SCHWARTZ HANNUM PC
Guiding Employers & Educators

Labor and Employment Law Update

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IN THIS ISSUE

The Attorney-Client Privilege And Workplace Investigations

By William E. Hannum III and Brian D. Carlson[1]

A recent court decision vividly illustrates why employers should give careful consideration to the attorney-client privilege before conducting an investigation in the workplace – to avoid unexpectedly having to disclose confidential information.

In *Koss v. Palmer Water Dept.*, a Massachusetts federal magistrate judge held that the employer had waived the attorney-client privilege because its outside counsel actively managed another attorney's investigation of a sexual harassment complaint. This should serve as a reminder to employers to consider the boundaries of the attorney-client privilege, at the outset of every investigation, when deciding how to staff and manage the investigation, so as to minimize the risk of having to disclose confidential information.

Background: The *Koss* Case

Koss involved an administrative assistant (the plaintiff, Ms. Koss) who claimed she was subjected to sexual harassment and a hostile work environment by her employer's (the town's) treasurer. The plaintiff complained, and later contended that the treasurer continued to harass her and that the town failed to respond properly.

The town subsequently hired an attorney to conduct an independent investigation of the plaintiff's complaint. While the investigating attorney conducted all of the interviews, the town's regular outside law firm had significant involvement in guiding, advising, and directing the investigating attorney.

The plaintiff then filed a sexual harassment lawsuit in federal court, and the town's regular law firm represented the town in that litigation.

The town's defense was based, in part, on the investigation performed by the investigating attorney. Specifically, the town asserted the *Faragher-Ellerth* affirmative defense, which (as established by the U.S. Supreme Court) allows an employer to avoid vicarious liability for a hostile work environment allegedly created by a supervisor's conduct, if the employer can prove that (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Thus, the town put its investigation "into issue" in the case.

Motion To Compel, Granted

The plaintiff eventually moved to compel production of documents related to the town's investigation. And the town maintained that documents reflecting the town's regular law firm's involvement in the investigation were protected from disclosure under the attorney-client privilege.

After reviewing the documents at issue, the judge ordered the town to produce investigation-related documents involving the town's regular law firm. The judge found that the town's regular law firm had been "part and parcel of the investigation" that formed the basis of its *Faragher-Ellerth* affirmative defense. Thus, the judge concluded that the town had waived the attorney-client privilege "for not only the [investigation] report itself, but for

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1 *A previous version of this article appeared in* Massachusetts Lawyers Weekly ("MLW") *and* New England In-House ("NEIH"). *The Firm is grateful to* MLW *and* NEIH *for their support in publishing this article. Will and Brian gratefully acknowledge Jessica M. Farrelly, who is also an attorney at Schwartz Hannum PC, for her assistance in preparing this article.*

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LABOR AND EMPLOYMENT LAW UPDATE MARCH 2014

Independent Schools: Time To Update Your Policies And Procedures!

By Sara Goldsmith Schwartz and Susan E. Schorr

Although we are now well into 2014, it is not too late for independent schools to take a number of important steps to ensure compliance with legal requirements and best practices. We recommend that school administrators review and update existing policies and practices, in addition to making sure that new policies are in place to address the key components of independent school life. With sound policies and procedures in place, independent schools increase the likelihood of averting problems and will also have a framework in place for managing challenges when they (inevitably) arise. And the mantra for this year: to educate faculty, staff, the Board, and students so as to help prevent legal problems.

Focus On Compliance

Update Enrollment Agreements To Reflect The Current Environment. There is still time to make sure that your school's enrollment agreement describes more than the tuition payment process. The enrollment agreement establishes the contractual foundation of your school's relationship with its families and students. It should, for example, describe the school's expectations with regard to student and parental comportment, address use of student images, and restrict use of the school's name (trademark issues and more). Be sure to include an "over 18" provision if you enroll high school students. We recommend a review (and overhaul, if necessary) of this essential contractual document to make sure it sufficiently protects the school, in case the school needs to enforce payment from, or behavioral expectations of, families.

Faculty Offer Letters. Are you still using annual contracts for faculty, staff, and administrators? It might be time to transition from an annual employment contract to one-time offer letters that emphasize the at-will nature of employment, describe duties and responsibilities with specificity, and describe what happens if employment is terminated (either for cause or voluntarily) during the school year. Offer letters ease the administrative burden on the school (because they do not have to be provided annually), while also keeping pace with best employment practices. Alternatively, now is the time to update your faculty contracts for best practices and legal compliance!

Compliance With Federal Laws? There is an alphabet soup of federal laws that many independent schools mistakenly believe either do or do not apply to them! If the school receives financial assistance from the federal government, then Section 504 of the Rehabilitation Act (Section 504) (requiring accommodation for students with disabilities) and Title IX of the Education Amendments of 1972 (Title IX) (prohibiting discrimination on the basis of sex) may apply, based on recent developments in the law. The Family Educational Rights and Privacy Act ("FERPA") may apply depending on the source of federal aid received by the school, and compliance with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may be triggered if the school's health center is a qualified entity, or if it shares student medical information with other covered entities. It is important to take stock of the federal, state, and municipal legal landscape and applicability of these laws to your independent school. If you are not sure, obtain a formal legal opinion on these matters in 2014.

Assess Risk, Safety, And Security—Broadly Defined. Violence on school campuses has focused schools on building and campus safety, which are important areas to analyze and address if your school has not yet conducted a safety audit. But we focus on risks in other areas too, particularly with regard to proper licensing of school bus drivers and background checks for school applicants, employees (new and current), dorm parents, volunteers, and contractors. Significant changes in federal and state laws have recently occurred, so it is advisable to have your school's potential and current employee pool appropriately vetted, with student safety at the forefront.

