The proposed regulations would address this situation by increasing the minimum weekly salary required for the white collar exemptions to the 40th percentile among all salaried employees, and by providing for automatic, annual increases tied to this same percentile level. In practical terms, this would increase the minimum annual salary from its present level of $23,660 per year to an estimated $50,440 per year in 2016.

Status And Potential Impact Of New Regulations

A 60-day public comment period for the proposed FLSA regulations closed this past September. According to the DOL, more than 250,000 comments were submitted.

While it is possible that the proposed regulations may be revised as a result of the comments submitted to the DOL, most observers anticipate that the regulations will not be changed significantly from their current form. However, the timetable for their eventual implementation remains unclear.

Before the new regulations go into effect, they may face court challenges by business groups, alleging, for instance, that the DOL did not adequately consider the likely economic impact of the proposed changes. Given, however, the deference courts generally give to administrative agency rulemaking, the prospects for such challenges seem questionable.

Barring a successful court challenge, the new regulations could bring dramatic ramifications for many employers. In particular, exempt white collar employees would need to be paid fixed salaries of at least $970 per week (with future annual increases), or else be reclassified as non-exempt, with commensurate overtime eligibility.

Employees in industries with large numbers of managers who regularly work long hours for relatively modest pay – such as the retail and hospitality industries – are likely to be hit particularly hard by the increased salary requirements. The same is true of businesses located in regions of the country with lower costs of living and, commensurately, lower overall wage levels.

Recommendations For Employers

In light of the pending new FLSA overtime regulations, we recommend that employers:

- Determine which, if any, of their exempt employees are currently being paid at salary levels that would fall below the new threshold for exempt status under the new regulations;
- Begin considering how best to address those employees' situations when the regulations go into effect – *i.e.*, by raising their salaries to at least the new minimum weekly amount, or by reclassifying the employees as non-exempt. In the latter scenario, employers also may want to consider possible ways of limiting additional overtime obligations – for instance, by closely monitoring non-exempt employees' weekly work hours, and/or hiring additional staff to minimize the need for overtime work;

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Schwartz Hannum PC Celebrates *20 Years*

On November 13, Schwartz Hannum PC celebrated its 20th anniversary at the John Joseph Moakley United States Courthouse in Boston with nearly 100 clients, employees, and friends. The evening included dinner and a performance by the Harvard Krokodiloes, Harvard University's oldest a cappella group.

Schwartz Hannum PC has enjoyed tremendous growth and success since its founding by Sara Schwartz in 1995. This success reflects the Firm's long-standing commitment to help organizations address their labor, employment, and education-related challenges in a responsible and proactive manner.

The Firm is proud to have a talented and dedicated team that strives for excellence every day and delivers thoughtful, practical guidance to our clients throughout New England and the United States. The Firm wants to acknowledge and thank them, as well as our colleagues over the years, for their efforts and support. This milestone would not have been possible without them, nor without the trust of our clients.

We look forward to working with our clients during the next 20 years and beyond.

Non-Discrimination Statements: In Sync And In Line With Your School's Mission

By Susan E. Schorr

Does your school's application for admission ask potential students to provide a photograph? Are applicants required to indicate whether they are male or female? Do you promise not to discriminate against student applicants based on their genetic information? While all of these practices may be well-intended, some of them may miss the mark when it comes to avoiding discrimination and promoting diversity on campus.

Addressing Compliance Challenges

Take the request for a photograph. The Internal Revenue Service (the "IRS") notes that requiring a photograph may indicate that the admissions process is racially or ethnically discriminatory, even if that is not the school's intent. Indeed, the IRS specifically requires private schools to include policies in their by-laws and admissions materials, stating that the school does not discriminate based on race, color, or national or ethnic origin, as a condition of obtaining and maintaining § 501(c)(3) tax exempt status. Schools may, therefore, consider asking student candidates about their ethnicity as an optional question on an application, but should not insist on obtaining this information as a condition of admission.

Where does your state law stand on gender identity and expression? Some states prohibit this form of discrimination in public schools, and many independent schools are choosing to take a fresh look at dress codes, rest rooms and locker rooms with this characteristic in mind. Be sure that your school's non-discrimination statement and application for admission are consistent with your school's philosophy on this evolving topic. Do you need to know the gender of the applicant? You might consider increasing the number of check boxes on an application to permit a wider range of answers to the gender identity question, or include no check boxes, but ask a student applicant to self-identify in a way that best fits the applicant. Of course, in single-sex schools, this topic is significantly more complex.

