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NLRB Bolsters Union Organizing Through Email Ruling And "Quickie" Election Rules

By Brian D. Carlson

The National Labor Relations Board ("NLRB" or the "Board") has handed unions powerful new weapons for their organizing arsenals: (1) a ruling that gives employees the presumptive right to use their employers' email systems for union organizing and related activity, and (2) the adoption of "quickie" election rules, which give employers little time to campaign against union representation after an election has been scheduled.

These developments tilt the playing field in favor of unions like never before. Accordingly, employers should immediately implement appropriate policies, practices, and management training concerning use of their email systems, and develop campaign strategies and communications *now* – well in advance of any union organizing activity at their facilities.

Right To Use Employer Email Systems

In *Purple Communications, Inc.*, 361 NLRB No. 126, the NLRB adopted the presumption that "employees who have rightful access to their employer's email systems in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time."

Section 7 of the National Labor Relations Act guarantees employees "the right to self-or-

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Massachusetts Maternity Leave Act Now Applies To Men

By Hillary J. Massey

Massachusetts employers should prepare now for revisions to the Massachusetts Maternity Leave Act ("MMLA") that, effective April 7, 2015, will provide job-protected unpaid leave to both male and female employees for the purpose of birth, adoption, or placement of a child pursuant to a court order. The bill, which was signed into law January 7, 2015, the day before Governor Deval Patrick left office, converts the MMLA into a parental leave law ("Parental Leave Law"), *i.e.,* applicable to both men and women, and expands the scope of parental leave protections as follows.

Extension To Male Employees

The Parental Leave Law extends to both male and female employees, entitling all working parents to eight weeks of unpaid job-protected leave. The Massachusetts Commission Against Discrimination ("MCAD"), which administers the law, likely will take the position, as it did under the MMLA, that it is discriminatory to offer more leave time or related benefits to female employees without offering the same arrangement to male employees. In this regard, courts outside Massachusetts have concluded that granting leave to female but not male employees may constitute gender discrimination under Title VII if the leave is for childcare

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Time Is Running Short To Plan For Summer Seasonal Hiring

By Julie A. Galvin

With the first day of spring still ahead of us, summer may seem a long way off. For employers planning to use H-2B visas to supplement their summer workforce with temporary foreign workers, however, summer is not far off at all. Employers planning to file H-2B applications for summer employment need to act promptly to maximize their chances of obtaining work authorization for their intended H-2B employees.

Background

Employers can use the H-2B visa program to hire foreign workers from eligible countries in non-agricultural, temporary, full-time positions. While H-2B visas can be used for a variety of temporary circumstances (such as a one-time need, a peak-load need, or an intermittent labor shortage), they are commonly used for seasonal employment, making H-2B visas a vital part of the summer economy.

H-2B visas are subject to a quota of 66,000 visas per year. The visas are allotted twice each year, on October 1 and April 1, with 33,000 visas released on each of these dates and awarded until the quota is met. Employers can submit one application for multiple H-2B employees, so long as they are from the same country, traveling to the same consulate or embassy to process their visas, and being recruited for the same position. Under current regulations, an employer cannot begin recruiting potential H-2B employees until 120 days prior to the date of need.

Filing Process

Obtaining an H-2B visa is a multi-step process, involving both the U.S. Department of Labor ("DOL") and U.S. Citizenship and Immigration Services ("USCIS"). First, the employer must obtain a prevailing wage determination from the DOL, which dictates the minimum wage that the employer must pay H-2B employees, based on the position and the geographic area.

Next, the employer must advertise the position by placing job advertisements in specific locations to ensure that there are no U.S. employees who are willing and able to perform the job. The job ads cannot be placed earlier than 120 days prior to the date of need. If no U.S. employees are found, the employer can then request a temporary DOL labor certification that no U.S. employees were available and that the employment of H-2B employees will not adversely affect the wage rate and working conditions of similarly employed U.S. employees.

If the DOL approves the temporary labor certification, the employer then may file a petition with USCIS. The petition should include a copy of the certified temporary labor certification, proof of the temporary nature of the employer's needs, evidence demonstrating the number of H-2B employees needed, and documentation of the H-2B employees' qualifications, if required. As part of the petition, the employer must make certain attestations, including that it will pay for return transportation costs if an H-2B employee is dismissed before the end of the visa period, that it will notify USCIS if an employee fails to appear or abandons work, and that the H-2B employees have not paid any fees to the employer in order to obtain employment.

Finally, once USCIS approves the petition, the H-2B employees, if abroad, must travel to an appropriate U.S. consulate or embassy to apply for their visas, which they will need to enter the U.S. and begin work.

Recommendations For Employers

Given the timeframes and filing requirements detailed above, many employers planning to hire foreign workers for the summer have already commenced the H-2B recruitment and filing process in order to claim a share of the 33,000 visas that will be released on April 1. Since it is not clear how long it will take for that semi-annual quota to be exhausted, employers that have not yet begun the H-2B process for summer employment would be wise to do so as soon as possible.