Review Governance Documents And Policies. Do the school's bylaws permit creation of the emeritus trustee advisory committee that your school has just established? Have all members of the Board signed an acknowledgement indicating receipt and review of the school's conflict-of-interest policy? Does your Board require the signing of a confidentiality agreement each year? Is it permitted to give notice of Board meetings via e-mail? Both the Internal Revenue Service and many state Attorney General's Offices issued reports on executive compensation at non-profit institutions in 2013, indicating that this will be an area of regulatory focus in the years ahead. We recommend that schools conduct "benchmarking" analyses to establish that compensation paid to senior school administrators meets the IRS's "reasonable" standard, in addition to satisfying the guidelines established by state agencies with non-profit oversight. Both the IRS and state agencies also require tax-exempt, non-profit organizations to file annual tax returns and reports. We recommend a review of the school's governance policies to ensure that these annual requirements and "good governance" practices are in place in the event that state or federal regulators come calling (or to keep them at bay).

Review And Update The Employee/Faculty Handbook. Please see our recent e-alert on this topic: "2014 Is Here! Time To Review And Update Your Employment Policies." The

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Independent Schools: Time To Update Your Policies And Procedures!

e-alert can be found on our website, at the following link: *http://shpclaw.com/Schwartz-Resources/2014-is-here-time-to-review-and-update-your-employment-policies/.*

Focus On Student Life

Review And Update The Student/Parent Handbook. Is your student/parent handbook up-to-snuff with 2014 best practices and legal standards? Does it address the common traps for unwary schools – like re-enrollment issues, anti-bullying, accommodations, acceptable use, and parental comportment? Student/parent handbooks are the best opportunity a school has to convey its cultural norms, standards, and expectations to students and families. We urge schools to include a proper disclaimer and acknowledgement form, and to tone down language that is overly promissory or that includes mandates around disciplinary procedures, thus hampering the school's flexibility.

Mitigate Risks Associated With Student Travel. Recent litigation and news reports have highlighted the myriad risks involved in taking students on trips of all kinds, from local excursions to international adventures. We advise schools to create an ideal trip compliance package in order to guard against the risks inherent in such activities. Such a compliance package should include permission and release forms, medical authorization forms, chaperone guidelines, and policies to include in student and employee handbooks.

International Students And Managing The Homestay Experience. Independent schools are increasingly recruiting and admitting well-qualified students from around the globe. There are several compliance issues that we recommend considering before welcoming international students on campus and into homestay living arrangements. Boarding schools should make sure that *in loco parentis* arrangements are clear with international parents and that appropriate permission and release forms are in place that permit or define the school's decision-making authority while the student lives on campus. For homestay situations, schools should (i) ensure that their enrollment agreements account for the vagaries of international travel and behavioral expectations of students living in homestay situations; (ii) ensure that handbooks for both students and host families delineate roles, rules, and responsibilities, with procedures included should a particular student and family not be a good match; (iii) create procedures for vetting host families, including conducting background checks on all adult members of the household (even college-age siblings who may return home only for school vacations); and, (iv) if a school is working with an outside vendor to assist with any of these arrangements, ensure that an appropriate written contract is in place with the vendor that shifts as much risk as possible from the school to the vendor.

Focus On School Community

Be Vigilant About Updating Electronic Communications And Social Media Policies. We often encounter acceptable-use policies that are quite narrow in scope and do not account for student and employee cyber behavior that may negatively impact the school experience, even if that activity occurs off campus and with personally owned (and not school-issued) devices. While we do not advocate that schools act as "Big Brother," monitoring all on-line student and employee activity, we do recommend that acceptable-use policies empower schools to discipline students and staff alike should any Internet-based activity, be it cyber-bullying, sexting, or inappropriate text or email exchanges, affect the school environment (in fact, some state bullying laws mandate this approach). We recommend a review of existing policies to ensure that their scope and content keep pace with constantly evolving technology and behavioral norms as well as each school's unique culture.

Educate The School Community About Shades of Grey And Blurred Lines. The song "Blurred Lines" topped the pop charts last year with its racy video, but the song title also captures a hot topic facing school communities in 2014: when functional and caring relationships within the school community become dysfunctional, dark, and harmful. It may be obvious to most that intimate relations between teachers and students is a bad idea on many fronts – legally, morally, and ethically. However, in the independent school world, where many interactions happen outside of the classroom, let alone in cyberspace, it is important to revisit the complex definitions of what is appropriate and in the best interests of students. Of course, the concept of boundaries in the independent school world transcends the teacher/student context, and often includes teacher/parent, teacher/alumni, student/student, and any number of other pairings in which positive, close connections can quickly turn into an uncomfortable and negative experience that expands beyond appropriate boundaries. Please see our website, at *http://shpclaw.com/custom-on-site-training/special-issues-facing-schools/#5817*, for more information about our innovative, interactive boundary training for school communities.

Learn How To Manage Workplace Investigations. Every now and then, in spite of all the education that independent schools provide through seminars, policies, and other communications, employees and/or students "do the wrong thing." How should a school respond if a student complains about being bullied or sexually abused, or a teacher accuses a co-worker of harassment? Taking effective action in response to a student or employee complaint or allegation of wrongdoing is surely everyone's goal. We recommend that school administrators participate in training to learn how to plan an investigation, choose a qualified investigator, identify appropriate witnesses, document the investigation, address any wrongdoing, understand confidentiality and privacy issues, and take steps to avoid retaliation by a student (or family) or employee who may be disciplined as a result of the investigation. Please see our website, at *http://shpclaw.com/custom-on-site-training/special-issues-facing-schools/#5817*, for a detailed description of the Firm's investigations workshop.

