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*Guiding Employers & Educators*

# SHPC Legal Update

THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

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**IN THIS ISSUE**



## Heading To Court? Practice Tips For Employers Seeking To Enforce Non-Competes

By Matthew D. Batastini

Non-compete agreements and other restrictive covenants are important tools that many businesses use to protect their most sensitive and irreplaceable assets. But, while these provisions can have an incalculable deterrent effect, attempting to enforce a non-compete or other restrictive covenant in court is often an uncertain prospect.

Unlike most contractual provisions, non-competes are subject to enhanced scrutiny and are typically enforced only to the extent they are "reasonable." The definition of what is "reasonable" varies – widely at times – based on factors such as the industry involved, the position and responsibilities of the employee in question, the business interests the employer is seeking to protect, the state in which enforcement is sought, and, most unpredictably, the individual judge assigned to the employer's lawsuit. As a result, even an employer armed with a carefully tailored restriction in a state with favorable laws can be denied enforcement.

Practitioners navigating these uncertain waters need to look for every potential advantage to tip the scales in favor of their clients. Litigation involving non-competes can move quickly, yet decisions made at the outset are often critical to

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## Student Personal Information And Privacy: An Adult Conversation

By Brian D. Carlson

In few contexts are we more tempted to exclaim, "Kids Today!" than when it comes to their views on privacy. Much has been written about the changing mores of young people with respect to what they are willing to share about themselves in cyberspace.

Though students' ideas of acceptable boundaries may be shifting with each new enticing smart phone app, the adults in the room need to be mindful and vigilant about the potential misuse of student personal information. In particular, independent schools should ensure that their data-collection processes, website privacy policies, and vendor agreements are compliant with all laws concerning student personal information.

### Data Collection And Privacy Policies

Whether through the admissions office portal, from its general access website or elsewhere online, if a school collects "personal information" from children under age 13, the school must comply with the Children's Online Privacy Protection Act ("COPPA"), in effect since 2000 and overseen by the Federal Trade Commission. "Personal information" for children includes, but is not limited to, a child's full name, address, telephone number, Social Security number and screen or user name, and any photo or video file containing a child's image or voice. This definition is broader than the typical definition of "personal informa-

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# Heading To Court?
# Practice Tips For Employers Seeking To Enforce Non-Competes

the success of the enforcement effort. With these points in mind, this article discusses five practice tips for employers that are considering going to court to seek enforcement of non-competes.

## 1. Shop For The Right Forum

Non-competes are governed by state law, which can vary dramatically from state to state as to whether and how a non-compete will be enforced. A handful of states, most notably California, have statutes prohibiting the enforcement of non-competes altogether. Other states have statutes restricting enforcement of non-competes to certain classes of employees, such as salespersons or professional employees.

States also differ as to how their courts will review and enforce a restrictive covenant. Some states permit judicial modification (or "blue-penciling") of restrictions that are deemed overly broad, while other states refuse to enforce unduly broad restrictive covenants or permit them to be modified and enforced only in narrow circumstances.

To mitigate this uncertainty, employers often include choice-of-law and forum-selection provisions in their non-compete agreements. Unfortunately, those provisions will not always prevent a crafty former employee, or his or her new employer, from preemptively filing suit in a different state (typically, seeking a declaratory judgment invalidating the non-compete) and arguing for application of that state's laws. Employers with employees who work remotely (such as regional sales representatives) are at particular risk of being forced to litigate non-compete matters in unfavorable state courts.

It is therefore critical that an employer comprehensively evaluate the competing state laws that *could* apply prior to sending out a cease-and-desist letter, since receiving such a letter may cause the employee and/or his or her new employer to initiate litigation. Typically this list will include the state where the employer is headquartered, the state where the employee lives, the state(s) where the employee works, and, in some instances, the state where the employee's new employer is headquartered. If any of these state laws are hostile to the enforcement of non-competes, the employer should consider filing suit preemptively in its jurisdiction of choice – most often, the jurisdiction specified in the non-compete agreement's choice-of-law provision.

## 2. Your Competitor Is Not Always The Enemy

It is natural to assume that when an employee with a non-compete departs to join a competitor, the departing employee and the competitor are conspiring to evade the post-employment restrictions. While that certainly may be the case, it is important to consider the possibility that the competitor may not be aware of the employee's contractual breaches or other bad acts.

Prospective employees often fail to disclose the existence of post-employment restrictions to a new employer, especially when joining a competitor. Some employees simply forget they signed a restrictive covenant; others willfully conceal its existence. Likewise, departing employees are unlikely to tell their new employers that they are stealing confidential information (such as customer lists) during their last days or hours of employment for future use in their new position.

Whether and how to involve the competitor in an enforcement action is a critical strategic issue. If the competitor is unaware of the employee's restrictions or bad acts, a letter to its General Counsel outlining those violations may cause the employer to reevaluate the wisdom of hiring the employee. Alternatively, such a letter could open a dialogue that results in a favorable resolution. On the other hand, the competitor may respond by bringing in sophisticated legal counsel, which may make enforcement of the restrictive covenant more difficult. Of course, if the competitor is determined to hire the individual, it might decide to pay for top-flight legal counsel for the employee's defense regardless of whether the competitor is formally brought into the matter.

