SCHWARTZ HANNUM PC
Guiding Employers & Educators

Labor and Employment Law Update

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Independent Schools Face Immigration Obstacles In Hiring Foreign Employees

By Julie A. Galvin

In recent years, independent schools have begun attracting more and more foreign faculty members, mirroring the trend of enrolling more international students. Unfortunately, under the stringent and complex U.S. immigration laws, it is not always easy for a school to hire a foreign national whom it considers to be the best candidate for a position. Thus, it is crucial for independent schools to have an understanding of the unique immigration issues they face in international faculty hirings, so that they can consider how best to address these issues.

H-1B Quota

Like other employers, independent schools must file petitions with U.S. Citizenship and Immigration Services ("USCIS") on behalf of foreign workers they wish to employ. In this regard, schools most commonly file petitions for foreign teachers under the H-1B visa program, which encompasses "specialty occupations," *i.e.,* professional positions that require a minimum of a Bachelor's degree in a specialized field. The requirements of the H-1B visa program, however, can present difficult hurdles for independent schools.

First, only 65,000 H-1B visas are awarded each fiscal year, along with an additional 20,000 visas

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Employers Beware: New NLRB Rules Will Radically Streamline Union Election Process

By Brian D. Carlson[1]

The National Labor Relations Board (the "NLRB" or "Board") recently proposed new rules intended to expedite the union election process. If adopted, the Board's new election rules will make it much easier for unions to organize employees, as employers will have little time to tell employees their position on unionization and respond to union propaganda before elections are held. In addition, the new rules will significantly bolster unions' ability to communicate with employees in advance of elections.

The proposed new election rules are essentially the same as those the NLRB originally proposed in June 2011. While the Board briefly implemented most of those new rules in April 2012, a federal court quickly invalidated that action on the basis that the NLRB did not have a valid quorum when it voted to adopt the new rules. The quorum issue has now been resolved, paving the way for the Board's reintroduction of the new election rules.

Under the new election procedures proposed by the Board, advance planning will be the most effective – and perhaps the *only* – way for employers to prevail in union elections. Our planning recommendations are set forth below, following a summary of the new election rules.

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1 *Brian gratefully acknowledges Lori R. Clark, formerly with Schwartz Hannum PC, for her assistance in preparing this article.*

Massachusetts Wage Act Does Not Preclude Common-Law Claims For Unpaid Wages

By Jaimie A. McKean

In recent months, state and federal courts in Massachusetts have confirmed that the Massachusetts Wage Act (the "Wage Act") is not the sole remedy for employees seeking to recover unpaid wages. Rather, employees may also bring common-law claims for unpaid wages.

While the Wage Act will continue to be the primary vehicle for Massachusetts employees who seek unpaid wages, these recent court holdings may prove significant in certain types of cases. For instance, because some common-law claims entail longer statutes of limitations than claims brought under the Wage Act, plaintiffs whose wage claims would be time-barred under the Wage Act may instead be able to assert common-law claims. Further, some employees with timely Wage Act claims may be able to raise common-law claims as well and thereby extend the time period as to which they can be awarded unpaid wages.

SJC's *Lipsitt v. Plaud* Decision

In a decision last summer, *Lipsitt v. Plaud*, the Massachusetts Supreme Judicial Court ("SJC") affirmed the principle that the Wage Act does not preempt common-law claims by plaintiffs seeking unpaid wages.

In *Lipsitt*, the plaintiff was employed by the defendant from 2004 until 2007 and, throughout that time period, allegedly was not paid the salary due him under his written employment agreement. After initially filing a complaint under the Wage Act with the Attorney General, the plaintiff filed suit in court in 2010. Due to the passage of time, the plaintiff's wage claims were largely untimely under the Wage Act's three-year statute of limitations. Accordingly, in addition to asserting claims under the Wage Act, the plaintiff raised various common-law claims in his complaint, including claims for breach of contract and *quantum meruit* (also known as "quasi-contract"), each of which is subject to a six-year statute of limitations.

The defendant moved to dismiss the plaintiff's common-law claims, arguing that the Wage Act preempted common-law claims seeking unpaid wages. The trial court agreed and dismissed those claims, and the plaintiff appealed this ruling to the state Appeals Court. The SJC then took the case on its own motion and eventually reversed the trial court's decision, holding that the Wage Act does not preclude common-law causes of action for unpaid wages.

In its decision, the SJC noted that a statutory remedy generally will be found to preempt similar common-law causes of action only where (i) the statute expressly provides for such preemption, or (ii) "the [statute] creates a new right or duty that… does not exist at common law." The court found that neither of these criteria applied in the case of the Wage Act. In particular, as to the latter, the SJC emphasized that "the right of an employee to sue for breach of contract or on a quasi-contract theory arising from the nonpayment of wages is so longstanding and fundamental that it requires no citation." The SJC also noted that while the Wage Act was first enacted in 1886, a private right of action under the statute was not created until 1993, and that during the interim, an employee's right to seek recovery of unpaid wages through common-law claims was well established.

