SCHWARTZ HANNUM PC
Labor and Employment Lawyers Guiding Management

Labor and Employment Law Update

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How To Manage Employees Who Are Members Of The Military[1]

By Todd A. Newman

An employer has many legal obligations to employees who are members of the military, beginning when a job candidate submits an application and extending through the entire period of employment. These legal obligations affect hiring, retention, discipline, discharge, benefits and all other human resources functions.

These obligations stem from the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which applies to all public and private employers in the United States, regardless of size. In addition to USERRA, various federal and state laws may come into play when managing employees who are members of the military, depending on the circumstances. Below are steps to help employers satisfy their basic obligations under these laws.

Step 1: Be Aware That Applicants Have Rights Based On Their Military Status Or Activity

USERRA Rights

An employer's obligations under USERRA begin once a prospective employee submits a job application. Employers are prohibited from discriminating against members of the military in denying employment due to their military status. This is because USERRA's definition of *employer* includes a person or entity that has denied initial employment to an individual in violation of USERRA's antidiscrimination provisions.

An employer may be liable under USERRA if initial employment is denied based on an applicant's:

- Membership in the uniformed services;
- Application for membership;
- Performance of service;
- Application for service; or
- Obligation for service.

If an unsuccessful applicant brings a claim under USERRA believing he or she was denied employment based on military status, the applicant must show that the employer was motivated by a USERRA-protected status or activity in denying employment. If the applicant proves this, the employer must prove it would not have hired the applicant regardless of the applicant's military status. If the employer cannot prove this, then the court may order the employer to:

- Hire the applicant;
- Compensate the applicant for lost wages and benefits;
- Pay damages equal to the value of lost wages and benefits;
- Pay the applicant's reasonable attorney fees and court costs; or
- Require other forms of relief, such as ordering the employer to discontinue its discriminatory practices against military members.

Any questions concerning military status or activity included on job applications or asked during interviews should be job related and consistent with business necessity. Otherwise, it may appear that the employer is looking to weed out military applicants.

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The FLSA's Fluctuating Workweek

By William E. Hannum III [1]

On the somewhat arcane topic of paying non-exempt employees under the federal Fair Labor Standards Act's (FLSA) "fluctuating workweek" method, there have been some significant developments in recent months. Under the FLSA, employers can pay non-exempt employees under the "fluctuating workweek" method by paying a fixed salary for fluctuating work hours and paying one-half the regular hourly rate for any hours worked over 40 in a week. In 2011, the United States Department of Labor (DOL) published new regulations and made clear that these non-exempt employees *cannot* receive an additional bonus or incentive. However, it is still not clear whether they are permitted to receive *commissions*. Finally, late in 2011, a federal judge rejected an employer's attempt to use the fluctuating workweek method *retroactively* as a means to reduce liability for employees who were misclassified as exempt. These developments serve as reminders to employers using the fluctuating workweek method to audit their payroll practices and ensure compliance with the strict requirements imposed by federal regulations.

Fluctuating Workweek Basics

The FLSA's fluctuating workweek regulation allows an employer to pay a non-exempt employee who works fluctuating hours from week to week a fixed salary as "straight-time compensation" for *all* hours worked in a workweek. To use the fluctuating workweek method of payment, certain requirements must be met:

- The employee's workweek must fluctuate such that the employee works more than 40 hours in some weeks and less than 40 hours in other weeks.
- The employee must be paid a fixed salary regardless of the number of hours worked each week. Thus, an employee working 30 hours one week must receive the same weekly salary as when he or she works 40 hours another week.
- The salary must be sufficient to ensure that the regular rate of pay will never drop below the minimum wage. Where an employer is subject to both the federal and state minimum wage laws, the employee is entitled to the greater of the two minimum wages.
- If the employee works in excess of 40 hours in a workweek, the employer may calculate the employee's overtime rate by dividing the salary by the total number of hours worked and dividing the resulting rate in half. The half-time rate is then paid (in addition to the fixed salary) for all hours worked in excess of 40 hours.
- There must be an understanding between the employer and the employee that the employee will be paid using the fluctuating workweek method and how it works. Ideally, this mutual understanding should be reflected in a policy or agreement signed by the employee.