The wisest approach will depend on a variety of factors, including the seniority and importance of the departing employee, the nature of the trade secrets or confidential information at issue, the employer's prior relationship with the competitor, and, to the extent known, the manner in which the competitor has responded to prior non-compete actions brought or threatened against it. Trusted counsel can help evaluate the likelihood that involving the competitor will facilitate a favorable outcome.

## 3. Time Is Of The Essence

Employers seeking enforcement of a non-compete typically apply for injunctive relief in the form of a temporary restraining order or preliminary injunction. These are temporary orders by which a judge can prohibit a former employee from working for a competitor, soliciting the employer's customers, and/or disclosing the employer's trade secrets or confidential information during the pendency of the non-compete litigation. Most often, the entry of a broad temporary restraining order or preliminary injunction will effectively end the dispute in favor of the employer obtaining the order.

The cornerstone of obtaining injunctive relief is a showing of irreparable harm – that is, harm that cannot be measured by monetary damages, such as the impact of disclosure of the employer's trade secrets to a competitor. Courts evaluating irreparable harm in the context of an injunction application consider, among other factors, the employer's promptness in moving to enforce its rights. An unexplained delay in taking action could

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# Heading To Court?
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lead the court to conclude that the employer is not truly at risk of irreparable injury.

## 4. Secure Evidence Of Bad Acts

Judges deciding a temporary restraining order or other emergency application typically have scant time to review the parties' submissions prior to the hearing. As a result, unless the employer is able to quickly and effectively communicate a real likelihood of future harm, the application will likely be denied. Often, marshaling evidence of bad acts already committed by the departing employee is the best way to satisfy this showing.

Because time is of the essence, an employer should move quickly to identify a departing employee's bad acts. Although there are many forms these bad acts can take, technology can provide indisputable evidence of the employee's efforts to steal confidential information or to unlawfully solicit customers or employees. Emails, instant messages, social media posts, and other electronic records are fertile ground for documentary evidence of a departing employee's bad acts.

For instance, outgoing email traffic could show a departing employee sending confidential documents to his or her personal email address. Instant messages could reveal that an employee has solicited subordinates to join a competitor. Social media data could prove that an employee communicated confidential information to a recruiter. Computer registry data could show that an employee inserted thumb drives into his or her computer on the day the employee resigned. Sometimes, a computer's memory can be restored in a manner that recovers whole or partial emails sent from a web-based email provider, like Hotmail or Gmail.

Due to the potential value of this data, it is imperative that an employer immediately secure and preserve any company-issued computers, tablets, smartphones or other devices used by a departing employee. Computer forensics firms can be retained to extract information from these devices to support the employer's application for injunctive relief.

## 5. Take Advantage Of The Process

Non-compete litigation can be very costly for businesses, in legal fees as well as disruption to normal business operations. Employers seeking to enforce non-competes should be prepared to take advantage of available procedural mechanisms to maximize the pressure exerted on the departing employee and his or her new employer.

One possible move is to name the new employer as a co-defendant in the lawsuit. State common law claims such as tortious interference or aiding and abetting breaches of common law duties may provide for direct liability against the employer or its employees. So long as such claims are sufficient to withstand a motion to dismiss, they will permit discovery from the entity and its email systems, which can be very burdensome.

Another potential step is to petition the court for expedited discovery. Often, after a temporary restraining order hearing is held, the court will permit the parties to conduct limited discovery in advance of a preliminary injunction hearing. Typically, each side is permitted to serve a limited number of discovery requests and take a handful of short depositions. Expedited discovery can result in significant cost and disruption to business operations for the new employer.

Finally, consistent with Tip 4, an employer should seek discovery of personal email accounts and electronic devices the employee used during his or her employment. If evidence suggests that certain accounts or devices were used to transmit trade secrets, confidential information or unlawful communications with customers or employees, the employer should petition the court to order the employee to preserve those devices for discovery. This discovery can help to uncover further evidence of bad acts.

## Final Considerations

The tips discussed above are only a sampling of the strategic considerations at play in an action to enforce a restrictive covenant. To maximize the likelihood of success, an employer should seek the advice of trusted counsel immediately upon learning that a departing employee with a non-compete may be planning to join a competitor.

> "The cornerstone of obtaining injunctive relief is a showing of irreparable harm – that is, harm that cannot be measured by monetary damages, such as the impact of disclosure of the employer's trade secrets to a competitor."

*Our attorneys have extensive experience in counseling employers and litigating non-compete actions in a wide variety of jurisdictions. We would be pleased to assist your business with any issues in this area.*

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# Student Personal Information And Privacy: An Adult Conversation

tion" in state statutes covering data security for adults, taking into account the need to safeguard the connection between a student's name and his or her image.