Cormier v. Landrey's: U.S. District Court Weighs In

More recently, in a case brought in Massachusetts federal court, U.S. District Court Judge Nathaniel Gorton issued a ruling that sheds further light on the scope of this principle. In *Cormier v. Landrey's, Inc.*, the court followed *Lipsitt* but noted that the holding does not extend to common-law claims seeking remedies created only by statute.

The *Cormier* lawsuit was brought by a group of restaurant wait staff employees. Among other claims, the plaintiffs contended that their employer had made improper meal deductions from their paychecks. In connection with that allegation, the plaintiffs asserted a claim under the Wage Act, as well as a common-law claim for unjust enrichment. Additionally, the plaintiffs claimed that their employer had improperly pooled tips among wait staff and non-wait staff employees, and that that alleged practice both violated the Massachusetts Tips Act (the "Tips Act") and constituted a breach of an implied contract. The employer moved to dismiss both of the plaintiffs' common-law claims.

In a decision last summer, Lipsitt v. Plaud, *the Massachusetts Supreme Judicial Court ("SJC") affirmed the principle that the Wage Act does not preempt common-law claims by plaintiffs seeking unpaid wages.*

As to the first of these claims, the court decided, on the basis of the *Lipsitt* holding, that the plaintiffs' unjust-enrichment claim should stand, because the plaintiffs would have had a cause of action for improper wage deductions even absent the Wage Act.

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Union Rights For Student Athletes? NLRB Decision Creates A Whole New Ball Game For Colleges And Universities

By Todd A. Newman

Football players for Northwestern University (the "University") who receive grant-in-aid scholarships may vote for union representation under federal labor law, according to a recent, controversial ruling by the Regional Director ("RD") of the National Labor Relations Board ("NLRB" or "Board") office in Chicago. The RD's decision is under review by the full Board. Meanwhile, the football players have voted in an NLRB secret-ballot election, with ballots impounded pending completion of the Board's review.

If the Board lets the RD's decision stand, and if in turn, the ballots show that the football players voted to unionize, then the University might refuse to bargain with the union. This would force the union to file an unfair labor practice charge, the first step in a legal process that includes rights of appeal to the United States Court of Appeals and then to the United States Supreme Court. (If, on the other hand, the players voted against unionization, then the legal process would end, but the players could seek another union election after one year.)

If allowed to stand, the RD's ruling would be a "game changer" for many colleges and universities. In this regard, union organizing campaigns targeted toward student athletes, followed by costly collective bargaining involving big-ticket demands, could become the norm.

Background

Earlier this year, a labor organization called College Athletes Players Association ("CAPA") filed a representation petition with the RD. The petition asked the RD to schedule a secret-ballot election for University football players receiving grant-in-aid scholarships (the "Players") to determine if they wished to be represented by CAPA for purposes of collective bargaining with the University.

The University objected to the representation petition, primarily on the ground that its football players are not employees and, as such, do not have a right to unionize under federal labor law. In this regard, the National Labor Relations Act (the "Act") provides collective bargaining rights only to nonsupervisory "employees" of employers covered by the Act. (In the educational realm, the Board generally (i) asserts jurisdiction over private and nonprofit colleges, universities, and other schools with gross annual revenue of $1 million or more; (ii) treats public educational institutions as exempt from the Act; and (iii) declines to assert jurisdiction over employees of religious organizations who are involved in effectuating the religious purpose of the organization. Please note, however, that entities not covered by the Act may be covered by state labor laws.)

The University and CAPA (which, by the way, receives financial support from the United Steelworkers union) participated in an evidentiary hearing at the NLRB and then submitted briefs in support of their respective positions. The briefs were forwarded to the RD for a decision.

The RD's Decision

The RD concluded that the Players are employees of the University for purposes of the Act. In reaching this conclusion, the RD applied the common-law definition of "employee." Under this definition, an employee is a person who (1) performs services for another, (2) under a contract of hire, (3) subject to the other's control or right of control, and (4) in return for payment. According to the RD, each of these elements was satisfied.

First, the RD found that the Players' participation on the football team constituted "valuable services" to the University. He noted that the University's football program generated approximately $235 million in revenue between 2003 and 2012 through ticket sales, television contracts, merchandise sales, and licensing agreements. According to the RD, the University "was able to utilize this economic benefit provided by the services of its football team in any manner it chose." The RD also reasoned that the Players' services have resulted in a winning football program, which has had an "immeasurable positive impact" on alumni giving and the number of applicants for enrollment at the University.

Second, in the RD's view, the "tender" that each Player was required to sign before the beginning of each scholarship period served "as an employment contract." The tender is a document providing detailed information about the duration of the scholarship and the conditions under which scholarship funds are to be provided. Noting that the National Collegiate Athletic Association ("NCAA") prohibits student athletes from receiving additional compensation or otherwise profiting from their athletic ability and reputation, the RD concluded that "the scholarship players are truly dependent on their scholarships to pay for basic necessities, including food and shelter," making the tender all the more akin to an employment contract.