DOL Precludes Bonuses Under The Fluctuating Workweek Method

In April 2011, the DOL rejected a proposed amendment to the FLSA regulations that allowed the payment of bonuses and incentives under the fluctuating workweek method. Subsequently, courts have held that an employer clearly violates the FLSA when it pays an additional bonus or incentive but continues to use the fluctuating workweek method for calculating overtime.

The DOL's change in direction on this issue appears to have been motivated by the stiff opposition mounted by plaintiffs' attorneys and labor unions, which sought to discourage the use of the fluctuating workweek. In short, they seemed to prefer that non-exempt employees receive standard overtime (time and one-half) for hours worked above 40 in a week. The proposed clarifying language of the FLSA would have made clear that, in addition to a fixed salary, an employee also could be paid bonuses and other non-overtime premiums without invalidating the fluctuating workweek method. This bonus or incentive payment would have helped employers motivate employees to work longer hours and weekends under the fluctuating workweek method.

In rejecting the proposed rule, the DOL acknowledged that bonus payments and other forms of premium payments can be generally beneficial to employees. Nevertheless, the DOL ultimately rejected the proposed amendment. The DOL concluded that the proposed clarifying language could have the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of the employees' compensation into bonus and premium payments. This could potentially result in wide disparities in an employee's weekly pay, depending on the particular hours worked, which is exactly the type of disparity the fluctuating workweek method was intended to avoid.

Thus, the DOL concluded, payment of such bonus or premium amounts is incompatible with and, therefore, invalidates the fluctuating workweek method. In the absence of a valid fluctuating workweek method of paying overtime, an employer must pay non-exempt employees 1.5 times the regular rate for all hours in excess of 40 in one workweek unless some other form of overtime pay is available (such as a Belo plan).

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

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The FLSA's Fluctuating Workweek

Recent court decisions addressing the fluctuating workweek method are consistent with the DOL's limitation on the fluctuating workweek. For instance, in its October 2011 decision in *Brantley v. Inspectorate America Corp.*, the United States District Court for the Southern District of Texas referred to the DOL's recent rejection of the proposed FLSA amendment and made clear that an employer that pays salary premiums may not apply the fluctuating workweek method for calculating overtime. The District Court further suggested that due to the DOL's rejection of the proposed FLSA amendment, for violations occurring after April 2011, an employer would no longer have reasonable grounds for believing that its payment of salary premiums was valid under the FLSA, thus exposing the employer to liability for liquidated damages.

Commissions May Still Be Allowed

Several cases have recently challenged an employer's use of the fluctuating workweek method for employees who also receive commission payments. Neither the current nor the recently-rejected FLSA regulations specifically addressed commission payments. Thus, plaintiffs' attorneys are now arguing that the DOL's rejection of any bonus or incentive payments should also invalidate an employer's use of the fluctuating workweek method for employees who are paid a fixed salary for fluctuating hours and receive commissions in addition to that fixed salary. However, the issue has not been resolved by the DOL or the courts, and at least one court has approved the payment of commissions.

No Retroactive Application Of Fluctuating Workweek

A recent decision from the District of Connecticut held that employers cannot use the fluctuating workweek retroactively to reduce their liability in misclassification cases. As the court pointed out, there is a circuit split on this question, with the First and Tenth Circuits finding that such retroactive use is possible. In contrast, however, several federal appeals and district courts have held that applying the fluctuating workweek method to a misclassification violates the plain language of the fluctuating workweek rule.

Recommendations For Employers

In light of these developments, we recommend that employers who use the FLSA's fluctuating workweek method of payment do the following:

- Review payroll practices to ensure strict compliance with the fluctuating workweek regulations;
- Cease payment of any bonuses or non-overtime premium or incentive payments, such as attendance or safety bonuses and shift differentials;
- Review contractual obligations, if any, to pay bonuses, commissions or non-overtime premium payments to employees; and
- If the employer prefers to keep bonus or other types of incentive compensation in its payroll practices, the employer should move to alternative forms of compensation, rather than the fluctuating workweek method.