Educate The Community About How To Respond Effectively To Instances Of Bullying, Cyber-Bullying, And Sexting. It is essential for independent school faculty, staff, administrators, and students to know what to do when

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OFCCP Final Rules Create New Compliance Obligations For Federal Contractors

By Hillary J. Massey

The Office of Federal Contract Compliance Programs ("OFCCP") has issued stringent new requirements for federal contractors under Section 503 of the Rehabilitation Act of 1973 ("Section 503") and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"), the laws that require contractors to affirmatively recruit, hire, train, and promote qualified individuals with disabilities and certain categories of military veterans ("covered veterans"). The new requirements concern, among other issues, data collection, hiring and outreach efforts, self-evaluation of progress toward benchmarks, invitations to employees and applicants to self-identify, and contract modifications. They take effect on March 24, 2014.

Compliance will entail significant costs for many federal contractors. For example, contractors may need to hire additional staff to conduct outreach efforts and to update their online job applications and information technology systems to capture newly required hiring data. Contractors who do not comply with the new requirements could face stiff penalties, including termination of their federal contracts and subcontracts, as well as debarment from receiving future contracts. Thus, contractors should begin working immediately to ensure that their policies, human resources systems, and practices are compliant with the new regulations.

Contractors also should be aware that they will now have to pay a higher minimum wage to workers on future government contracts. On February 12, 2014, President Obama signed an executive order increasing the minimum wage for workers under *new* federal contracts to $10.10 per hour, up from $7.25 per hour. The change does not apply to previously existing contracts.

Data Collection And Record-Keeping Requirements

The Section 503 and VEVRAA regulations introduce new data collection and analysis requirements for federal contractors. For example, contractors will be obligated to collect the following information annually and retain the associated records for three years:

1. The number of job openings;
2. The number of jobs filled;
3. The number of applicants for all jobs;
4. The number of applicants who self-identify as, or are otherwise known to be, covered veterans or individuals with disabilities;
5. The number of applicants hired; and
6. The number of applicants hired who are covered veterans or individuals with disabilities.

Capturing this data may require employers to implement new human resources data systems and procedures and to revise record retention policies.

Recruitment And Outreach Requirements

Federal contractors and subcontractors will be required to undertake certain outreach and recruitment activities for disabled employees and covered veterans, to document all such activities, and to retain those records for three years. Contractors must also annually review and assess their outreach efforts and document the review process, including the criteria used in the review and the contractor's conclusions about the effectiveness of its review process.

In this regard, the Section 503 regulation requires contractors to establish a seven percent "utilization goal" for disabled individuals in each of the contractors' job groups. This means that contractors must strive to achieve the goal of having individuals with disabilities constitute seven percent of the employee population in each job group. Previously, Section 503 required federal contractors only to make "good faith" efforts to hire people with disabilities.

The VEVRAA regulations similarly require a hiring goal and establish two methods by which contractors may set a hiring benchmark for covered veterans. Specifically, a contractor may use either (i) the national percentage of veterans in the workforce (which currently stands at eight percent) or (ii) its own benchmark, based on the best available data. If a contractor uses the latter method, it must consider the following factors:

a. The average percentage of veterans in the civilian labor force over the preceding three years in the state where the contractor is located, as posted in the Benchmark Database on the OFCCP website;
b. The number of veterans who participated, over the previous four quarters, in the employment service delivery system in the state where the contractor is located, as posted in the Benchmark Database on the OFCCP website;
c. The contractor's applicant and hiring ratios for the previous year;
d. The contractor's recent assessments of the effectiveness of its outreach and recruitment efforts; and
e. Any other factors, such as the nature or location of a job, that would affect the availability of qualified covered veterans.

As contractors adjust to the new requirements, they may prefer to use the first option, *i.e.*, the national percentage.

The goals and benchmarks established by the regulations are aspirational and not meant to establish hiring quotas (or ceilings). While contractors will not be penalized for failing to meet the goals or benchmarks, they

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may be penalized for failing to try to achieve them or for failing to respond appropriately to a missed goal.

In this regard, if a contractor fails to meet the utilization goal, the contractor must take steps to assess and address any impediments to equal employment opportunity, including assessing existing personnel processes, the effectiveness of its outreach and recruitment efforts, and the results of its affirmative action program audit. After conducting this assessment, the contractor must "develop and execute action-oriented programs" to correct any identified problem areas. The OFCCP is likely to penalize contractors that, after failing to meet the utilization goal, do not identify the potential reasons for the under-utilization and establish programs to address those reasons.

Penalties for failure to comply with such requirements can be significant. The government may withhold payments due, terminate or cancel a contract, or even debar the contractor from obtaining future contracts.

Self-Identification Requirements

The OFCCP now requires contractors to invite job applicants to self-identify as covered veterans or individuals with disabilities at both the pre-offer and post-offer stages of the hiring process. Contractors also must invite current employees to self-identify as an individual with a disability within the first year the contractor is subject to the self-identification requirement and once every five years thereafter. In addition, at least once during the years between these invitations, contractors must remind employees that they may voluntarily update their disability status at any time. Contractors that have in place on March 24, 2014, affirmative action plans ("AAPs") pursuant to the previous Section 503 and VEVRAA rules may delay compliance with subpart C of the new regulations, which includes the self-identification requirement, until the beginning of their next AAP cycle.