Third, the RD determined that the Players perform their services under the University's "strict and exacting control" throughout the entire year. In particular, the RD found that the University requires the Players: (a) to commit 50-60 hours per week to football-related activities during a six-week training camp prior to the academic year; (b) to commit 40-50 hours per week to football-related activities during the "football season" portion of the academic year, despite NCAA rules purporting to limit such activities to 20 hours per week once the academic year begins; and (c) to abide by restrictions governing numerous aspects of their personal

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Massachusetts Schools: Employee And Point Of Contact Fingerprinting Has Begun

By Susan E. Schorr

The Massachusetts Department of Elementary and Secondary Education ("DESE") has begun sending schools information about the Statewide Applicant Fingerprint Identification Services ("SAFIS") for Points of Contact and for employees hired for the 2013-2014 school year. MorphoTrust USA IndentoGo™ ("MorphoTrust") has been selected by DESE to implement SAFIS, and the vendor is now processing online registration for fingerprinting appointments.

While we are still awaiting DESE's updates to the model fingerprint-based check policy, below are highlights of the steps that we recommend that all independent schools undertake now in connection with fingerprint-based checks of employees and Points of Contact.

1. Fingerprint Checks For Points Of Contact

Schools should already have identified the individuals who will be responsible for reviewing the results of the fingerprint-based checks (the "Points of Contact") (akin to a CORI reviewer designated by the school) as part of the registration process with SAFIS. Points of Contact should now be making appointments with MorphoTrust to have their fingerprints scanned. Schools will not be able to receive and process information regarding covered employees' fingerprint-based checks until Points of Contact have been cleared through the system. Because there are currently just a few vendor sites established for scanning fingerprints in Massachusetts (though approximately 30 such sites are planned), Points of Contact may have to travel one hour or more to the nearest fingerprint-check site.

2. Identify Covered Employees

First, identify all (1) employees, substitute employees, student teachers, and interns who may have direct and unmonitored contact with children, and (2) individuals who regularly provide school-related transportation to children (collectively referred to herein as "Employees") who began work during the *2013-2014 school year only* (defined as starting employment after July 1, 2013). Employees who have worked at a school since before that date will be fingerprinted based on a schedule not yet released by DESE.

If the school has conducted CORI checks on such Employees, and their CORI results do not preclude employment, then these Employees are required to proceed with the fingerprinting process via SAFIS (as described further below). If an Employee has not yet been successfully CORI checked, then the Employee must be CORI checked *before* undergoing a fingerprint-based check, as CORI results alone may preclude employment.

3. Employee Registration For Fingerprinting

Schools should notify Employees and the Points of Contact to register and make an appointment for a fingerprint-based check through MorphoTrust *(http://www.identogo.com/FP/Massachusetts.aspx)*.

It is important that schools instruct Employees to review two important documents: (a) the SAFIS Registration Guide for PreK-12th Grade Education (available at *http://www.l1enrollment.com/state/forms/ma/5323798140bf9.pdf*); and (b) How to Change, Correct, or Update Your National Criminal History Record Response (available at *http://www.l1enrollment.com/state/forms/ma/52f8ec486a65e.pdf*). In addition, schools should provide Employees with the 8-digit DESE organizational code already issued to each school, which Employees will use as the "Provider ID" during the registration process.

As of now, it appears that a consent form to authorize the collection of fingerprints will be provided via SAFIS/MorphoTrust (*i.e.*, "Acknowledgement/Release form") as part of the registration process. However, we recommend that independent schools consider having Employees and Points of Contact sign an authorization and consent form provided by the school so that schools will have the benefit of the protections offered by such consent and authorization. (An E-Alert published by Schwartz Hannum discussing criminal background check compliance in general can be found here: *http://shpclaw.com/Schwartz-Resources/massachusetts-dcjis-issues-final-regulations-governing-criminal-background-checks-by-employers/*.) For schools that have already implemented our CORI Compliance Package, please contact us to discuss updating those documents for the fingerprinting context (and, of course, schools may contact us for assistance with initial implementation of a criminal record compliance package).

After an Employee completes the fingerprint enrollment appointment, MorphoTrust will send a receipt to the Employee. The school's designated Point of Contact should obtain a copy of this receipt from each Employee. The receipt will provide the school with confirmation that the fingerprints were captured and will also include important reference information should the school need

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Massachusetts Schools: Employee And Point Of Contact Fingerprinting Has Begun

assistance from the Department of Criminal Justice Information Services ("DCJIS") with regard to the fingerprint-based check.

4. Establish A Background Check Policy

If your school does not have a general background check policy in place, now is the time to implement this policy, which should include policies and procedures for fingerprint-based checks and any other relevant background checks (CORI, SORI, motor vehicle, credit reports, drug testing, etc.) that an independent school may perform on applicants, employees, volunteers, and contractors. Such a policy should include, at a minimum, provisions that address: consent and authorization for background checks, notifying employees of findings of concern, permitting employees to contest background check results, taking adverse employment action based on the results, and disseminating and storing background check information.