The primary upshot of COPPA is that schools should not be requesting or encouraging the submission of personal information from children under the age of 13 absent parental consent. If a school is aware that it – or another entity, through the school's website – is collecting such information directly from young students, then a privacy policy, prominently displayed and easy to access, must be posted on the school's website. The privacy policy must list all services or vendors collecting the personal information, explain how the personal information is used, and describe parents' rights to control the parameters of how their children's personal information is handled. Though limited exceptions apply, schools must generally verify parental consent prior to obtaining any personal information from younger children.

Independent schools are also encouraged to have more general website privacy policies covering the collection and use of personal information of older children and users. In addition to identifying "personal information" and describing how such information is used (for example, by the advancement office, to maintain a database of donors), privacy policies should indicate that personal information may be disclosed to school employees on a need-to-know basis and under other appropriate circumstances, including when required by law or court order, or when necessary to protect a school's legal rights. In sum, schools should signal their intent to be protective of personal information, but also indicate that under appropriate circumstances, such information may need to be shared.

A privacy policy should also describe, if applicable, how the school's website employs cookies (text files that permit a user to have a more fluid experience using the school's website), the limits of the school's privacy policy (should a visitor access another website or service through the school's website), and contact information for a staff member who may assist with any privacy-related questions.

## Vendor Agreements

Faculty may debate the merits of cyber tools in their classrooms, but independent school administrators should be united in ensuring that vendor agreements covering such tools and services place the onus on vendors to safeguard student data.

At the outset, we recommend that such agreements define as narrowly as possible the types of student data covered by the particular educational technology tool. Vendor agreements should stipulate that the vendor does not own the student data and will limit its use of the data to purposes related to its services. In particular, vendors should agree not to sell student data.

We further recommend that a vendor contract specify that the vendor will comply with all applicable state data security laws, which typically mandate that the state attorney general and consumer protection agency be notified if a data breach occurs, along with parents whose children's personal information might have been compromised. In order to avoid a breach in the first place, vendors should also agree to encrypt student data if it is managed on any portable devices, and have protocols in place to address the storage and security of such data.

In 2014, a consortium of software providers to K-12 schools announced a pledge to protect student privacy. As of this writing, approximately 260 vendors have signed the pledge, which includes the tenets outlined above and commits the vendors to offering additional protections, including not retaining student data beyond the term of a contract for services and providing students and parents with the ability to access the student data maintained by vendors. Independent schools might consider checking whether their vendors have signed on to this pledge, at *www.studentprivacypledge.org*, in advance of executing any contracts for educational technology services. If a vendor has signed the pledge, this is a strong signal that the vendor takes seriously the safeguarding of student personal information.

On their websites, through policy announcements to their communities at large (including applicants and alumni), and behind the scenes (through appropriately drafted contracts with technology service providers), independent schools can take meaningful steps to protect student privacy, even in an age where students themselves seem less concerned with doing so.

> "The primary upshot of COPPA is that schools should not be requesting or encouraging the submission of personal information from children under the age of 13 absent parental consent."

*Please contact any member of the Firm's Education Practice Group if you need assistance in understanding and managing student personal information or related compliance issues.*

# NLRB Revises Captive-Audience Rule For Mail-Ballot Union Elections

By Nicole M. Vient

Employers saw a flurry of union-friendly decisions by the National Labor Relations Board ("NLRB") in 2015, and, thus far, 2016 has brought more of the same.

In one recent decision, *Guardsmark, LLC,* the NLRB changed its longstanding rule on when employers may hold "captive-audience" meetings before union elections conducted through mail ballots. The Board's decision shortens by 24 hours the time period within which employers are permitted to hold such meetings.

## Background

During union election campaigns, employers often hold captive-audience meetings – *i.e.,* presentations that employees are required to attend, at which the employer makes its case as to why employees should vote against unionization. Under the National Labor Relations Act, employers are permitted to hold captive-audience meetings during the work day, require employees' attendance, and discipline employees if they fail to attend.

Captive-audience meetings are frequently used by employers for advocating a "no" vote, and, generally speaking, they are an effective tool. According to a 2009 Economic Policy Institute study, between 1999 and 2003, unions prevailed in 47 percent of election campaigns when the employer held at least one captive-audience meeting, but a much higher 73 percent of campaigns when the employer did not hold a captive-audience meeting.

## Legal Precedents

Since a 1953 decision, *Peerless Plywood Co.,* the NLRB has prohibited employers from holding captive-audience meetings within the 24-hour period prior to a union election. The rationale behind this prohibition is that employees should be left undisturbed during the final hours before an election to make their final voting decisions.

In a subsequent decision issued in 1959, *Oregon Washington Telephone Co.,* the NLRB refined this rule in the context of elections conducted through mail balloting. (While union elections are traditionally held through manual ballots, NLRB procedures permit mail balloting in certain situations, such as where eligible voters are scattered over a wide geographic area because of their job duties, or where eligible voters' work schedules vary significantly, so that designating a particular day for manual voting would be difficult.)