Contractors *must* use the disability self-identification form, Form CC-305, that was published in January 2014. This form is available on the OFCCP's website. Contractors may use an electronic online version of the form only if they include the form number and expiration date, meet strict requirements concerning font style and size, and do not alter the content of the form.

For veteran self-identification, contractors may use model invitation forms issued with the VEVRAA regulations or any form that complies with the regulations.

All veteran and disability self-identification information must be kept in a separate file from the employee's personnel file.

Updates To EEO Statements And Contract Language

Federal contractors have long been required to include a "tagline" in all job postings stating that the contractor is an "equal opportunity employer" of females and minorities. Under the new OFCCP regulations, contractors must add veterans and individuals with disabilities to the tagline. The revised tagline must, at a minimum, use the words "disability" and "vet," as opposed to "D" and "V."

Also, under the prior OFCCP regulations, contractors were required to include, in their covered subcontracts and purchase orders, only general language incorporating the equal employment opportunity obligations of Section 503 and VEVRAA. Under the new regulations, contractors may still include such general references to Section 503 and VEVRAA in their subcontracts and purchase orders but must also include explicit language, in bold text. Contractors must also post and disseminate information about their equal employment opportunity policy to applicants, employees, subcontractors, suppliers, and union officials.

Recommendations For Contractors

In consultation with experienced employment counsel, federal contractors and subcontractors should take appropriate steps to ensure that they will be in compliance with the Section 503 and VEVRAA regulations when the regulations take effect in March 2014. In particular, contractors should immediately:

- Implement procedures for the collection and storage of the required self-identification information of applicants and employees. Because gathering disability-related information creates risks, contractors should establish procedures that will prohibit managers and others involved in employment decisions from having access to the information;
- Invite current employees to self-identify as an individual with a disability within the first year the contractor is subject to the self-identification requirement and every five years thereafter;
- Disseminate required notices internally and externally;
- Develop referral sources for qualified disabled persons and covered veterans;
- Establish appropriate benchmarks and goals for the hiring of disabled persons and covered veterans;
- Train human resources staff to identify impediments to equal employment opportunity and to design action-oriented programs;
- Update EEO statements and contracts as necessary to include required language concerning covered veterans and individuals with disabilities; and
- Designate an OFCCP compliance specialist within the organization.

If you have any questions about the Section 503 and VEVRAA regulations or would like guidance in connection with any other OFCCP compliance issues, please do not hesitate to contact us.

Company Agrees To Record $34 Million Fine For Alleged Immigration Violations

By Julie A. Galvin

Recently, the technology firm Infosys Corporation agreed to pay $34 million to settle claims by the U.S. government that it had engaged in systemic visa fraud and other violations of federal immigration law. As this is the largest fine ever recorded in a case involving immigration-law violations, the settlement underscores how critical it is for employers to comply strictly with immigration laws.

Alleged Violations By Infosys

The government's charges against Infosys involved a variety of alleged violations of the immigration laws:

1. Misuse Of B-1 Visas.

First, the government alleged that Infosys was systematically bringing foreign workers into the U.S. under B-1 visitor visas, rather than the legally required but more expensive and highly regulated H-1B "skilled professional" visas.

B-1 visas are routinely issued to foreign visitors who wish to enter the U.S. to conduct discrete business activities, such as attending a meeting or seminar, negotiating a contract, or consulting with a client. B-1 visa holders are not, however, permitted to engage in "productive work" that would otherwise be performed by U.S.-based employees. Foreign nationals who will be working in the U.S. must secure employment authorization such as H-1B visas, which are subject to annual quotas and are much more difficult and expensive to obtain than B-1 visas.

According to the government, Infosys sought to evade these restrictions by intentionally submitting false documentation in support of B-1 visa applications. For instance, Infosys claimed that applicants would be visiting for "discussions" or "meetings," when they were actually coming to perform work that was not authorized under the B-1 visa program. The government also claimed that Infosys had issued a "dos and don'ts" memorandum intended to help B-1 visa applicants deceive U.S. consular officials as to the true purposes of their visits, such as by avoiding using terms such as "work" during visa interviews.

2. Failure To Comply With Labor Condition Application Requirements.

The government also claimed that Infosys had deliberately failed to comply with its Labor Condition Applications in connection with H-1B visa applications filed on behalf of foreign employees.

As part of the H-1B application process, the sponsoring employer must file a Labor Condition Application with the U.S. Department of Labor, attesting that the employer will pay at least the prevailing wage for the job location. If the job location of an employee admitted under an H-1B visa changes, the employer must submit a new Labor Condition Application for the new geographic area.

According to the government, Infosys deliberately flouted this requirement by instructing employees entering under H-1B visas not to tell Customs and Border Protection officers that their actual destinations in the U.S. were not the same as the destinations listed in their Labor Condition Applications. Infosys allegedly did this in order to avoid the higher wages and administrative burdens associated with filing new Labor Condition Applications.

3. Failure To Comply With Form I-9 Requirements.

Finally, the government claimed that Infosys had failed to comply with its obligations with regard to Employee Eligibility Verification Forms (commonly known as I-9 forms). Specifically, Infosys allegedly failed to complete I-9 forms for many of its U.S. employees and to re-verify the employment authorization of a large percentage of its foreign national employees in the U.S.