5. Post-Fingerprinting

DCJIS will send fingerprint-based check results to the designated Point of Contact for each school, through the SecureMail system. As of now, results are arriving within one or two business days.

Before taking an adverse action based on fingerprint-based criminal history check results, schools must: (a) comply with applicable federal and state laws and regulations, (b) notify the Employee, (c) provide a copy of the fingerprint-based check results to the Employee, (d) provide a copy of the fingerprint-based check policy to the Employee, (e) identify the information in the Employee's fingerprint-based check results that is the basis for the potential determination, (f) provide the Employee with the opportunity to dispute the accuracy of the information contained in the fingerprint-based check results, (g) provide the Employee with a copy of Massachusetts and FBI information regarding the process for correcting the fingerprint-based check information, and (h) document all steps taken to comply with applicable regulations.

…identify all (1) employees, substitute employees, student teachers, and interns who may have direct and unmonitored contact with children, and (2) individuals who regularly provide school-related transportation to children…

The Firm will continue to monitor further developments regarding implementation of the fingerprinting system, and we will provide updates as they become available. In the meantime, if you have any questions about this process, background check requirements in general, or have interest in updating your school's background check policy, consent and authorization forms, or seek assistance with a background check compliance package, please do not hesitate to contact any member of the Firm's education practice group.

Schwartz Hannum PC Has Been Selected As A 2014 "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.

The Firm has been ranked:

31st on the list of Top 50 Women-Owned Businesses in Massachusetts

54th on the list of Top 100 Diversity-Owned Businesses in Massachusetts

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.

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Employers Beware: New NLRB Rules Will Radically Streamline Union Election Process

Proposed New Election Rules

The Board's proposed new rules would change the union election process in a number of important respects, including the following:

- A union election could be held as early as *ten days* after the Regional Director's issuance of a formal election notice. Under current procedures, elections are normally conducted within 25 to 30 days following the issuance of an election notice, so this is a major change.
- Election petitions, election notices, and voter lists would be permitted to be filed electronically.
- A pre-election representation hearing, if held, would be required to take place within seven days of a union filing a representation petition. This change would cut in half the typical interval between the filing of an election petition and a representation hearing, thereby making it much more difficult for an employer to prepare for such a hearing.
- The employer would be required to file, by the date of the representation hearing, a comprehensive position statement with respect to the election petition. Any issues not raised in the employer's position statement would be deemed waived.
- NLRB hearing officers would have authority to exclude from representation hearings evidence concerning proposed voters' eligibility unless those individuals constituted at least 20 percent of the potential votes.
- Similarly, hearing officers would have authority to deny parties the right to file briefs following representation hearings.
- The so-called *Excelsior* list that an employer must provide to a union before an election would be expanded to include eligible voters' e-mail addresses, telephone numbers, job classifications, locations, and shifts. (Currently, *Excelsior* lists need include only voters' names and addresses.) In addition, employers would normally be required to provide *Excelsior* lists in electronic format.
- An employer would be required to provide its *Excelsior* list to the union within two days (rather than the current seven days) following the issuance of a Direction of Election.
- Finally, under the proposed new rules, all election-related appeals to the NLRB would generally be consolidated into a single, post-election appeals process.

Implications

By substantially streamlining the election process, the Board's proposed new rules could make it much more difficult for employers to campaign effectively and ultimately prevail in union elections. Often, when an election petition is filed, an employer is caught off-guard and must scramble to get its message out to employees and address any legal issues before the election. The shortened time frames provided for in the proposed new election rules would create major challenges for employers in taking such steps.

Further, by expanding the content of mandatory *Excelsior* lists and requiring those lists to be provided to unions much more quickly, the proposed new rules would significantly enhance each union's ability to communicate with eligible voters prior to a representation election. This change, as well, is likely to work to the unions' advantage in election campaigns.

Recommendations For Employers

The proposed new election rules will not be finalized at least until after a public comment period (which ended April 7, 2014) and a subsequent public hearing. Following that process, the Board could proceed with the new rules as currently proposed or implement some modified version of the rules. Notably, after the new rules are finalized, they are expected to face legal challenges from employer groups.

In the interim, however, employers should assume that the new election rules will eventually go into effect and begin preparing accordingly. In particular, employers should:

- Adopt and enforce valid policies that limit when employees may solicit and distribute literature in the workplace and that prevent unauthorized visitors from gaining access to the premises. Such policies should always be reviewed by labor counsel, as the rules governing them are complex;

Under the new election procedures proposed by the Board, advance planning will be the most effective – and perhaps the only *– way for employers to prevail in union elections.*

- Be sensitive to issues that are of concern to employees and attempt to remedy legitimate complaints. By being proactive on such matters, an employer can alleviate the dissatisfaction among employees that often sparks union organizing campaigns;
- Train supervisors, managers, and human resources personnel in how to recognize and respond appropriately to possible union organizing activity;
- Develop and prepare to implement a plan for communicating the employer's position on unionization and related issues, both internally and externally; and

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- Consider preparing appropriate materials, including written communications to employees, to be used in the event of a future union organizing or election campaign. Under the NLRB's proposed new election rules, after receiving an election petition, an employer may not have sufficient time to communicate its message to employees unless those communications have been drafted well in advance.