Specifically, *Oregon Washington Telephone Co.* prohibited employers from holding captive-audience meetings from the date and time the ballots are scheduled to be sent out by the NLRB Regional Director until the date and time set as the deadline for the ballots to be returned.

## NLRB's *Guardsmark* Ruling

In the NLRB's recent *Guardsmark* case, a Stipulated Election Agreement established a mail-ballot union election under which ballots were scheduled to be mailed to employees at 3 p.m. on January 28, 2015. Several days before the mailing date, the employer sought confirmation from the NLRB Regional Office as to the agency's position regarding the timing of captive-audience meetings prior to a mail-ballot election.

Despite the longstanding and seemingly clear holding of *Oregon Washington Telephone Co.,* the NLRB agent informed the employer that it could not conduct a captive-audience meeting *within 24 hours prior to the scheduled date and time for mailing the ballots.* Two additional requests by the employer for clarification yielded the same answer, and the NLRB Regional Director subsequently affirmed that position. After the union prevailed in the election, Guardsmark objected to the election.

On review, the NLRB majority upheld the Regional Director's position, concluding that "it is appropriate to provide for a full 24-hour period before the ballot mailing that is free from speeches that tend to interfere with the sober and thoughtful choice which a free election is designed to reflect." In addition, the majority asserted that the new rule would help to avoid "ambiguity" by establishing a uniform 24-hour rule governing the timing of captive-audience meetings, regardless of whether an election is to be held by manual or mail balloting.

## Implications And Recommendations

The *Guardsmark* majority claimed that its decision would avoid potential confusion as to how the captive-audience rule applies in the context of a mail-ballot election. This assertion seems dubious, however, in light of the longstanding and seemingly clear *Oregon Washington Telephone Co.* decision. Rather, it appears that the labor-friendly Obama NLRB simply viewed the case as another opportunity to tip election scales in favor of unions.

At any rate, employers facing mail-ballot union elections should be sure to comply with the new *Guardsmark* rule, as a captive-audience meeting held in violation of the new time restriction could constitute grounds for overturning an election result in an employer's favor.

*Please feel free to contact us with any questions about the* Guardsmark *decision or union elections generally. The Firm's attorneys have a wealth of experience in this area, and we would be happy to help.*

# From Miracle To Menace – What You Need To Know (And Do) About Asbestos And PCBs In Your School

By Gary D. Finley

*Imagine you are building a school. Your contractor tells you about materials that will resist wear and tear and help keep your new building insulated. These materials can be used in cement, insulation, floor tiles, paint, caulk and roofing materials. Without adding to building costs, you will have a school that is quieter, stronger, and less likely to burn down.*

It is not difficult to see why many schools built between the late 19th century and the 1970s are filled with asbestos. For schools (or parts of campuses) built between 1950 and 1979, another source of concern is polychlorinated biphenyls ("PCBs"), which were widely used to enhance the performance of construction materials and fluorescent lighting fixtures.

## Risks Associated With Asbestos And PCBs

In recent years, science has come to more fully understand the dangers of asbestos and PCBs. We now know that prolonged inhalation of the fibers contained in asbestos products can cause serious illnesses such as lung cancer, mesothelioma, and asbestosis. Similarly, if PCB particles are not contained, exposure can potentially cause an array of maladies, including skin irritation, malignant tumors and reproductive abnormalities.

Some kinds of asbestos and PCB exposure are more dangerous than others, and state and local laws pertaining to these hazards differ. Not all asbestos-containing materials are actively harmful. Asbestos-containing materials become harmful only when they release dust or fibers into the air when damaged or disturbed. PCBs, on the other hand, may be emitted into the air or neighboring surfaces through normal use of outdated fluorescent light fixtures, or deteriorating caulk or paint.

Given these risks, and the presence of asbestos and PCBs in many school buildings, important questions persist. If you work in, or are in charge of, school buildings that contain asbestos or PCBs, what are you required to do? If students, teachers, and staff members work or live in rooms that contain asbestos or PCBs, what steps should you take?

## The Legal Landscape

The Toxic Substances Control Act includes the Asbestos Hazard Emergency Response Act ("AHERA"), or the Asbestos in Schools Program, a federal law enacted in 1976 that applies to a variety of institutions, including independent schools. AHERA, whose implementation is overseen by the Environmental Protection Agency ("EPA"), requires – among other things – that schools inspect for asbestos-containing material, prepare management plans, and take action to prevent and/or reduce asbestos hazards. Many states have adopted laws similar to AHERA in dealing with school asbestos issues.

Generally, the removal of asbestos hazard materials is not required by AHERA or other laws unless the material is severely damaged or will be disturbed by a building, demolition, or renovation project. However, all asbestos-removal projects must be designed, supervised, and conducted by accredited professionals. In addition, if removal of asbestos during renovation is warranted, or school buildings will be demolished, the school must comply with specific standards applicable to hazardous emissions. Many state-specific and municipality-specific regulations may also apply. Independent schools should consult with legal counsel and removal experts before undertaking an abatement project, as penalties for non-compliance with AHERA can be steep: up to $25,000 for each day during which the violation continues.