Recommendations For Employers

The massive scale of the Infosys settlement serves as a reminder of how seriously the federal government takes employer violations of the immigration laws. Thus, in consultation with experienced immigration counsel, employers should be sure to do the following:

- Ensure that foreign workers who are in the U.S. on B-1 visas (or the visa waiver program) do not engage in productive work;
- Closely monitor any changes to the terms of an H-1B visa holder's employment (such as a change in job location, a reduction in hours, or a material change to a job description), and file an amended H-1B petition or new Labor Condition Application as necessary;
- Ensure that I-9 forms are accurately and completely filled out for all employees, including foreign nationals, working in the U.S.; and
- Re-verify the employment authorization of foreign national employees whose employment authorizations are subject to expiration dates.

Please feel free to contact us if you have any questions about the issues involved in the Infosys settlement or any other immigration matters. We regularly assist employers with hiring foreign nationals and complying with related record-keeping requirements, and we would be happy to help.

Change To Federal Rule Impacts Subpoenas And Litigation Strategy

By Todd A. Newman[1]

Now that proposed amendments to Rule 45 of the Federal Rules of Civil Procedure ("Rule 45") have gone into effect, parties involved in federal-court litigation may have an easier time obtaining discovery from non-parties, but more trouble getting out-of-state witnesses to attend trial. The amendments, among other things, address which court should issue the subpoena; where the subpoena may be served; what must be done to properly notify other parties that a "documents only" subpoena will be served; where compliance with the subpoena is to take place; and where motions to enforce the subpoena are to be filed.

Because these changes to Rule 45 significantly affect subpoena procedures in federal-court litigation, it is important for all employers, schools, and other organizations to familiarize themselves with these changes. The most significant revisions to Rule 45 are summarized below.

1. Issuing Court

Under the amended rule, "the court where the action is pending" will always be the issuing court, regardless of the type of subpoena being served. Previously, the issuing court varied: (i) if a subpoena required a person to attend a hearing or trial, then the issuing court was "the court for the district where the hearing or trial [was] to be held"; (ii) if the subpoena required a person to attend a deposition, then the issuing court was "the court for the district where the deposition [was] to be taken"; and (iii) for a "documents only" subpoena, the issuing court was "the court for the district where inspection or production [was] to be made." Accordingly, this amendment simplifies the practice of issuing a federal subpoena.

2. Nationwide Service

Similarly, as amended, Rule 45 now simplifies things by allowing subpoenas to be served anywhere in the United States, regardless of the type of subpoena being served. Rule 45 previously required service of subpoenas to take place as follows: (i) "within the district of the issuing court"; (ii) "outside the district but within 100 miles of the place specified for deposition, hearing, trial, production, or inspection"; (iii) "within the state of the issuing court if a state statute or a court rule allows service at that place of a subpoena issued by a state court of general jurisdiction"; or (iv) "any place … that the court authorizes on motion and for good cause, if a federal statute so provides."

3. "Documents Only" Subpoenas

Rule 45 now requires notice and a copy of a "documents only" subpoena to be served on all parties *before* service of the subpoena itself. The requirement to include a copy of the subpoena with the notice is new. Advance notice was required under the former rule, but compliance with this obligation was inconsistent. Accordingly, the amended rule places greater emphasis on the notice requirement by moving it from its prior position, the last sentence of subsection (b)(1), to a stand-alone subsection, (a)(4). It appears that these changes are intended to give parties with standing an opportunity to raise timely objections.

4. Place Of Compliance

The text now appearing at Rule 45(c) clarifies that a party or a party's officer may be required to travel for a hearing or trial *only* "within 100 miles of where the person resides, is employed, or regularly transacts business in person" or to a more distant location "within the state where the person resides, is employed, or regularly transacts business in person." This resolves a split among federal district court judges as to whether parties and their officers (as opposed to non-parties) may be compelled to travel beyond these limits. Two recent cases from the Eastern District of Louisiana illustrate this split. In the first case, a judge from this district required a party's officer to travel from New Jersey to New Orleans to testify at trial, while in the second case, a different judge from this district refused to enforce a trial subpoena that would have required various parties to travel more than 100 miles from outside the state.

This clarification has strategic implications for corporate defendants whose officers are outside the rule's geographical limitations. To illustrate, suppose an officer of a corporate party is deposed in the ordinary course of a lawsuit and testifies brilliantly. In this scenario, the corporate party might refuse to voluntarily produce the officer for trial, being comfortable with the prospect of any portion of the deposition transcript being introduced into evidence. On the other hand, if the deposition does not go so well, then the corporate party may wish to make the officer available for trial, even though the officer could not be compelled to attend, in order to resurrect, clarify, or supplement portions of the officer's deposition testimony that might otherwise be misunderstood.

The revised Rule 45(c) takes a slightly different approach to non-parties. Like a party or a party's officer, a non-party may be compelled to travel "within 100 miles of where the person resides, is employed, or regularly transacts business in person." However, a non-party may not be required to appear within the state at a location outside the 100-mile limit unless the non-party "would not incur substantial expense." As to this point, the comments to the revised rule explain that "[w]hen travel over 100 miles could impose substantial expense on the witness, the party that served the subpoena may pay

1 *Todd gratefully acknowledges the assistance of Jorge Gamboa, who is also an attorney at Schwartz Hannum PC, in preparing this article.*

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all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation."

In sum, because attorneys at the town's regular law firm "were intimately connected to, if not controlling of, the investigation," and because the town was affirmatively raising the investigation as a defense to the plaintiff's claims, the judge held that the town had waived the attorney-client privilege as to investigation-related documents involving the regular law firm.

The Attorney-Client Privilege

Against this backdrop, it is worth revisiting the basic principles applicable to the attorney-client privilege – not only to show why the *Koss* judge reached this conclusion, but more importantly as a reminder to help employers avoid similar traps when conducting their own workplace investigations.