Thus, we recommend that employers considering the H-2B program to fill vacancies for summer employment do the following:

- Compile and carefully review documentation relating to past and anticipated hiring needs, as such evidence will be needed to establish the employer's need for seasonal workers;
- Establish appropriate policies and protocols to ensure compliance with all H-2B program requirements. Strict compliance with the H-2B regulations is essential, as post-adjudication audits are common, and failure to comply can set an employer up for hefty fines or even debarment from the program;
- Start the application process at the appropriate time, considering the annual quota, date of need, pre-filing steps, and processing time; and
- Contact experienced immigration counsel for assistance with the H-2B application process.

Although the H-2B program can seem like a daunting process, it can be a valuable resource for employers that require additional workers for the summer. If you have any questions or would like assistance with an H-2B application or any other immigration-related matter, we would be happy to help.

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The Risk Of Waiving Arbitration Rights Through Litigation Activity

By Brian D. Carlson

How should an employer respond to a lawsuit by an employee (or former employee) subject to a contractual arbitration provision? If the employer would rather resolve the matter in arbitration than in court, then it should respond with a motion to compel arbitration or by otherwise giving the court prompt and appropriate notice that a binding arbitration provision appears to cover the dispute.

Moving to dismiss the lawsuit on the merits or participating in other litigation activity – without raising the arbitration issue with the court – could come back to haunt. In this regard, a subsequent attempt to invoke arbitration could result in a ruling that the employer waived the right to arbitrate and, as such, is stuck in court. This is the lesson of the Massachusetts Superior Court's recent decision in *Shalaby v. Arctic Sand Technologies, Inc.*

The Facts Of *Shalaby*

Arctic Sand Technologies, Inc. ("Arctic Sand") develops power conversion chips for electronic devices. Dr. Nadia Shalaby was a co-founder of Arctic Sand, where she served as CEO under a contract with an arbitration provision. During its start-up period, Arctic Sand replaced Dr. Shalaby as CEO and then terminated her employment. Dr. Shalaby, in turn, sued Arctic Sand in a nine-count complaint in the Massachusetts Superior Court.

When Dr. Shalaby filed her lawsuit on April 8, 2014, she immediately sought a preliminary injunction concerning the preservation and handling of data on a laptop computer, an external hard drive, and an iPhone. Arctic Sand opposed the motion, making no mention of arbitration. On April 14, 2014, the Court resolved the motion by ordering the parties to negotiate a forensic protocol and a confidentiality order. In carrying out this directive, the parties filed a joint motion on May 19, 2014, attended the ensuing motion hearing on June 5, 2014, and then implemented the protocol approved by the Court. Arctic Sand remained silent about arbitration.

On July 16, 2014, Arctic Sand filed a motion to dismiss all nine counts in Dr. Shalaby's complaint. While this motion was pending, Dr. Shalaby filed a motion to compel Arctic Sand to produce certain documents. Arctic Sand opposed Dr. Shalaby's motion on the ground that a favorable decision on its motion to dismiss would render the discovery dispute moot. In its court papers concerning these motions, Arctic Sand said nothing about arbitration rights.

On September 9, 2014, the Court decided Arctic Sand's motion to dismiss, ruling that Dr. Shalaby could proceed with four of the nine counts in the complaint. Arctic Sand filed an answer and counterclaim. In its answer, Arctic Sand asserted for the first time, as an affirmative defense, that the Court lacked jurisdiction over Dr. Shalaby's claims because they are all "subject to a mandatory arbitration clause."

On October 21, 2014, Arctic Sand filed a motion to compel arbitration and dismiss Dr. Shalaby's remaining four claims. In support of this motion, Arctic Sand argued that the arbitration provision in the parties' contract was binding.

The Court's Ruling

In a pointed decision, the Court denied Arctic Sand's motion on the ground that the company "waived arbitration by its litigation conduct," stating:

> *Arctic Sand waived any contractual right to arbitrate Dr. Shalaby's claims by deliberately waiting six months before seeking to compel arbitration, and by actively litigating the case in Superior Court in the meantime. Arctic Sand did not promptly move to compel arbitration, but instead moved to "dismiss the Amended Complaint with prejudice" pursuant to Mass. R. Civ. P. 12(b)(6). It made no attempt to invoke its alleged contractual right to binding arbitration until after it learned that its motion to dismiss was not completely successful.*

In the Court's view, Arctic Sand "wanted to play heads I win, tails you lose," which the Court described as "the worst possible reason for failing to move for arbitration sooner than it did." The Court added that Arctic Sand "could have first moved to compel arbitration and then, if successful, filed a motion to dismiss with the arbitrator," which would have been permissible under the arbitration rules specified in the parties' contract.

In concluding that Arctic Sand committed "undue delay," the Court emphasized that the company had opposed Dr. Shalaby's motion for preliminary injunction, participated in the creation and implementation of a discovery protocol, and engaged in "extensive and exhaustive" motion practice that "substantially invoked the litigation machinery" – all before asserting that the matter was subject to binding arbitration. This prejudiced Dr. Shalaby, the Court ruled, because it "caused the opportunity for an expeditious alternative to litigation to be lost."