Schools sometimes try to be inclusive with respect to genetic information. Under federal law, employers are generally prohibited from discriminating against employees based on genetic information; however, discrimination based on genetic information is not prohibited by independent schools toward student applicants and current students. Though your school may not intend to evaluate students on this basis, schools are not legally required to include this characteristic as a protected class with respect to student applicants.

Ensuring Consistency

With schools focused on diversity and inclusion for the whole school community – based on financial need, disability, citizenship, the protected classes mentioned earlier and other characteristics – it is important to ensure that your non-discrimination statements and practices are consistent across the organization, are in sync with your school's mission and are lawful.

We recommend that independent schools review their non-discrimination policies wherever they appear – as illustrated in the list below – to ensure that they are drafted appropriately for both students and employees:

- Student/parent handbook(s);
- Employee/faculty/staff handbook(s);
- Acceptable Use agreements (employees/students);
- By-laws;
- Employment applications;
- Enrollment contracts; and
- Website.

If you have any questions about legal compliance with respect to non-discrimination policies and diversity initiatives, please do not hesitate to contact a member of the Firm's Education Practice Group.

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- Regularly review, in conjunction with experienced employment counsel, the FLSA classifications of their workforce as a whole, in order to ensure that employees are classified appropriately based on their job duties, compensation, and any other pertinent factors; and
- Stay alert for further developments in this area, including future guidance from the DOL as to when the new FLSA regulations will be finalized and implemented.

Please don't hesitate to contact us if you have any questions about the proposed new FLSA regulations or how they may affect your organization.

Recognized By Super Lawyers®

The Firm is thrilled to announce that **four of its attorneys were recognized by Super Lawyers® in 2015.** We are extremely proud of these four individuals and congratulate them on receiving their well-deserved recognition, and we also extend our thanks to the entire Schwartz Hannum team.



Sara Goldsmith Schwartz, William E. Hannum III and **Jaimie A. McKean** were selected for inclusion in **2015 Massachusetts Super Lawyers®** in the area of Employment & Labor Law.

Sara and Will were first acknowledged by Super Lawyers® in 2004.

This is Jaimie's second acknowledgment as a Super Lawyer®. Jaimie was previously listed as a Super Lawyers Rising Star for six consecutive years (2008-2013).

The Firm is also thrilled to announce that **Susan E. Schorr** has been selected for inclusion in **2015 Massachusetts Rising Stars** in the area of Schools & Education. This is Susan's second acknowledgment as a Massachusetts Rising Star.

PUBLICATION DETAILS

Rankings were published in the November issues of ***New England Super Lawyers Magazine*** and ***Boston*** magazine.

Sara, Jaimie and Susan will also be featured in "The Top Women Attorneys in Massachusetts," a special section of the April 2016 issue of ***Boston*** magazine.

Schwartz Hannum PC Is Thrilled To Announce That **Joseph E. Santucci, Jr.** Has Joined The Firm As *Senior Counsel*

Joseph E. Santucci, Jr. joins Schwartz Hannum PC after serving as a Partner at Morgan, Lewis & Bockius LLP's Washington, DC office for over 20 years. A nationally-renowned labor and employment law attorney, Joe has extensive experience advising clients with collective bargaining, labor and employment counseling and litigation, and arbitration. During his legal career, he has negotiated national, industry and local collective bargaining agreements in a variety of industries and with most labor unions. Joe has served clients in the energy, transportation, food service, shipping, technology, manufacturing, and government contracting industries.

Joe was appointed by President Ronald Reagan as a conferee to the White House Conference for a Drug-Free America. He has also served as associate general counsel for the International Brotherhood of Teamsters in Washington, DC, as an attorney and advisor to the National Labor Relations Board, and as an adjunct professor at Georgetown University Law Center. Joe has been consistently named by ***Legal 500*** as a Leading Lawyer for Labor-Management Relations. ***Best Lawyers in America*** named him as its Washington, DC Lawyer of the Year for management-side labor matters for 2016.

Joe received his J.D. from Columbus School of Law at the Catholic University of America and his B.A. degree from the University of Notre Dame. Joe is a member of the American Bar Association and is a longtime member of the bar of the United States Supreme Court and numerous federal courts of appeal and district courts.

Joe is admitted to practice in the District of Columbia and Virginia. He will continue to reside primarily in Washington, DC, and plans to continue to spend a significant amount of time in Massachusetts.