As for PCBs, the Toxic Substances Control Act banned their manufacture in the United States; however, continued use of building materials containing PCBs is permitted, though highly regulated at both the state and federal level. EPA's preference is for PCBs to be phased out entirely, and the agency has particularly emphasized reducing or eliminating the use of PCB-containing fluorescent light ballasts and caulk in schools as a best practice (though not a legal requirement). As with asbestos, if PCB removal or containment projects are contemplated, schools should be mindful of regulations requiring careful management of those procedures.

## Notification Requirements

At least once every school year, each school with asbestos in its building(s) must provide written notification to parents and employees regarding the availability of the school's Asbestos Management Plan and any response actions taken or planned. Furthermore, many states require schools to notify state agencies before conducting any asbestos remediation projects – for example, Massachusetts requires entities to notify the Massachusetts Department of Environmental Protection at least ten days prior to conducting any project that involves the handling and/or removal of asbestos-containing material.

No such notification requirements pertain to PCBs in schools. Many states recommend close monitoring of building materials – especially deteriorating caulk – to determine if safe removal of PCBs is warranted. This measured approach to removal of PCBs from schools, however, has not prevented school districts across the country from filing lawsuits against manufacturers of PCBs. And in one recent instance, an activist group of parents (including some celebrity parents)

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# From Miracle To Menace – What You Need To Know (And Do) About Asbestos And PCBs In Your School

filed suit against the Malibu Unified School District in California, frustrated with the school district's EPA-endorsed approach to the presence of PCBs.

## Where Do We Go From Here?

In the event asbestos and/or PCBs have been used and are still present on campus, we recommend that independent schools take these practical steps to comply with applicable law and best practices:

- Familiarize yourself with all laws – federal, state, and local – that apply to buildings containing asbestos and PCBs, including any that are specific to schools.
- Conduct initial and periodic inspections of the applicable facilities, and comply with the pertinent documentation procedures.
- Make sure that all appropriate personnel (particularly custodial staff) are aware of the requirements for handling asbestos and PCB-containing materials.
- Comply with all applicable notification guidelines.
- Before commencing a construction, demolition, or renovation project, or when otherwise handling, moving, or disposing of asbestos and/or PCB-containing materials, collaborate with architects and contractors to make sure protocols comply with all applicable laws, regulations and standards.

Dealing with older buildings can — perhaps literally — create headaches for school administrators. Understanding your responsibilities, however, can make this process less painful.

*Please contact any member of the Firm's Education Practice Group if you need assistance in managing asbestos or PCB compliance issues.*

SHPC BOOK ANNOUNCEMENT:

## Will Hannum Authors Chapter In Legal Trends Book

Will Hannum recently authored a chapter, entitled "Managing the Impact of Changing Education Law," in the upcoming Inside the Minds book ***Legal Trends Shaping Private Schooling.*** Brian Carlson assisted in preparing the chapter.

This new publication, by Aspatore Books, will address crucial legal issues independent schools are facing today. It will offer top legal guidance on admissions and hiring practices, conflicts between school rules and governing laws, funding concerns, transgender discrimination, social media use, and many other important issues. A copy of Will's chapter will be available to read on *www.shpclaw.com*.

## Schwartz Hannum Attorneys Recognized By **Chambers USA**

Schwartz Hannum PC is thrilled to announce that **Sara Goldsmith Schwartz** and **William E. Hannum III** have been recognized by **Chambers and Partners** as ***leading attorneys in labor and employment law in Massachusetts.*** This is the eleventh consecutive year that Sara has been honored and Will's fourth year acknowledged by Chambers.

We are also thrilled that Chambers has listed the Firm as a **"Noted Firm"** and **Jessica L. Herbster** as a **"Recognized Partner."**

The rankings were published in the recent *Chambers USA 2016* guide.

Chambers publishes guides world-wide, ranking law firms and lawyers, and is a recognized leader in its field. Congratulations to Sara, Will, Jessica, and the Firm! And thank you to the entire Schwartz Hannum team for their excellent work supporting all of our clients.

# To I-9 Or Not To I-9: When Must Employers Re-Verify Seasonal And Other "Rehired" Employees?

By Julie A. Galvin

*With the summer season now upon us, it is important for employers to understand when they are required to complete new U.S. employment authorization forms (known as Forms I-9) for individuals returning to work after breaks in active employment, such as seasonal layoffs.*

As outlined below, an employer should first determine whether an individual qualifies as a "rehired" employee. If an employee falls into this category, specific rules apply as to when a new I-9 must be completed.

## Background

Under the Immigration Reform and Control Act of 1986 ("IRCA"), employers are required to complete Forms I-9 for employees hired after November 6, 1986, in order to verify their U.S. employment authorization. As part of this process, an employee must present documentation (such as a passport) establishing his or her identity and right to work in the U.S.

Generally, an employee must complete Section 1 of the Form I-9 on or before his or her date of hire (defined as the first day the employee performs work for wages or other remuneration). The employer then has three business days from the date of hire to examine the employee's documentation and complete Section 2 of the Form I-9.