Please feel free to contact us if you have any questions regarding the fluctuating workweek or need assistance with any wage-and-hour issues or litigation.

Schwartz Hannum PC

Has Been Selected As A 2012 "Top Business"

By DiversityBusiness.com

Schwartz Hannum PC has distinguished itself as one of the top entrepreneurs in the country. The Firm is truly grateful to all of its clients, employees and colleagues for making this achievement possible. We ranked:

28th in the list of 2012 Top 50 Women-Owned Businesses in Massachusetts

64th in the list of Top 100 Privately-Held Businesses in Massachusetts

403rd in the list of Top 500 Women-Owned Businesses in the United States

These awards are the foundation of DiversityBusiness.com's annual "Top Business List," which DiversityBusiness.com describes as a comprehensive look at America's privately-held companies and a widely-recognized and respected compilation of companies that truly differentiate themselves in the economy today.

The Firm received this award at the 12th Annual National Business Awards Ceremony and Conference in April.

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Employers should establish clear hiring criteria based on legitimate business needs for each position to be filled. This should help employers to successfully defend against USERRA claims brought by unsuccessful job applicants who disclosed their military status during the application process.

ADA Rights: Generally

Employers covered by the Americans with Disabilities Act (ADA) have additional obligations relative to job applicants who have disabilities stemming from their military service. While employers generally may not ask applicants questions about a disability, certain limited questions may be permissible.

Specifically, if the employer believes that the applicant will need reasonable accommodation to perform the job because of the following circumstances, then the employer may ask questions about the reasonable accommodation:

- A service-connected disability that is obvious;
- A hidden disability related to military service that the applicant has voluntarily disclosed; or
- The applicant's voluntary disclosure that he or she needs reasonable accommodation.

However, the employer must *not* ask questions about the underlying physical condition.

ADA Rights: Self-Identification

The ADA permits employers to ask applicants to voluntarily self-identify as individuals with disabilities or *disabled veterans*, provided that certain safeguards are met. In particular, employers may make this request only when:

- They are required to comply with affirmative action under a federal, state or local law, including a veterans' preference law; or
- Voluntarily using the information to benefit individuals with disabilities, including veterans with service-connected disabilities.

Employers that invite applicants to self-identify must state clearly and conspicuously on the written questionnaire used for this purpose that the information:

- Is intended for use solely in connection with the employer's affirmative action obligations or voluntary affirmative action efforts;
- Is being requested on a voluntary basis;
- Will be kept confidential in accordance with the ADA; and
- Will be used only in accordance with the ADA.

Employers must also state that refusal to provide the information will not subject the applicant to any adverse treatment. Employers that collect this information from applicants must keep the information separate from the application to ensure confidentiality.

Step 2: Do Not Take Adverse Employment Actions Based On Military Status

Under USERRA, an employer may not discriminate against an employee in terms of maintaining employment, promoting the employee, or in any benefit of employment because of the employee's service or potential service in the armed forces.

Additionally, an employer may not retaliate against anyone who helps someone else assert or enforce their USERRA rights, even if that person has no service connection. Examples include participating in a USERRA investigation and testifying in a USERRA proceeding.

If an adverse employment action, e.g., demotion or termination, is proposed to be taken against an employee who may be covered by USERRA's antidiscrimination or antiretaliation provisions, the employer should review the matter carefully with counsel to ensure that the proposed action has a legitimate business justification. Absent this justification, in the case of a termination, the employer may be ordered to reinstate the employee, and pay lost wages, lost benefits, attorney fees and court costs.

Step 3: Just Say *Go* To Requests For Military Leave

Employers must allow their employees to take leave to perform military service. An employee is not required to request or obtain the employer's permission to take military leave. Nor is the employee required to accommodate the employer's needs as to the timing, duration or frequency of military leaves.

The employee's sole obligation is to give the employer notice of pending service, unless giving such notice is either prevented by military necessity or impossible or unreasonable under the circumstances. This notice does not need to follow any particular format. It may be verbal, written, informal or even provided by an officer of the military rather than by the employee.