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Universities Should Prepare For Likely Return Of Graduate Student Union Organizing

Background

Historically, graduate students serving as teaching or research assistants at private colleges and universities were not considered employees under the Act and thus did not have the right to organize. In 2000, the Board reversed this precedent in *New York University,* 332 NLRB 1205 (2000), holding that graduate assistants should not be excluded from the protections of the Act. NYU was directed to hold an election, and in 2002 entered into a contract with students who had selected the United Autoworkers ("UAW") as their representative. Following *NYU*, students at other private universities, including Brown University and Tufts University, filed petitions with the Board for representation elections.

These petitions were ultimately appealed to a more conservative Board, which in 2004 revisited the status of graduate assistants in *Brown* and reversed *NYU*. The *Brown* Board held that graduate assistants were not employees under the Act because they had a predominantly educational, rather than economic, relationship with Brown University. Following *Brown,* NYU withdrew recognition of its graduate assistant union in August 2005, when its contract with the UAW terminated.

Status Of Graduate Student Election Petitions

In December 2014, the UAW filed representation petitions on behalf of graduate assistants enrolled at the New School and Columbia University. The Regional Director for Region 2 of the NLRB dismissed both petitions, citing *Brown* as controlling precedent. The UAW sought review of the dismissal, and in March 2015, the Board unanimously reversed and reinstated both petitions, noting that they raised "substantial issues warranting review."

On July 30, 2015, following hearings and briefing, the Regional Director entered findings of fact and again dismissed the New School petition, noting that she was "constrained by *Brown*." The UAW sought review of the Regional Director's decision, and on October 21, 2015, a three-member majority of the Board granted review.

On October 30, 2015, the Regional Director similarly dismissed the Columbia petition, again noting that *Brown* is controlling. The Board is expected to grant review of the Regional Director's decision.

In addition to the strong likelihood that graduate assistants soon will be able to organize, educators should also be concerned about the Board's rulings concerning the appropriate scope of student assistant bargaining units. At Columbia University, the UAW seeks to represent not only doctoral student assistants, but also terminal masters students and undergraduate students who serve in instructional or research appointments. The Regional Director did not decide this issue, but hinted that terminal masters and undergraduate assistants could be included in the bargaining unit should *Brown* be reversed.

"Accordingly, communications to faculty and staff must be crafted with knowledge that they could become public or become exhibits in an unfair labor practice hearing."

Petitions were filed on behalf of graduate assistants at New York University and the Polytechnic Institute of New York University in 2010 and 2011, seeking to challenge *Brown* in light of a political shift in the composition of the Board following the 2008 presidential election. The Board accepted review of both petitions, with a three-member majority noting the existence of "compelling reasons for reconsideration of the decision in *Brown University.*" However, New York University and the UAW reached a voluntary resolution in November 2013, obviating the need for review by the Board.

Recommendations For Educators

Given the likelihood that the Board will overturn *Brown* and restore bargaining rights to graduate assistants, below are several recommendations for educators to consider in order to prepare themselves to respond appropriately to organizing activity on their campuses:

Be Aware Of The Potential For Organizing Activity.

Organizing activity and support for unionization on campuses is on the rise as the anticipated reversal of *Brown* grows near. The Coalition of Graduate Student Employee Unions, an umbrella organization that brings together labor unions and organizing leaders from campuses across the country, hosted a three-day conference in August 2015 featuring talks hosted by student organizing leaders from Columbia, Cornell University and the University of Chicago. On October 15, 2015, organizing leaders at private universities nationwide held demonstrations and other events to demonstrate solidarity and raise awareness for their cause.

It is critical for educators to now be aware of the potential for organizing activity by graduate assistants on their campuses. For institutions with unions currently representing adjunct faculty, administrative staff or service workers, organizing activity is very likely to come from the same union organizers. Faculty and staff are typically aware of

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Universities Should Prepare For Likely Return Of Graduate Student Union Organizing

activity within their respective departments or schools, and can serve as excellent sources of information.

Notably, much of the organizing activity on campuses takes place on social media platforms such as Twitter and Facebook, which are often the primary sources of news and content for students. Educators are free to review information on social media sites that are public, but must avoid engaging in unlawful surveillance. For example, joining a group to monitor its activities would likely violate the Act.

Communicate With Faculty And Staff About Organizing Activity.

Leaders at many institutions have already begun to outline strategies for responding to organizing activity. It is critical for administrators to communicate clearly and candidly with faculty and staff on this subject, while being cognizant that not all faculty and staff will oppose student assistant unionization, and some may even support it. An October 14, 2015 memorandum from Harvard University's Graduate School of Arts and Sciences to its faculty regarding graduate assistant organizing efforts was promptly leaked to media outlets.