In general, the attorney-client privilege shields from disclosure those communications in which an attorney and client communicate confidentially for the purpose of seeking or providing legal advice. *See, e.g., RFF Family Partnership, LP v. Burns & Levinson, LLP,* 465 Mass. 702, 707-08 (2013). For the privilege to attach, an attorney must be acting in the role of a legal advisor. *See, e.g., In Re: Grand Jury Subpoena,* 662 F.3d 65, 72 (1st Cir. 2011).

In contrast, if an attorney acts in a *non*-legal capacity – for instance, interviewing fact witnesses in an investigation – the attorney-client privilege likely will not apply. *Id.* Similarly, when an in-house attorney provides business, rather than legal, advice, those communications are also unlikely to be privileged. *See, e.g., U.S. v. Windsor Capital Corp.,* 524 F. Supp. 2d 74, 81 (D. Mass. 2007).

Further, the attorney-client privilege can also be waived in a variety of ways, such as disclosure (inadvertent or not) to outside parties, or, as in the *Koss* case, when an employer offers the fact of a thorough investigation as an affirmative defense to a plaintiff's claims. *See, e.g., Musa-Muaremi v. Florists' Transworld Delivery, Inc.,* 270 F.R.D. 312, 317-19 (N.D. Ill. 2010). When making such an affirmative defense, the employer will almost certainly waive any claim of privilege as to the *investigator's* report and interview notes, even if the investigator is an attorney. *See, e.g., Walker v. Cnty. of Contra Costa,* 227 F.R.D. 529, 535 (N.D. Cal. 2005).

However, *Koss* goes beyond the mere waiver of the attorney-client privilege as to the investigator's report and interview notes. Rather, *Koss* also reflects the waiver of the privilege as to communications involving the town's regular, outside counsel (in effect, its general counsel). In this regard, the *Koss* decision may well have shocked and dismayed both the town and its regular law firm. Without reflecting upon the precise boundaries of the attorney-client privilege, they might well have assumed that outside counsel's communications would be privileged.

Indeed, in general, an employer's communications with its outside attorney (and not involving the investigating attorney) about how the employer might direct the investigation and/or respond to information learned during the investigation typically *would* be protected by the attorney-client privilege. *See, e.g., Waugh v. Pathmark Stores, Inc.,* 191 F.R.D. 427, 431-32 (D.N.J. 2000). Specifically, so long as those communications are kept confidential, involve the provision of legal advice, and do not spill over into the actual conduct of the investigation, then the employer should be able to protect those communications under the privilege. *Id.*

Implications Of *Koss*

In *Koss*, the privilege did not protect communications from the town's regular outside law firm to the investigating attorney. This should not come as a surprise, given not only the parameters of the attorney-client privilege, but also the likelihood that the town would need to disclose the details of its investigation to defend against the sexual harassment claim (in light of the town's assertion of the *Faragher-Ellerth* defense). Of course, if the town's regular outside law firm anticipated this waiver of the attorney-client privilege, then there would be no surprise for them or the town, and thus (presumably) no problem.

On the other hand, if the town and the regular outside law firm expected that all of the outside firm's communications would be protected as privileged, then the court-ordered disclosure would likely be truly damaging.

In short, the employer and the law firm acting as counsel in connection with an investigation should discuss whether the law firm should (a) entirely avoid communicating with the investigator, or (b) limit its communications with the investigator to (i) listening to (or receiving) the investigator's report(s) and (ii) asking follow-up questions of the investigator. Counsel should not be giving legal advice to the investigator, and counsel should not be giving legal advice to its client while the investigator is listening on the phone or sitting in the room. If counsel limits its communications with the investigator accordingly, then counsel should not be disclosing to the investigator any legal advice that counsel provided to its clients.

Thus, the *Koss* decision suggests that when an attorney conducts a factual investigation that may be raised as a defense to a legal claim, that attorney should not *also* act as legal counsel. Likewise, that investigating attorney should not participate in communications between the employer and its regular counsel regarding matters of legal advice.

In the end, *Koss* is an important reminder to employers to understand the scope of the attorney-client privilege, and to take appropriate steps to avoid unintended waivers of the privilege in connection with workplace investigations.

Recommendations

1. An employer should give careful consideration to *the attorney-client privilege* – and any potential waiver issues – before commencing an investigation of a workplace complaint.
2. The employer should carefully evaluate *the nature of the complaint:* for example, is the *Faragher-Ellerth* defense likely to be asserted in response to that type of complaint? If so, outside counsel should consider whether to manage its communications with the investigating attorney on the assumption that those

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The Attorney-Client Privilege And Workplace Investigations

communications will not be protected by the attorney-client privilege.

3. The employer should carefully evaluate *the likelihood that litigation will occur.* This "big picture" analysis will help the employer determine whether an inadvertent waiver of the attorney-client privilege may be a significant danger and, if so, how that hazard can best be minimized or avoided.
4. The employer should consider what roles outside counsel and/or an investigating attorney should play in advising the employer and/or conducting the investigation.
5. The employer may want to create, at the outset, a formal investigation document, to clearly differentiate the role of the investigator (who will be performing the fact-gathering) from the role of the outside attorney (who will be advising the employer on its response to the results of the investigation).
6. Throughout the investigation, the employer should take appropriate precautions to ensure that the investigator and outside counsel do not go beyond their assigned roles.

Taking these steps, both before and during an investigation, will help an employer maximize its chances of avoiding an unintentional disclosure of confidential information.