Significantly, enacting some of these recommendations *after a union organizing campaign is underway* may be viewed as unlawful retaliation against union activity and, in turn, support an unfair labor practice charge against the employer. Accordingly, employers that wish to remain union-free should act *now* to implement these protections.

Please feel free to contact us if you have any questions about the Board's proposed new election rules or need assistance with any other labor-law matters. We regularly assist employers in all aspects of labor law and would be happy to help.

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Massachusetts Wage Act Does Not Preclude Common-Law Claims For Unpaid Wages

As Judge Gorton noted, "plaintiffs' unjust enrichment claim with respect to the allegedly improper deductions is a simple matter of longstanding tort law."

By contrast, applying *Lipsitt,* Judge Gorton found that the plaintiffs could cite no basis outside of the Tips Act for claiming that their employer's alleged tip-pooling practices were unlawful. Accordingly, the court dismissed the plaintiffs' claim for breach of an implied contract based on that allegation.

Implications Of Decisions

In light of the *Lipsitt* and *Cormier* decisions, plaintiffs in Massachusetts are likely to continue to assert common-law claims for unpaid wages in certain circumstances. In particular, plaintiffs who claim to have been denied wages owed to them over a period of time longer than the Wage Act's three-year limitations period may assert both Wage Act claims and common-law claims, in order to maximize the time period over which they can be awarded unpaid wages.

Another scenario in which common-law wage claims may sometimes be pursued is when such claims fall entirely outside the Wage Act's three-year statute of limitations. In such circumstances, the six-year limitations period applicable to contract and quasi-contract claims may permit such common-law claims to be brought. Of course, as a practical matter, this may not be economically viable for a plaintiff. While the Wage Act provides for mandatory treble damages, attorneys' fees, and costs, those remedies do not apply to common-law wage claims. Nor can a plaintiff extend the Wage Act's three-year statute of limitations by raising common-law claims that are subject to longer limitations periods. Thus, once attorneys' fees and other litigation expenses are factored in, seeking unpaid wages solely through common-law claims may not make economic sense unless the amount of wages at issue is substantial.

Recommendations For Employers

In light of these court decisions, we recommend that Massachusetts employers:

- In consultation with experienced employment counsel, carefully review their practices with regard to maintaining payroll records. Because, under *Lipsitt* and *Cormier,* employees seeking unpaid wages may assert common-law claims that are governed by limitations periods longer than the Wage Act's three-year statute of limitations, employers that fail to maintain payroll records for a sufficient period of time may find it difficult to defend such claims;
- Audit – again, in consultation with counsel – their payroll practices generally and implement any revisions required to comply with the wage laws; and
- Continue to monitor further developments in this area of the law.

Please feel free to contact us if you have any questions regarding the Lipsitt *and* Cormier *decisions or any other wage-and-hour issues.*

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Independent Schools Face Immigration Obstacles In Hiring Foreign Employees

set aside for workers who earned advanced degrees in the United States. The annual H-1B quota is usually met on or soon after the first date of filing (April 1), and employers whose petitions are not selected through the lottery that USCIS uses to award H-1B visas when demand is heavy generally cannot reapply for H-1B visas until the following April 1. Thus, if a school applies unsuccessfully for an H-1B visa for a foreign teacher, it will likely need to wait a full year before filing another H-1B petition on behalf of the individual.

…it is crucial for independent schools to have an understanding of the unique immigration issues they face in international faculty hirings…

Another issue for schools is that while April 1 is the first date for filing new H-1B petitions, employment under new H-1B visas cannot start until October 1. For this reason, even if a school successfully obtains an H-1B visa for a foreign teacher, it must wait until October 1 to employ the teacher (unless he or she already has U.S. employment authorization). Given that the academic year usually starts in August or September, this is less than ideal. However, if a school can find a substitute to fill in until October, hiring a foreign teacher under an H-1B visa may still prove viable, particularly since H-1Bs can last for six years and be a good vehicle to permanent residency status, should the school and the individual wish to pursue this.

It is important to note that some employers are exempt from the annual H-1B visa quota. In particular, this exemption applies to colleges and universities and to nonprofit entities that are affiliated with colleges and universities. In order to meet this "affiliation" requirement, an employer must satisfy one of the following criteria: (i) the employer is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation; (ii) the employer is operated by an institution of higher education; or (iii) the employer is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

USCIS interprets the above criteria very strictly. Nonetheless, if an independent school has a close relationship with a college or university, it may be beneficial for the school to explore whether that relationship might potentially exempt it from the H-1B cap. Not only are cap-exempt employers not subject to the annual H-1B quota, but they are also free to file H-1B petitions at any time and are not limited to the October 1 employment start date.