## When Is An Employee "Rehired"?

For an employee returning after a break in active employment, the threshold issue is whether he or she has been "rehired," for Form I-9 purposes. If, at all times, an individual retains a reasonable expectation of resuming employment, he or she will not be deemed to have been rehired, despite an interruption in active service.

For example, when an employee returns from an approved leave of absence (such as parental, personal, or disability leave), the employee is generally considered to have had continuous employment. The same is true of an employee who regularly works season-to-season or returns after being laid off due to an anticipated, temporary lack of work. In such situations, the employee is not deemed to have been "rehired," and the employer need not complete a new Form I-9.

While there is no bright-line rule for determining whether an employee has been "rehired," the following factors should be considered:

- Was the individual employed on a "regular and substantial" basis, as compared to others who worked in a similar capacity? (This tends to indicate a reasonable expectation of continuous employment.)
- Did the employee comply with the employer's established policies for leaves of absence (if applicable)?
- Does the employer have a track record of recalling laid-off employees within a reasonable time?
- Was the position formerly held by the employee taken permanently by another worker?
- Has the employee sought or obtained unemployment or other benefits inconsistent with an expectation of continuous employment?
- Did the employer indicate to the employee that he or she would likely be able to resume employment within a reasonable time?

## When Is A New I-9 Required For A Rehired Employee?

If an individual does qualify as a "rehired" employee for Form I-9 purposes, then the following rules apply:

- If an employee is rehired within three years of the date when his or her previous Form I-9 was completed, the employer may rely on that previous form, *so long as* that prior I-9 shows that the documentation the individual provided to establish his or her identity and work authorization is still valid. However, the employer should update Section 3 of the previously completed Form I-9 to reflect the date of rehire.
- By contrast, if an employer is rehired within that three-year period, but the documentation the employee provided in support of his or her previous Form I-9 has expired, then the employer must request current documentation to re-verify the individual's employment eligibility. In addition, the employer must either complete Section 3 of the previous Form I-9 or complete a new Form I-9, if a new edition of the form is available or if Section 3 has already been used.
- Finally, if an employee is rehired more than three years after the date when his or her previous Form I-9 was completed, then the employer must request current documentation from the employee and fill out a new Form I-9.

## E-Verify And Rehires

Employers that participate in the federal E-Verify program also need to consider whether to create a new E-Verify case for a rehired employee.

If a rehired employee's Form I-9 lists an expired identity document, and an E-Verify case has not previously been created for the

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# To I-9 Or Not To I-9: When Must Employers Re-Verify Seasonal And Other "Rehired" Employees?

employee, then an E-Verify case should be created.

On the other hand, if a rehired employee's identity document has expired, and an E-Verify case exists for the individual, the employer may either (i) complete Section 3 of the Form I-9 (and not create a new E-Verify case), or (ii) create a new E-Verify case.

Finally, if a rehired employee's identity document is still valid, and an E-Verify case exists for him or her, the employer need not create a new E-Verify case. (Conversely, if an E-Verify case has not been created, the employer should do so.)

## Recommendations For Employers

To ensure compliance with these requirements, we recommend that employers do the following:

- When terminating employees for economic reasons (such as seasonal closings), clearly indicate to them the employer's expectations as to potential future employment;
- Carefully evaluate the specific circumstances to determine whether an individual qualifies as a "rehired" employee;
- If so, determine whether a new Form I-9 and/or E-Verify case is required, under the rules detailed above; and
- Consult experienced immigration counsel with any questions as to how these requirements apply.

*Please feel free to contact us if you have any questions about your business's Form I-9 obligations. We routinely counsel employers on these issues and would be happy to help.*

## SHPC SUCCESS STORY:

### SJC Allows Dismissal Of Former Employee's Claims To Stand

William E. Hannum III and Matthew D. Batastini recently persuaded the Supreme Judicial Court ("SJC") to deny further appellate review of the dismissal of a former employee's claims against a Massachusetts independent day and boarding school. The former employee had petitioned the SJC to review whether her alleged reports of bullying, which she claimed were made pursuant to the Massachusetts Mandatory Reporting Law, M.G.L. ch. 119, § 51A, were "protected conduct" under that statute's retaliation provision.

The former employee claimed that she reported incidents of student-on-student bullying to the administration of the school. When her employment was later terminated, she argued that the school was retaliating against her for making those reports. The trial court granted the school's motion for summary judgment based, in part, on its finding that the former employee's alleged reports were not "protected conduct" under § 51A. The court reasoned that her reports were not reports of "abuse" because they did not involve alleged misconduct by a "caretaker," as required by the statute.

The former employee appealed the trial court's ruling to the Massachusetts Appeals Court, which affirmed the ruling. The former employee then sought further review by the SJC. She argued that bullying is an issue of such great public importance that reports of student-on-student bullying should count as "abuse" for purposes of § 51A. In opposition to her petition, the school argued that the statute was clear, and that interpreting the statute to include student bullying as "abuse" would expand the scope of the statute's mandatory reporting requirements far beyond that intended by the legislature. The SJC declined to exercise review.