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Independent Schools: Time To Update Your Policies And Procedures!

confronted with students who bully, cyber-bully, or sext. The entire school community needs to consider how important it is to abide by the law and school policies that restrict such behaviors. Outside experts are often better able to convey to the school community the gravity attendant to these types of behaviors than internal school personnel, with whom students, faculty, and staff interact on a daily, collegial basis. We recommend that the school community review applicable laws related to bullying, cyber-bullying, and sexting; review student handbook policies covering respect, honesty, diversity, acceptable use of technology, bullying, cyber-bullying, and discipline; discuss the consequences, both inside and outside the school environment, for engaging in bullying, cyber-bullying, and sexting; describe the school's process for investigating these types of misconduct; and provide information about support and resources for students who are victims or perpetrators of the misconduct. Please see our website, at *http://shpclaw.com/custom-on-site-training/special-issues-facing-schools/#5778*, for a description of the various programs offered by the Firm.

Please don't hesitate to contact one of the attorneys in the Firm's Education Group if you have questions about any of these issues. We regularly provide training and other assistance to independent schools in all of these areas and would be thrilled to help.

SUCCESS STORY:

SHPC Client Prevails At Trial: Independent Contractor Denied Extra Pay

Schwartz Hannum PC successfully represented a private club in a Superior Court bench trial involving an independent contractor who sought payments for services allegedly performed outside his written agreement with the club. After a three-day trial, the judge ruled that the club owed nothing to the contractor.

Finding that the contractor had voluntarily attended club functions and events out of his own interest in developing business from the club's members and patrons under the written agreement, the judge dismissed the contractor's claim and entered judgment for the club.

Todd A. Newman and Jaimie A. McKean represented the club at the trial.

The Firm regularly assists employers with litigation disputes, grievance arbitrations, workplace investigations, and related labor and employment matters and would be pleased to provide your organization with guidance and assistance.

Schwartz Hannum PC Announces That **Brian D. Carlson** Has Been Named Of Counsel

The Firm is thrilled to announce that Brian Carlson has been named Of Counsel.

Brian's practice focuses on counseling and representing clients in the full gamut of labor and employment matters, including labor arbitrations, unfair labor practice charges, union organizing campaigns, collective-bargaining issues, employment and ERISA litigation, wage-and-hour issues, employment-related agreements, issues arising from corporate mergers and acquisitions, and compliance with federal and state employment statutes. In addition, Brian provides training to clients on labor and employment matters.

Brian also serves as Editor of Schwartz Hannum PC's Labor and Employment Law Update.

Brian is admitted to practice in Massachusetts and New York, as well as the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit.

Brian is a graduate of Harvard Law School and Williams College and is a member of both the American Bar Association and the Boston Bar Association.

Please join us in congratulating Brian in his new role!

NLRB Abandons Poster Requirement But Revives Fight For Union-Friendly Election Rules

By Hillary J. Massey

After more than two years of legal wrangling, the National Labor Relations Board ("NLRB" or "Board") has conceded defeat in its court battles to enforce its rule requiring employers to post a workplace notice informing employees of their rights under the National Labor Relations Act ("NLRA"). The NLRB opted not to ask the U.S. Supreme Court to review two recent decisions by federal appeals courts striking down the notice-posting rule, and the Board has indicated that it will not make further efforts to try to enforce the rule. However, the Board has just revived its fight to implement expedited election procedures to facilitate union organizing, signaling that it continues to pursue a pro-union agenda.

The Notice-Posting Rule

The Board's notice-posting rule, which was issued in August 2011, would have required most private-sector employers to post a notice in their workplaces summarizing employees' rights under the NLRA, including the right to be represented by a union for purposes of collective bargaining. In addition, the rule would have made it an unfair labor practice for an employer to fail to post the notice. Finally, the rule provided that throughout any time period in which an employer failed to post the notice, the six-month statute of limitations applicable to unfair labor practice charges would be suspended.

Court Challenges To Rule

Shortly after the NLRB issued the notice-posting rule, employer groups challenged it in the U.S. District Court for the District of Columbia and the U.S. District Court for the District of South Carolina. The District of Columbia court struck down certain portions of the rule, while the South Carolina court invalidated it entirely. Both rulings were appealed, and the NLRB announced that it would delay implementation of the rule while the legal proceedings continued.

Eventually, in 2013, the appeals were decided by the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Court of Appeals for the Fourth Circuit. Both of these federal appeals courts struck down the notice-posting rule. The D.C. Circuit concluded that (i) the rule violated employers' free-speech protections under Section 8(c) of the NLRA, and (ii) the Board did not have authority under the NLRA to suspend the statute of limitations for unfair labor practice charges. The Fourth Circuit held that the Board lacked statutory authority to promulgate the rule in the first place.

NLRB Abandons The Notice-Posting Fight ...

The Board declined to seek U.S. Supreme Court review of both decisions. In a statement posted on its website, the Board explained that, despite its decision, "employers are free to voluntarily post the notice, if they wish." The agency added that it would continue to pursue other means of promoting its "national outreach program to educate the American public" about the NLRA.

The NLRB's decision to abandon its notice-posting rule is certainly good news for employers. Posting the notice may have sparked union organizing campaigns or encouraged challenges to management policies. In this regard, under the Obama Board, non-unionized employees have successfully challenged employer policies relating to such matters as confidentiality and social media on the basis that they improperly restrict employees' rights to engage in concerted activity.