Licensing

Another issue that independent schools often face in hiring foreign teachers involves licensing requirements. For occupations that require professional licenses, USCIS demands proof of such licenses before approving H-1B petitions. As public school teachers are subject to state licensing requirements, USCIS often expects to see a teaching license in conjunction with an H-1B petition for a teacher, even when the petition is filed by an independent school. Therefore, if a teaching position does not require a license, the school should be sure to submit proof of the license exemption along with its H-1B petition, in order to avoid processing delays.

Wage And Compensation Issues

Schools may confront compensation issues in obtaining H-1B visas for foreign nationals. An employee working under the H-1B program must be paid at least the "prevailing wage" for the specific occupation, based on the geographic location. The required wage must be paid, free and clear, except for standard payroll deductions. The U.S. Department of Labor ("DOL") generally determines the prevailing wage. While, in theory, the prevailing wage should reflect the standard wage for the occupation and geographic area, in reality, the prevailing wage set by DOL is often significantly higher than the actual wages that many such employees receive.

The prevailing wage requirement can be especially problematic for independent schools that offer compensation packages that include lower salaries supplemented by non-cash benefits, such as on-campus housing. Unfortunately, since only "cash" wages are considered in determining whether the prevailing wage requirement is met, the value of employer-provided housing cannot be taken into account, unless the employee pays for the housing through authorized wage deductions reported on his or her W-2 form. Further, even in such a case, in order for the value of the housing to count toward the prevailing wage, the school would have to establish that the housing is provided primarily for the benefit of the employee, and not for the school's own convenience. In some situations (such as where a faculty member's housing is attached to a student dormitory and the faculty member is expected to be "on call" at all times), it may be difficult to meet this test.

If the salary for a teaching position presents a challenge, there may be other ways for an independent school to meet the prevailing wage requirement. For instance, a school may be able to submit a private wage survey to DOL, if such a survey exists and meets

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regulatory requirements, and request that DOL consider that survey, rather than its own data, in certifying the prevailing wage. Another option may be to restructure the position as part-time, if the salary for the position would satisfy the prevailing wage when taken on an hourly basis.

Other Visa Options

If an H-1B visa is not a feasible option for hiring a foreign national (whether due to the annual quota, prevailing wage issues, or another reason), an independent school should explore whether any additional visa options may exist. For example, if a school is affiliated with a religious denomination, it may qualify for R-1 visas for its teachers of religion.

Alternatively, if a prospective faculty member is considered to be preeminent in his or her field, the individual may qualify for an O-1 visa, reserved for aliens of "extraordinary ability." The O-1 visa is difficult to obtain, as the foreign national must meet several stringent criteria. Still, this option is worth examining if a candidate has top credentials (such as numerous publications and/or distinguished awards) and has made valuable, original contributions to his or her field.

Finally, a foreign teacher may qualify for a J-1 Exchange Visitor visa, which is available to certain foreign nationals who are qualified to teach in their home countries and in the U.S. states where they intend to work. J-1 visa holders may teach full-time in U.S. primary and secondary accredited educational institutions for up to three years. A J-1 program participant must be sponsored by an organization that is approved by the U.S. Department of State, and the program must provide the participant with an opportunity to take part in cross-cultural activities in the school and/or the community.

Recommendations For Schools

In light of these challenges, there are a number of steps that independent schools should take in seeking to hire foreign national faculty members:

- Non-cap-exempt schools that want to apply for H-1B visas should plan well ahead so that they are prepared to file their H-1B petitions with USCIS on April 1.
- If an H-1B visa beneficiary will not have employment authorization prior to October 1, the school should make alternative arrangements until the H-1B visa can take effect.
- A school that has a relationship with a college or university should closely examine that relationship to determine if it may exempt the school from the H-1B visa quota.
- If the salary for a position does not meet the prevailing wage set by DOL, a school should explore other ways in which it may be able to meet this requirement.
- Finally, schools should consult experienced immigration counsel to ensure that all of these actions are pursued in the most effective manner.

Please feel free to contact us if you have any questions regarding hiring foreign national faculty members or any other immigration issues. The Firm regularly counsels employers in these areas and would be happy to assist.

Schwartz Hannum PC Attorneys Recognized For Participation In Marathon Assistance Project

In the days immediately following the marathon bombings last year, the Boston Bar Association ("BBA") jumped in to help provide pro bono legal assistance to small businesses and individuals affected by the bombings. Through the Marathon Assistance Project, lawyers volunteered to assist small businesses with insurance claims and employment issues and to help individuals with One Fund claims.