USERRA does not specify how far in advance this notice must be given. The Department of Defense strongly recommends providing at least 30 days' advance notice to civilian employers when possible. However, this is not mandatory.

Given this legal framework, when an employee provides notice of pending military service, the employer should just say *go*.

Step 4: Fulfill Your Obligations To Employees On Military Leave

During the military leave, the employee is considered to be on furlough or leave of absence from the employer. In this status, the employee is entitled to the same nonseniority rights and benefits that the employer provides to other employees with similar seniority, status and pay who are on furlough or leave of absence.

Nonseniority rights and benefits are those that are not determined by seniority, such as holiday pay, and that are provided according to employment contracts, agreements, policies, practices or plans in effect at the employee's workplace.

The employer may not *require* an employee on military leave to use accrued vacation or other accrued paid leave. However, the employer must allow *the employee's request* to use such accrued paid leave in order to continue his or her civilian pay.

An exception to this rule is accrued paid sick leave, which may be used only if the employer:

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- Allows accrued paid sick leave to be used for any reason; or
- Allows other similarly situated employees on comparable furloughs or leaves of absence to use accrued paid sick leave.

If the employee has coverage under a health plan in connection with his or her employment, then the plan must permit the employee to elect to continue the coverage for up to 24 months while on military leave. If the employee's military leave is for fewer than 31 days, the employee may not be required to pay more than the regular employee share of the premium. Otherwise, the employee may be required to pay up to 102 percent of the full premium, which represents both the employer and employee shares, plus two percent for administrative costs. This structure is similar to that of the Consolidated Omnibus Budget Reconciliation Act (COBRA).

Employers should also ensure compliance with any leave obligations to family members of military personnel. The Family and Medical Leave Act (FMLA) provides expanded rights to military family members, and includes nondiscrimination protections.

Step 5: Prepare For Reemployment

Eligibility

An employee returning from military leave has certain reemployment rights, provided that the employee:

- Satisfied his or her notice obligation at the start of the leave;
- Was not released from military leave under dishonorable conditions;
- Reported back to work or reapplied for employment in a timely manner; and
- Accrued no more than five years of cumulative military service while employed by the employer.

Determining whether the five-year limit has been met can be tricky, as USERRA excludes various military activities from the calculation.

"Escalator" Rights

Eligible returning employees are entitled to reinstatement under what USERRA refers to as the *escalator principle*. The escalator principle requires reemployment in either:

- The escalator position, i.e., the position that best reflects with reasonable certainty the pay, benefits, seniority and other job perks the employee would have had if not for the military leave; or
- A position of like seniority, status and pay.

If the military leave was for fewer than 91 days, the employee must be reemployed in the escalator position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

If the employee remains unqualified, the employer must reassign the employee to his or her pre-leave position. If further reassignments are necessary, the employer must reassign the employee to the "nearest approximations" of the escalator and pre-leave positions, in that order. If the military leave was for 91 days or longer, then the employer must follow the same sequence, except that "a position of like seniority, status, and pay" may be substituted at each step.

An employer that fails to reemploy the returning service member will not be liable if it can prove that:

- Circumstances have changed so as to make reemployment impossible or unreasonable;
- Assisting the employee in becoming qualified for reemployment would impose an undue hardship; or
- The position the employee left was for a brief, one-time period, and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

Just Cause Rights

After reemployment, the employee has heightened protections against discharge. If the duration of the military leave was between 31 and 180 days, the employee may not be discharged except for cause in the first 180 days of reemployment. However, if the military leave exceeded 180 days, then the protective "just cause" period extends to the entire first year of reemployment.

Health And Pension Rights

Upon reemployment, the employee has the right to be reinstated in the employer's health plan, generally without any waiting periods or preexisting condition exclusions, except for service-connected illnesses or injuries. The employee can invoke this right even if he or she did not elect to continue coverage during the military leave.