## Schwartz Hannum PC Named To The ***BTI Brand Elite Honor Roll***

Schwartz Hannum PC is thrilled to announce that the Firm has been named to the ***BTI Brand Elite Honor Roll*** for the second consecutive year. The *BTI Brand Elite* list is published by the BTI Consulting Group, the leading provider of strategic research to the legal community; and is determined solely based on in-depth interviews with 639 corporate counsel at the world's largest and most influential companies.

BTI Consulting Group also listed Schwartz Hannum PC on its ***2016 Client Service A-Team*** list, and William E. Hannum III was recently named a ***2016 Client Service All-Star MVP.***

The Firm thanks its clients, employees and colleagues for making this achievement possible.

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# Federal Contractors Will Soon Face Paid Sick Leave Obligations Under Presidential Executive Order

with the new sick leave obligations they are slated to face.

## Administration's Rationale For Mandatory Paid Sick Time

In a fact sheet published in conjunction with the Executive Order, the White House characterized mandatory paid sick time as a way to address the dilemma faced by workers who depend on their wages but also need time away from work to take care of their families or attend to their own health concerns. Further, according to the Administration's fact sheet, paid sick time benefits employers and the economy as a whole by reducing employee turnover and decreasing the spread of illness, thereby "fostering a more productive workforce."

Previous actions on President Obama's part have reflected a similar emphasis on the issue of paid sick leave. In January 2015, the President signed a memorandum directing the federal government to advance up to six weeks of paid sick leave to federal employees under certain circumstances, including in connection with the birth or adoption of a child. The President has also called upon Congress to pass legislation that would give federal employees up to six additional weeks of paid parental leave and require all businesses with at least 15 employees to provide employees with up to seven days of paid sick leave annually. Both of these efforts, however, have stalled in the Republican-controlled Congress.

## Requirements Of Executive Order

The major provisions of the paid sick leave Executive Order include the following:

### Employer Coverage

The Executive Order applies to all federal contractors and subcontractors, regardless of the agency or department from which a contractor or subcontractor's business arises.

### Accrual And Use Of Sick Time

Under the Executive Order, each federal contractor or subcontractor will be required to allow all of its employees (including, presumably, part-time, seasonal, temporary, and casual employees) to accrue and use up to 56 hours of paid sick time per year. Employees must be permitted to accrue at least one hour of paid sick time for every 30 hours worked.

Paid sick time must be made available for absences resulting from:

*i.* an employee's physical or mental illness, injury, or medical condition;

*ii.* an employee's obtaining a diagnosis, care or preventive care from a health care provider;

*iii.* an employee's need to care for a child, parent, spouse, domestic partner, or any other individual "related by blood or affinity whose close association with the employee is the equivalent of a family relationship"; or

*iv.* domestic violence, sexual assault, or stalking, including seeking counseling, legal assistance, or relocation services.

For absences related to domestic violence, an employer will be permitted to request documentation from an appropriate individual or organization. The Executive Order specifies that the employer should request only the minimum information needed to support the employee's absence from work. The employer must keep that documentation confidential, unless the employee consents to disclosure or if disclosure is required by law.

### Carry-Over; Breaks In Service

The Executive Order provides that a covered employer must permit accrued, unused paid sick time to be carried over from one year to the next. (The Executive Order does not specify whether carry-over may be limited – for instance, to the 56 hours of paid sick time that employees will be entitled to accrue annually.)

Additionally, if an employee is rehired by a contractor or subcontractor within 12 months after a separation from employment, any accrued, unused paid sick time that the employee had as of his or her separation date must be reinstated.

> "…each federal contractor or subcontractor will be required to allow all of its employees…to accrue and use up to 56 hours of paid sick time per year."

### Documentation Of Use Of Sick Time

When an employee uses paid sick time for any of the purposes detailed in items (i) through (iii) above, an employer will be permitted to require certification by a health care provider only if the employee is absent for three or more consecutive work days. If requested, the employee must provide such certification no later than 30 days from the first day of the leave.

### Notification Of Use Of Leave

The Executive Order provides that where an employee's need for sick leave is foreseeable, the employee must notify his or her employer (either orally or in writing) of the employee's intention to take leave and the expected duration of the leave at least seven calendar days in advance. If the need for sick leave is not foreseeable, the employee must provide notice as soon as practicable.

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# Federal Contractors Will Soon Face Paid Sick Leave Obligations Under Presidential Executive Order

### No Right To Payout Upon Termination

Employees will not be entitled to be paid out for accrued, unused sick time upon separation from employment.

### Enforcement

The Secretary of Labor will have authority to enforce the Executive Order, including by investigating potential violations of the new requirements. Federal contractors and subcontractors will be prohibited from interfering with employees' rights to use paid sick leave or discriminating against employees based on their doing so.