Schwartz Hannum PC was thrilled to participate in this important effort. Suzanne King and Jessica Farrelly volunteered to help a small business in the Back Bay that had been affected by the bombings. *"The BBA took action very quickly,"* recalled Suzanne, *"and did a great job matching volunteer lawyers with people who needed legal assistance. It was very satisfying to be able to help in some small way."*

The BBA's efforts paid off. Over 60 Boston-area lawyers participated in the Marathon Assistance Project. Boston's former Corporation Counsel praised the BBA's efforts:

"The impact which BBA's staff and members had on the Marathon recovery was enormous. Victims and businesses were desperate for direction and professional assistance and BBA, partnering with the City, stepped up. As a runner, I was grateful. As a City official, I was impressed. As a lawyer... I was proud."

At the annual Law Day Dinner on May 12, 2014, Suzanne and Jessica were among dozens of Boston-area lawyers honored for their work with the BBA Marathon Assistance Project. Schwartz Hannum PC joins with many others in extending its thanks to all of the attorneys who were recognized for their service.

Employers Face Growing Trend Of Laws Targeting Discrimination Against The Unemployed

By Soyoung Yoon

As the economy has continued on an uncertain course in the wake of the Great Recession, many downsized workers have found themselves out of work for months or even years at a time. In response to such concerns, a number of states and municipalities have enacted measures over the past few years intended to protect unemployed job candidates from being discriminated against on that basis.

While many employers may view long stretches of unemployment as a "red flag," a sign that perhaps their job skills have stagnated or become outdated, in certain jurisdictions (discussed below), employers now need to ensure that their hiring practices do not unlawfully discriminate against the unemployed. Further, all employers should pay close attention to future developments in this area.

Recent Enactments

Thus far, four cities and two states have enacted legislative measures intended to protect unemployed job applicants. As noted below, some of these measures simply prohibit job advertisements that indicate that current employment is a prerequisite, while others affirmatively restrict employers' ability to take employment status into account in hiring decisions.

- Madison, Wisconsin. Last December, Madison, Wisconsin enacted an ordinance prohibiting employers from (i) discriminating against job applicants based on their unemployed status, or (ii) publishing any job advertisement that indicates a preference for applicants who are currently employed. (The ordinance, however, expressly does not restrict an employer's ability "to inquire into, or to consider or act upon the facts and circumstances" resulting in an applicant's unemployed status.) The Madison ordinance permits an aggrieved individual to file a complaint with the municipal Equal Opportunities Commission for monetary and other relief.
- New York City. In June of last year, the New York City Human Rights Law was amended to prohibit employers from (i) "bas[ing] an employment decision … on an applicant's unemployment," unless an employer can demonstrate a "substantially job-related reason for doing so"; and (ii) publishing a job advertisement "stating or indicating" that current employment is a prerequisite for a position. The ordinance creates a private right of action, through which a successful plaintiff may recover compensatory and punitive damages as well as attorneys' fees.
- Washington, D.C. A Washington, D.C. ordinance (known as the "Unemployed Anti-Discrimination Act of 2012") similarly prohibits employers from (i) refusing to consider or hire job applicants on the basis of their unemployed status, and (ii) publishing an advertisement or announcement for a job vacancy "stating or indicating" that unemployed individuals will not be considered for the position. The D.C. ordinance, however, does not establish a private right of action for violations of the law. Instead, aggrieved individuals must seek enforcement of the ordinance through the D.C. Office of Human Rights.
- Chicago. Under an ordinance enacted in 2012, Chicago prohibits employers from using "an advertisement for, or other posting of, any job opportunity that requires the applicant for the position to be employed." The ordinance, however, does not prevent employers from taking applicants' employment status into account in hiring decisions.
- New Jersey And Oregon. Finally, both New Jersey and Oregon have enacted statutes (in 2011 and 2012, respectively) that, like the Chicago ordinance, prohibit employers from using job advertisements that list current employment as a prerequisite. But these laws do not restrict employers from considering applicants' employment status.

These recent measures raise a number of seeming ambiguities that the courts ultimately may need to resolve. For instance, it is unclear what employers in New York City will need to show in order to establish a "substantially job-related reason" for taking an applicant's current employment status into account.

Similarly, as to the Madison and D.C. measures, there may not be a clear line between, on the one hand, declining to hire an applicant based on his or her unemployed status and, on the other, merely considering the circumstances that resulted in the applicant's unemployment.

Finally, with regard to the New York City and D.C. ordinances, plaintiffs' lawyers may argue that job advertisements that do not explicitly state that current employment is a prerequisite for a position nonetheless somehow improperly "indicate" that unemployed candidates will not be considered.

Proposed Measures

In addition to these recent enactments, a number of similar measures have been proposed at both the federal and the state level.

Specifically, in 2011, President Obama announced his support for proposed federal legislation that would amend Title VII to prohibit discrimination against unemployed job applicants. While the proposed measure died in Congress, the Obama Administration has continued to press for such protections. In this regard, at the President's prompting, top executives of a number of large U.S. corporations, including Apple, EBay, 20th Century Fox, and Walt Disney, signed a voluntary

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pledge earlier this year not to discriminate against applicants who have been out of work for extended time periods.