As for pension rights, the employee must be treated as if he or she did not have a break in employment for purposes of participation, vesting and the accrual of benefits. If the employee is enrolled in a contributory plan, then he or she has up to three times the length of the military leave, capped at five years, to make up missed contributions or elective deferrals. Any required employer match applies only to actual make-up payments. The employer need not make any pension contributions during the military leave.

Step 6: Check State Law For Potential Additional Requirements

Employers must check for any state laws that may also apply when managing employees who are members of the military, as USERRA preempts only those state laws that are less protective of employees. State laws that are more protective of employees impose further risks and obligations on employers.

Step 7: Confer With Counsel To Ensure Compliance With All Laws

The laws concerning employees who are members of the military are dynamic, detailed and complex. Employers are therefore encouraged to confer with counsel whenever issues concerning this subject arise to ensure compliance with all legal requirements.

Please feel free to contact us if you have any questions regarding employees in the military, military leave, or reemployment, or if you need assistance with any related issues.

Lawsuits Challenging Status Of Unpaid Interns: On The Rise

By Sara Goldsmith Schwartz

The prospect of hiring volunteer interns is alluring. But employers are learning the hard way that interns cannot be employed as volunteers, except in narrow circumstances. Two recent lawsuits illustrate this trend—and underscore the importance of treading carefully when considering "hiring" anyone on a volunteer basis.

Both cases involve the entertainment media industry, which relies heavily on interns, and both lawsuits seek class-action status. In *Wang v. Hearst Corp.*, a former intern for the fashion magazine *Harper's Bazaar* claims that the publisher failed to pay minimum wage and overtime to numerous interns who worked up to 55 hours per week over a four-month period. Similarly, in *Glatt v. Fox Searchlight Pictures, Inc.*, two interns allege that the defendant unlawfully treated them—and dozens of their peers—as unpaid volunteers for work related to production of the movie "Black Swan."

In light of these cases, which are in their initial stages, and which may portend a wave of such lawsuits if the plaintiffs are successful, employers should familiarize themselves *now* with the challenges of "hiring" volunteer interns.

Internships At For-Profit Employers

Under federal law, an internship at a for-profit business cannot be unpaid unless: (1) the internship is similar to training given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the intern does not displace regular employees and works under close supervision of existing staff; (4) the employer derives no immediate advantage from the activities of the intern, and, on occasion, its operations may actually be impeded; (5) the intern is not entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Internships At Non-Profit Employers

Federal law includes a special exception, under certain circumstances, for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit banks. The U.S. Department of Labor's Wage and Hour Division (WHD) also recognizes an exception "for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations." The WHD has explained that "[u]npaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible." While the WHD has not clearly defined the terms "religious," "charitable," "civic," or "humanitarian," the WHD has stated that it is "reviewing the need for additional guidance on internships in the public and non-profit sectors."

State Requirements

Sometimes, states impose additional requirements. For instance, in Massachusetts, a for-profit employer may need to show that an unpaid internship is part of a formal educational program, such as by being affiliated with a local college or university. If this interpretation of Massachusetts law is upheld against an employer that fails to comply with it, then the employer will be subject to *mandatory* treble damages and required to pay the prevailing plaintiff's attorneys' fees. Thus, employers should be sure to review state, as well as federal, law in considering the legality of any proposed internship.

Recommendations For Employers

Employers interested in providing internships should: (1) require interns to sign an agreement confirming that no wages will be paid for time spent in the internship and that the intern will not be entitled to employment at the conclusion of the internship; (2) structure the internship to focus on the provision of broadly applicable training to the intern, not on the performance of routine tasks by the intern; (3) avoid even the appearance that unpaid interns are being used to displace or to avoid hiring regular employees; (4) if in the non-profit context and risk-averse, tailor any internship so that it satisfies the factors applicable to for-profit employers; and (5) establish a formal academic affiliation, if required or advisable under applicable state law.

Please feel free to contact us if you have any questions regarding establishing an unpaid internship, or need assistance with a threatened lawsuit involving these issues.