### Upcoming Regulations

The Executive Order provides that by September 20, 2016, the Secretary of Labor will issue implementing regulations. The regulations will, among other things, define terms used in the Executive Order and outline record-keeping requirements for contractors and subcontractors. Potentially, the regulations may address other important issues not covered in the Executive Order, such as (i) whether employees may use accrued sick time in increments smaller than one day; (ii) whether an employer may place a limit on annual carry-over of accrued, unused sick time; and (iii) whether an employer may deny use of paid sick time if an employee fails to provide sufficient notice for an absence.

Within 60 days after the Secretary of Labor has issued the regulations, federal agencies will take steps to ensure that all contracts issued or awarded after January 1, 2017 comply with the new requirements.

### Interaction With State And Local Laws

Where the Executive Order provides a more generous paid sick time entitlement than state or local laws, it will supersede those laws. Conversely, the Executive Order will not displace state or local laws offering greater sick leave protections to employees.

## Recommendations

In preparation for the effective date of the Executive Order, employers that are federal contractors or subcontractors should carefully review the Executive Order and, in consultation with experienced employment counsel, consider how their sick leave policies and practices may need to be revised.

Affected employers should also stay alert for clarifications as to the requirements to be imposed under the Executive Order, including the regulations that are slated to be issued in the fall of 2016.

Finally, all employers should closely monitor further developments in this area, as paid sick leave continues to be a growing topic of proposed legislation.

## Recognized By **Diversity Business**

Schwartz Hannum PC has once again been distinguished as one of the top entrepreneurs in the country by **Diversity Business**.

**Schwartz Hannum PC was ranked:**

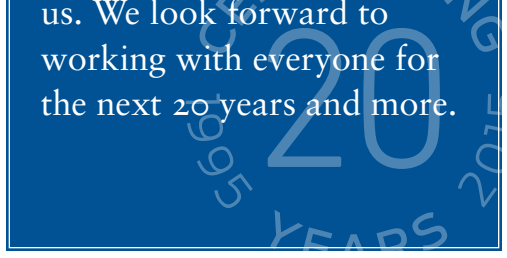
- **9** on the list of Top 50 Women-Owned Businesses in Massachusetts;
- **20** on the list of Top 50 Diversity-Owned Businesses in Massachusetts;
- **32** on the list of Top 50 Privately-Held Businesses in Massachusetts; and
- **373** on the list of Top 500 Women-Owned Businesses in the U.S.

These awards are the foundation of *DiversityBusiness.com*'s annual Top Business List, which Diversity Business 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 thanks its clients, employees and colleagues for making this achievement possible.

**June 1st marked the end of SHPC's 20th Anniversary celebration.**

We would like to thank our clients, friends, and colleagues for celebrating this monumental year with us. We look forward to working with everyone for the next 20 years and more.



# Federal Contractors Will Soon Face Paid Sick Leave Obligations Under Presidential Executive Order

By Gary D. Finley[1]

In recent years, employers in a number of states — including Connecticut, Massachusetts, Rhode Island and, most recently, Vermont – have been saddled with expensive and often confusing obligations as a result of new laws requiring employers to provide paid sick leave to employees.

Now, by virtue of an Executive Order announced by President Obama, federal contractors and subcontractors across the nation will soon be faced with similar paid sick leave obligations.

In a speech last fall at an event sponsored by the AFL-CIO, the President announced an Executive Order requiring all federal contractors and subcontractors to provide their employees with up to seven days of paid sick time per year. This new obligation must be included in all federal contracts and subcontracts issued or awarded beginning January 1, 2017.

Given that President Obama will be leaving office later that same month, it is possible that the new administration will rescind or modify the Executive Order. Nonetheless, federal contractors and subcontractors would be wise to begin preparing to comply

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1. *A previous version of this article appeared in* New England In-House ("NEIH"). *The Firm is grateful to* NEIH *for its support.*

## Seminar Schedule

**September 8, 2016**
Sex, Drugs, And Rock And Roll: When Off-Duty Conduct Spills Over And Into The Workweek
8:30 a.m. – 10:30 a.m.

**October 5 and 6, 2016**
Employment Law Boot Camp (Two-Day Seminar)
October 5: 8:30 a.m. – 4:00 p.m.
October 6: 8:30 a.m. – 4:30 p.m.

**October 20, 2016**
The Nuts And Bolts Of Compliance With The Family And Medical Leave Act
8:30 a.m. – 10:30 a.m.

**November 3, 2016**
Hot Topics In Labor & Employment Law
8:30 a.m. – 10:30 a.m.

**December 8, 2016**
Understanding The Massachusetts Sick Leave Law
8:30 a.m. – 10:30 a.m.

## Seminar Schedule For Independent Schools

**September 21, 2016**
Accommodating Applicants And Students With Disabilities
8:30 a.m. – 10:30 a.m.

**November 16, 2016**
Drawing The Lines: Exploring Disciplinary Policies And Procedures
8:30 a.m. – 10:30 a.m.

**December 12, 2016**
Drafting And Enforcing An Ideal Enrollment Agreement
8:30 a.m. – 10:30 a.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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