Accordingly, communications to faculty and staff must be crafted with knowledge that they could become public or become exhibits in an unfair labor practice hearing. These communications must instruct faculty that it is unlawful to threaten, discriminate or retaliate against students who engage in organizing activity, or to take any action to hinder or prohibit union activity during students' free time. Institutions that fail to adopt clear guidelines risk being faced with an unfair labor practice charge. Communications to faculty and staff concerning this subject should be reviewed by legal counsel.

"In addition to the strong likelihood that graduate assistants soon will be able to organize, educators should also be concerned about the Board's rulings concerning the appropriate scope of student assistant bargaining units."

Review Policies Concerning Student And Non-Student Access To Campus Facilities.

As a general rule, students and non-students must be permitted to engage in organizing activity in any spaces to which those individuals would otherwise have access. In other words, an institution cannot lawfully prohibit a student from holding an organizing meeting in a space where students are allowed to meet on other topics; nor can it prohibit a non-student organizer from meeting with students in spaces where non-students are allowed to be.

However, institutions are permitted to enforce reasonable school policies which restrict student and non-student access to campus buildings or spaces. In past campaigns, institutions have been faced with organizers gaining access to academic buildings, classrooms, laboratories and dormitories to carry out campaign activities. Educators should review and be familiar with existing policies which govern access to campus buildings and spaces for students and non-students. Such policies should be reviewed by legal counsel to ensure their compliance with the Act.

Be Aware Of And Responsive To Student Concerns And Complaints.

Students who are satisfied with their academic life are less likely to support union representation. Educators should pay close attention to and address, whenever possible, issues and concerns raised by leaders of student government or other student organizations. Many institutions have created formalized student grievance procedures or other avenues by which students can raise concerns.

Ultimately, whatever process is utilized, students should feel as though their concerns are being addressed, not just heard and ignored. However, any new process or procedure must be introduced *before* the institution learns of organizing activity, and should first be reviewed by legal counsel.

Conclusion

Educators need to prepare for the prospect of graduate student organizing activity on their campuses in the very near future. Institutions that fail to plan for such activity and to communicate effectively with faculty and staff risk being the subject of an unfair labor practice charge, and at a distinct disadvantage during an organizing drive. This is especially true under the Act's new election rules that permit an election to occur less than a month after a petition is filed. The best prepared institutions, of course, are also those most likely to prevail in the event of an election.

Facing an uncertain legal landscape and increasing scrutiny from union organizers, educators concerned by the prospect of union activity on their campus, or those who are uncertain about how to proceed in light of increasing activity, should contact trusted counsel for advice and guidance. Attorneys at our Firm have significant experience counseling schools on union avoidance, as well as advising clients with respect to bargaining unit issues unique to student assistants.

Universities Should Prepare For Likely Return Of Graduate Student Union Organizing

By Matthew D. Batastini

The National Labor Relations Board appears poised to restore the right of graduate student teaching and research assistants at private colleges and universities to organize and collectively bargain.

On October 21, 2015, the Board accepted review of a representation petition filed by graduate assistants at the New School in New York City. In the coming weeks, the Board is expected to grant review of a near-identical petition filed by graduate assistants at Columbia University. These petitions present the Board with an opportunity to reverse its current position, established in *Brown University*, 342 NLRB 483 (2004), that graduate assistants are not "employees" within the meaning of the National Labor Relations Act (the "Act").

It is widely expected that the Board will reverse *Brown*, so much so that graduate students at many institutions have started to prepare for organizing campaigns and elections that could begin as early as the spring semester of 2016. For this reason, it is imperative that educators at private colleges and universities take immediate steps to prepare an appropriate plan of action in the event of an organizing drive.

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Seminar Schedule

April 13 & April 14, 2016

Employment Law Boot Camp (Two-Day Program)

April 13: 8:30 a.m. – 4:00 p.m.

April 14: 8:30 a.m. – 4:30 p.m.

Winter Webinar Schedule For Independent Schools

January 7, 2016

Contracts And Compensation For The Head Of School: Tips, Traps And Best Practices

12:00 p.m. – 1:30 p.m. (EST)

February 1, 2016

Accommodating Applicants And Students With Disabilities

12:00 p.m. – 1:30 p.m. (EST)

February 11, 2016

Risk Management Strategies For Off-Campus Trips And Activities

12:00 p.m. – 1:30 p.m. (EST)

March 25, 2016

Getting It Write: Student Handbooks

12:00 p.m. – 1:30 p.m. (EST)

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

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

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