In light of these cases, which may portend a wave of lawsuits, employers should familiarize themselves now *with the challenges of "hiring" volunteer interns.*

Business Severely Sanctioned For CEO's Destruction Of Litigation-Related Documents

By Frances S.P. Barbieri

A Massachusetts business has received harsh sanctions from the Superior Court for its CEO's destruction of documents potentially relevant to a pending lawsuit. This underscores that once a business has been put on notice of an actual or potential legal dispute, it must take careful and thorough steps to ensure that all relevant documents are preserved – or face potentially devastating consequences.

Factual Background

In *Idnani v. Venus Capital Management, Inc.*, the defendant company, with its counsel's assistance, hired a vendor to collect and preserve business records pertinent to the litigation. However, shortly before the vendor was to make an on-site visit to collect hard-copy files, the defendant's CEO discarded thousands of pages of material. As justification for his action, the CEO claimed that this was a regular cleanup for purposes of freeing up storage space. He added that the documents were either unrelated to the case or available in electronic form anyway.

When this came to the attention of the defendant's counsel, he conducted his own investigation, which revealed that many of the discarded documents may have been responsive to the plaintiffs' discovery requests. Accordingly, pursuant to his ethical obligations under the Massachusetts Rules of Professional Conduct, he informed the plaintiffs and the court of the CEO's action.

Superior Court's Decision

In ruling on the plaintiffs' subsequent motion for sanctions, the Superior Court held that the CEO had committed a willful spoliation of evidence, rejecting the CEO's explanation – that his conduct was part of a routine cleanup – as "not credible."

The purported availability of some of the paper documents in electronic form also was rejected as a defense. In addressing this point, the court explained that the paper copies had independent relevance, as they could have included handwriting or notes not maintained electronically.

While the destroyed documents "would not appear to go to the heart of the plaintiffs' case," the court nonetheless ruled that the CEO's conduct "[could] not go unsanctioned." Thus, the court ordered that the plaintiffs could introduce the CEO's conduct into evidence at trial, in which case the jury would be given an "adverse inference" instruction – *i.e.*, an instruction that the jury could infer that materials destroyed by the CEO would have provided support for the plaintiffs' claims. The court also ordered the defendant to pay the attorneys' fees and costs incurred by the plaintiffs in litigating the spoliation issue.

Implications Of Decision

As the Superior Court's decision demonstrates, the destruction of evidence can carry severe costs for a litigant. In particular, an "adverse inference" jury instruction such as that ordered in the *Idnani* case could cause a party to lose a lawsuit, since the jury may infer that the documents would have been fatal to the party's case, regardless of whether that is actually true.

Additionally, the *Idnani* ruling is only the latest in a number of recent court decisions that have cautioned litigants to be diligent in preserving relevant documents. Sanctions imposed by other courts in such cases have included dismissal of a party's claims, substantial monetary penalties, orders that a party pay a computer forensic expert to try to salvage electronic documents destroyed by the party, and even criminal charges for obstruction of justice.

Recommendations For Businesses

There are a number of important steps that businesses should take to protect themselves against the potentially severe consequences of destroying relevant documents. Counsel should be involved in each of these steps to ensure that they are carried out correctly and thoroughly:

1. Issue Litigation Holds Early And Often

A "litigation hold" refers to both the suspension of normal document-destruction procedures and the issuance of specific communications to those employees or other individuals who may possess relevant documents. While a litigation hold should be issued whenever a party becomes involved in litigation, the duty to preserve evidence often arises at an earlier point. Specifically, as stated by the *Idnani* court, the duty arises "[o]nce a litigant knows or reasonably should know that evidence might be relevant to a possible legal action."

Thus, the duty to preserve evidence often arises before any formal legal action takes place. For instance, if a departing employee indicates that he or she may consider legal action, it may be appropriate for the employer to issue a litigation hold at that point. The service of a demand letter also may trigger this obligation.

Once a business has decided that a litigation hold is appropriate, two separate memoranda should be prepared and distributed. The first of these, directed to those individuals who will be overseeing the litigation-hold process, should include (i) a detailed description of the materials to be preserved, (ii) the steps that should be taken to prevent disposal of relevant materials, (iii) the potential sanctions for destroying relevant evidence, and (iv) a list of the "key players" who have or are believed to have

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Is Your Fundraising Raffle Legal?