Unfortunately, the Board's decision to walk away from the notice-posting rule provides no reprieve for federal contractors and subcontractors. These employers still must post a similar workplace notice about employees' NLRA rights pursuant to presidential Executive Order 13496 and the U.S. Department of Labor's implementing regulations. Although employer groups have filed a court challenge to that requirement as well, it remains in place for now.

... But Revives The Fight Over Election Rules

As this Update was going to press, the NLRB revived its efforts to change its election rules to facilitate unionization. On February 5, 2014, the Board announced new proposed rules to expedite union representation elections. The Board had proposed substantively identical rules in June 2011 and then decided to adopt certain of the proposed rules in December 2011. However, this action was invalidated by a federal district court on the ground that the Board did not have a valid quorum when the rule was promulgated. The Board now has a full slate of members, so the quorum issue is no longer an impediment.

The proposed election rules, among other things, would require employers to furnish employee telephone numbers and email addresses to unions as part of the election process. They also would prevent employers from challenging alleged campaign improprieties by the union until after the election takes place.

If the proposed election rules are adopted by the Board after the required period of public notice and comment – as is expected – then they will almost certainly be challenged in court by employer organizations. However, if the Board withstands the anticipated legal challenges this time around, then unions' chances of prevailing in workplace elections will be substantially bolstered.

Recommendations

While the Board has given up the ghost on its effort to require private-sector employers to post a workplace notice of employee rights under the NLRA, the Board (i) con-

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NLRB Abandons Poster Requirement But Revives Fight For Union-Friendly Election Rules

tinues to encourage employees to challenge management policies perceived as prohibiting "concerted activity," and (ii) is moving ahead aggressively to implement new election rules that would facilitate union organization. Accordingly, we encourage employers, in consultation with experienced labor counsel, to take the following steps:

- Review workplace policies and practices to determine whether they comply with the Board's present view of employee rights under the NLRA, particularly with regard to "concerted activity";
- Train supervisors, managers, and human resources personnel in how to recognize and respond appropriately to possible union organizing activity; and
- Continue to monitor NLRB decisions, announcements, and actions closely.

Please feel free to contact us if you have any questions about these issues 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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Change To Federal Rule Impacts Subpoenas And Litigation Strategy

that expense and the court can condition enforcement of the subpoena on such payment."

In the case of a "documents only" subpoena, production may be commanded to occur at a place "within 100 miles of where the person [subject to the subpoena] resides, is employed, or regularly transacts business in person." However, the revised rule is not intended to restrict agreements between the parties allowing production to be transmitted by electronic means, as such agreements are commonplace and serve to facilitate discovery.

5. Court Of Enforcement

The amendments also include a new provision, subsection (f), intended to protect subpoenaed persons from undue burden by requiring motions relating to the subpoena, such as motions to quash or to enforce the subpoena, to be filed in "the court for the district where compliance is required" as opposed to the issuing court (*i.e.*, the court where the lawsuit is pending). In addition, under this new subsection, such motions can be transferred to the issuing court only (i) with the consent of the subpoenaed person, or (ii) upon a showing of "exceptional circumstances." As a general rule, then, a subpoenaed person now will have the luxury of challenging the validity of the subpoena in his or her local federal district court, regardless of where the lawsuit was filed.

Conclusion

Parties involved in federal-court litigation should familiarize themselves with the new Rule 45, as the amendments to this rule may significantly affect not only compliance obligations and costs, but also litigation strategy. Please feel free to contact us if you have any questions about the amended Rule 45 or other aspects of federal-court litigation.

Celebrating 18 Years!

Schwartz Hannum PC recently celebrated its **18th Anniversary!**

The Firm is thrilled and proud to have an amazing team of talented attorneys and numerous dedicated staff who strive for excellence every day.

We want to take this opportunity to acknowledge and thank all of them, as well as our colleagues over the years, for their efforts and support.

We look forward to working with you during the next 18 years and beyond.

Schwartz Hannum PC *"Guiding Employers & Educators"*

The Firm is excited to announce its new tagline: **"Guiding Employers & Educators,"** to include a more explicit reference to the Firm's leading Education Practice.

For almost 20 years, Schwartz Hannum PC has served as an invaluable ally to organizations looking to promote positive employee relations and resolve disputes.

We guide employers on matters of labor and employment law, representing local and national businesses in industries including financial services, healthcare, hospitality, manufacturing, and technology.

We also guide educators, including independent schools, colleges and universities, offering counseling and advocacy to distinguished educational institutions and non-profit organizations.

Our practice is characterized by responsiveness, confidence, creativity, and candor. Our team of seasoned professionals has established the firm as a leading provider of thoughtful, results-oriented legal counsel.

Seminars For Independent Schools

April 3, 2014
Mastering An Effective Investigation Of Alleged Misconduct In An Independent School
8:30 a.m. – 11:00 a.m.

April 9, 2014
A Deep Dive For Academic Administrators
9:00 a.m. – 4:00 p.m.

Spring Seminar Schedule

April 10, 2014
Obamacare: A Moving Target
(An Overview Of Health Care Reform's Approaching Deadlines)
8:00 a.m. - 9:30 a.m.

April 17 & 18, 2014
Employment Law Boot Camp
(Two-Day Seminar)
April 17: 8:30 a.m. - 4:00 p.m.
April 18: 8:30 a.m. - 4:30 p.m.

April 22, 2014
Mastering An Effective Investigation Of Alleged Employee Misconduct
8:30 a.m. - 11:00 a.m.

May 7, 2014
Trustee Boot Camp
8:30 a.m. - 4:30 p.m.

May 14, 2014
Advanced Employment Law Boot Camp
8:30 a.m. - 4:30 p.m.

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