At the state level, proposed laws aimed at protecting unemployed job applicants were introduced in nine state legislatures (Florida, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New York, Pennsylvania, and Virginia) during 2013. Some of these proposed measures would merely prohibit job advertisements that list current employment as a prerequisite, while others would expand state employment discrimination laws to encompass unemployed job applicants. (The proposed Massachusetts legislation includes both of these elements.)

Recommendations For Employers

In light of these recent developments, we recommend that employers:

- In consultation with experienced employment counsel, revise their job advertisements, job application forms, employee handbooks, and related documents as necessary to comply with any applicable laws protecting unemployed applicants;
- Ensure that all employees involved in recruiting, interviewing, and hiring (including managers and HR personnel) are trained as to the requirements of any applicable laws; and
- Closely monitor future developments in this area.

Please don't hesitate to contact us if you have any questions regarding laws protecting unemployed job applicants or any other hiring issues. We would welcome the opportunity to assist you.

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Union Rights For Student Athletes? NLRB Decision Creates A Whole New Ball Game For Colleges And Universities

lives, including, among other things, their living arrangements, outside employment, and off-campus travel.

Fourth, according to the RD, "it is clear that the scholarships the players receive is compensation for the athletic services they perform throughout the calendar year, but especially during the regular season and postseason." In this regard, the RD noted that "while it is true that the players do not receive a paycheck in the traditional sense, they nonetheless receive a substantial economic benefit for playing football" in the form of "tuition, fees, room, board, and books for up to five years." The monetary value of these scholarships, the RD found, was as much as $76,000 per year – and in excess of $250,000 in the aggregate – for many of the Players.

The RD rejected the University's argument that the Board's decision in *Brown University,* 342 NLRB 483 (2004), required a finding that the football players are not employees. In *Brown University,* the Board ruled that "graduate assistants" who sought union representation were not employees within the meaning of the Act. The RD distinguished *Brown University* as being premised on a finding that the graduate assistants were "primarily students." To the contrary, explained the RD, "it cannot be said that [the Northwestern University football players] are 'primarily students' who 'spend only a limited number of hours performing their athletic duties.'"

Implications And Recommendations

If the RD's ruling is allowed to stand, then student athletes who receive scholarships from colleges and universities are likely to become targeted for aggressive union organizing. This means, in effect, that members of many collegiate football teams, basketball teams, and the like (*i.e.,* student athletes whose teams require them to put in substantial hours and generate substantial revenues, as reflected in the RD's first and third factors) could opt for representation by CAPA or other labor organizations and then proceed to demand collective bargaining with the institution.

What would the parameters be for collective bargaining involving student athletes? This is far from clear. CAPA's website suggests that, at a minimum, protecting student athletes from injury and assisting with medical expenses would be areas of emphasis. In this regard, CAPA contends that the NCAA denies having a legal duty to protect college athletes from injury; has failed to investigate and minimize concussion-related deaths; and ignores reports that coaches pressure athletic trainers to clear concussed players for action. CAPA also wants to loosen restrictions on how and the extent to which student athletes may be compensated.

Educational institutions – particularly those that generate revenue through their athletic programs – are urged to monitor the *Northwestern University* case closely. As the matter now stands, the prospect of union organizing campaigns in dormitories and athletic facilities; collective bargaining sessions with union-represented student athletes; and demands for big-ticket items such as guaranteed medical benefits for sports injuries is one step closer to reality. Given what is at stake, the game plan for educational institutions should be to stay informed and, in turn, to be prepared.

Independent School Training Events

September 18, 2014
Risk Management Strategies For Off-Campus Trips And Activities
8:30 a.m. – 10:30 a.m.

October 15, 2014
Transgender Employees And Students In Independent Schools: Best Practices Related To Gender Identity And Expression
8:30 a.m. – 10:30 a.m.

October 29, 2014
Contracts And Compensation For The Head Of School: Tips, Traps And Best Practices
8:30 a.m. – 10:30 a.m.

November 12, 2014
Legal Adventures And Hot Topics In Independent Schools
8:30 a.m. – 10:30 a.m.

Labor And Employment Training Events

July 15, 2014
Conducting An I-9 Audit: Tips, Traps And Best Practices
9:30 a.m. - 12:00 p.m.

September 10, 2014
Mastering An Effective Investigation Of Alleged Employee Misconduct
8:30 a.m. – 11:00 a.m.

October 1 & 2, 2014
Employment Law Boot Camp (Two-Day Seminar)
October 1: 8:30 a.m. – 4:00 p.m.
October 2: 8:30 a.m. – 4:30 p.m.

October 30, 2014
Annual Hot Topics In Labor And Employment
8:00 a.m. – 11:30 a.m.

November 20, 2014
The Nuts And Bolts Of Compliance With The Amended Family And Medical Leave Act
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.

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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