By Michelle-Kim Lee

For many independent schools and other non-profit organizations and charitable causes, raffles are a common and fun way to raise funds. However, in most states, raffles are considered a form of gambling or gaming and, as such, are subject to state regulation.

Each non-profit organization should determine whether a raffle is permitted in its state and, if so, whether state-specific legal requirements apply. Failure to do so could trigger an investigation by the state Attorney General (or other legal authorities) and expose the organization to a burdensome audit.

Organizational Requirements

While some states ban gambling in any form, others allow certain non-profit organizations to hold raffles. In Massachusetts, for instance, the following organizations are permitted to host a raffle for fundraising purposes:

- Certain veterans' organizations;
- Churches or religious organizations;
- Fraternal or fraternal benefit societies;
- Educational or charitable organizations (including schools);
- Civic or service clubs; and
- Clubs or organizations operated exclusively for non-profit purposes.

Massachusetts law requires that all raffle proceeds be used for educational, charitable, religious, fraternal or civic purposes or for veterans' benefits.

Notably, some states require a non-profit organization to have been in operation for a minimum period of time in order to hold a raffle. In Massachusetts, the organization must have been organized and actively functioning as a non-profit for at least two years.

Permitting And Licensure Requirements

Many states require a non-profit organization to obtain a permit or license before conducting a raffle. In Massachusetts, a non-profit organization must obtain a raffle permit from the clerk of the city or town in which the raffle is going to be held. The permit application must be endorsed by the city/town chief of police, and copies of the permit must be provided to the Massachusetts Commissioner of Public Safety and the Lottery Commission. In addition, some states require financial reports to be submitted to certain state and local agencies after the raffle has been held.

Additional Requirements

Most states impose yet additional requirements, which vary from place to place. For instance, in North Carolina, a non-profit organization is limited to hosting only two raffles per calendar year. Other states limit who can operate the raffle on behalf of the non-profit organization, as well as who can purchase raffle tickets or win the raffle prize.

Massachusetts law imposes an unusual "advance notice" requirement concerning the amount of the raffle prize. If the prize is cash, or if a portion of the prize is to be derived from the raffle's proceeds, such as in a "50/50" raffle, then ticket purchasers must be notified *in advance* of the *specific amount* of the prize. Thus, while the prize in a typical "50/50" raffle is 50 percent of the raffle proceeds *to be determined when the raffle is over,* this arrangement is unlawful in Massachusetts.

Taxes On Raffle Proceeds

Raffle proceeds may be subject to state and local taxes. In Massachusetts, a non-profit organization is required to pay a five percent (5%) tax on the *gross* proceeds of the raffle. Depending on the prize amount, the raffle host may also need to complete a federal Form 1099-MISC for the prize winner.

Recommendations For Non-Profit Organizations

We recommend that independent schools and other non-profit organizations confer with counsel to determine whether a proposed raffle is permitted by state law, and more specifically, to determine the answers to questions such as whether the organization:

- Has been in operation for the required number of years;
- Must obtain licenses or permits from local and/or state agencies;
- Can offer a cash prize derived from raffle proceeds, such as in a 50/50 arrangement;
- May have state and/or federal tax obligations based on raffle proceeds; and
- Must meet any additional requirements in order for the raffle to be legal.

If you have any questions about your state's raffle laws or would like guidance in connection with a non-profit organization's fundraising methods, please do not hesitate to contact us.

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custody of relevant materials. The second of these documents should be a simplified, instructional memorandum to those key players, with clear directions regarding the documents that must be preserved.

The identity of a party's "key players" will vary depending on the nature of the dispute. Generally, however, the following individuals will be included: (i) those named as parties or witnesses by the opposing party, (ii) any other persons believed to have knowledge of the issues in the case, and (iii) information technology (IT) personnel who are responsible for maintaining and periodically disposing of the entity's electronic records. In addition, key players may include former employees or third parties (such as vendors) over whom a business can exert some level of control.

It is important to remember that a litigation hold is a *process*, not a one-time event. An effective litigation-hold process requires, among other things, that the memoranda described above be regularly updated and reissued so that both new and current employees are fully aware of their obligation to preserve relevant documents.

2. Communicate Regularly With Key Players

A business should ensure that its "key players" are making diligent efforts to comply with the litigation hold. As part of this process, a business needs to understand its key players' specific document-retention practices so that it can most effectively guide them.

In addition, a business should ensure that materials identified in the course of a litigation hold are collected and preserved in a logical and useful manner. For instance, it may be prudent to make paper copies of electronic documents and to create a log of all collected documents. By taking such steps, a business can minimize the possibility of misplacing or losing track of relevant materials – which potentially could expose a business to sanctions similar to those applicable to the destruction of documents.

3. Coordinate Carefully With IT Personnel

Finally, businesses should bear in mind that IT personnel play a critical role in every litigation hold. Thus, those employees overseeing the litigation-hold process should coordinate carefully with IT personnel in order to understand the entity's electronic backup and document-destruction procedures, and to ensure that those procedures have been suspended or modified as necessary to preserve all relevant evidence. IT personnel can also serve as a valuable resource in locating relevant electronic records.

Please do not hesitate to contact us if you have any questions about litigation holds generally or the Idnani *case in particular. Our litigation team would be happy to help.*

Schwartz Hannum PC Is Pleased To Announce That **Julie A. Galvin** Has Joined The Firm As **Immigration Counsel**

Julie A. Galvin received her law degree from American University, Washington College of Law. She received her undergraduate degree from the University of Vermont, where she majored in Philosophy. Prior to joining the Firm, Julie was an immigration attorney at Iandoli & Desai, PC, where her practice was devoted to representing companies and non-profit organizations before U.S. Citizenship and Immigration Services, the U.S. Department of Labor, and the U.S. Department of State.

Julie has extensive experience in employment-based immigration, representing corporations, including start-up companies, and non-profit institutions, including schools and universities, regarding hiring foreign national employees, both on a permanent (immigrant) and temporary (non-immigrant) basis. Julie also counsels employers regarding Form I-9 obligations and audits. Julie represents employers before U.S. Citizenship and Immigration Services, the U.S. Department of Labor, the U.S. Department of State, and in immigration court.

She has lectured at colleges and universities regarding post-graduation visa options and has been a panelist for Massachusetts Continuing Legal Education (MCLE). Julie has been selected as a "Rising Star" by *New England Super Lawyers.*

Julie is a member of the Bar of the Commonwealth of Massachusetts, and is a member of the American Immigration Lawyers Association (AILA).

Seminar Schedule

June 26, 2012
Criminal Records Risk Management: Best Practices For Minimizing Your Company's Liability
9:00 a.m. – 11:30 a.m.

July 26, 2012
Dual Use Devices In The Workplace: Understanding And Managing The Risks
11:30 a.m. – 1:30 p.m.

September 27 & 28, 2012
Employment Law Boot Camp
(Two-Day Seminar)
9/27: 8:30 a.m. – 4:30 p.m.
9/28: 8:30 a.m. – 5:00 p.m.

October 25, 2012
Advanced Employment Law Boot Camp
8:30 a.m. – 4:30 p.m.

November 8, 2012
Annual Hot Topics Seminar
7:45 a.m. – 12:00 p.m.

November 27, 2012
Labor Law Traps For Non-Union Employers
9:00 a.m. – 11:00 a.m.

December 11, 2012
Doing Business In California – A Primer
9:00 a.m. – 12:00 p.m.

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

Seminars For Independent Schools

July 19, 2012
Criminal Records Risk Management: Best Practices For Minimizing School Liability
9:00 a.m. – 11:30 a.m.

September 20, 2012
Hot Topics In Independent Schools: The 2012 Seminar
8:30 a.m. – 11:30 a.m.

All listed seminars are being held at the Firm's Andover office at 11 Chestnut Street except for the Annual Hot Topics Seminar in November (its location will be determined and announced shortly).

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

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