In denying Arctic Sand's motion to compel arbitration, and thus requiring the case to remain in court, the judge remarked: "Arctic Sand had no legitimate reason for asking the Superior Court to decide the legal merits of Dr. Shalaby's claims before moving to compel arbitration."

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Is Your *Online* Fundraising Raffle Legal?

By Sarah H. Fay

In a previous Legal Update, Is Your Fundraising Raffle Legal?, we highlighted various issues that independent schools, charities, and other non-profit organizations may encounter when hosting a fundraising raffle. Here, we focus on additional challenges that arise in promoting and operating a fundraising raffle on the Internet.

Using the Internet for raffles may seem like an easy, modern way for non-profit organizations to raise funds. But non-profits should take heed before planning online raffles. The legality of such fundraisers is complex, varies from state to state, and even implicates federal gambling law. Moreover, where online raffles are lawful, they are often subject to hidden legal pitfalls that pose substantial risks for the organization and its officers.

For these reasons, and as discussed further below, non-profit organizations should confer carefully with counsel before undertaking Internet-based raffle fundraisers.

Selling Raffle Tickets Online

Some states, including Arizona, California, Delaware, and Nevada, prohibit non-profit organizations from selling raffle tickets online. Other states, like Massachusetts, have not addressed the issue, leaving the organization to assume the risk of potential liability.

Noncompliance with applicable raffle laws can have serious consequences.

In states where it is legal to sell raffle tickets online, there may be hidden pitfalls. For instance, in New York, raffle tickets may be sold only in municipalities that allow raffles generally *and* that consent in advance to the organization's specific raffle. Accordingly, a non-profit organization conducting an online raffle in New York would presumably have to ensure that Internet sales occur only in municipalities where these requirements are met.

In fact, an inability to limit Internet sales to permissible locations could expose a non-profit organization to liability under *other states'* laws. In California, for example, the online sale of raffle tickets is unlawful *per se*. Thus, a non-profit organization would appear to violate California law by making an Internet sale there, even if the online raffle was lawful in the organization's home state.

Online raffles could be viewed as online gambling under the Unlawful Internet Gambling Enforcement Act ("UIGEA").

Massachusetts further illustrates the risks and uncertainties in this area of the law. In Massachusetts, both the purchaser and seller of a raffle ticket must sign their respective ticket stubs. Therefore, if a non-profit organization takes the risk of selling raffle tickets over the Internet in Massachusetts (as noted, Massachusetts law is silent about the legality of this), then it would presumably need to comply with applicable laws concerning electronic signatures.

Federal law poses challenges as well. Online raffles could be viewed as online gambling under the Unlawful Internet Gambling Enforcement Act ("UIGEA"). This federal law restricts online gambling in states, such as Massachusetts, that do not require age and location verification. Accordingly, non-profit organizations interested in conducting online raffles must be sure to comply not only with state law but also with UIGEA.

Promoting Raffles Online

In general, a non-profit organization may use the Internet to *promote* a raffle. Indeed, even in California and New Jersey, where online raffles are prohibited, online advertising of raffles is not. However, legal issues may arise where a non-profit organization engages a *third party* to assist with online promotion of a raffle.

It is increasingly common to find third-party vendors offering online platforms for charity raffles. These platforms generally include online tools to promote, operate, and sell tickets for the raffle. However, many states limit who may lawfully carry out these functions.

For example, in Massachusetts, only "qualified members" of the sponsoring non-profit organization may promote, operate, and conduct a fundraising raffle, and these individuals may not receive compensation in any form. Similarly, in Maine, only uncompensated volunteers may sell tickets for a charity raffle. Accordingly, non-profit organizations should confer with counsel before engaging a third party to assist with any raffle-related operations.

Potential Liability

Noncompliance with applicable raffle laws can have serious consequences. First, the organization and its officers may face criminal penalties. In Maine, Massachusetts,

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Is Your *Online* Fundraising Raffle Legal?

and Nevada, for example, such penalties may include fines ranging from $1,000 to $2,000 per violation, as well as incarceration for up to one year. In California, the Attorney General may sue under the non-profit corporation law for breach of fiduciary duty or waste of charitable assets, and in Massachusetts, violation of the raffle laws may support a claim under the Massachusetts Consumer Protection Act, known as Chapter 93A. At a minimum, many states will revoke the organization's raffle permit and not issue a new one for a designated period of time.

Recommendations

Given the complexity of this issue and the legal risks associated with it, non-profit organizations contemplating online fundraising raffles should consider the following actions in consultation with legal counsel:

- Determine whether online raffle fundraising – including marketing, operating, and selling tickets for a raffle over the Internet – is permitted by applicable state law, and if so, structure the raffle so that it complies with all legal requirements;
- If selling raffle tickets over the Internet is allowed in the state, engage information-technology specialists to ensure that online sales can be made only to persons who provide appropriate verification of age, location, and any other applicable requirement;
- Determine whether the organization may lawfully engage a third-party vendor to assist with fundraising efforts, including providing an online platform for an Internet-based fundraising raffle; and
- Ensure that the online raffle also complies with UIGEA and any other applicable federal law.

If you have questions about applicable raffle or online gambling laws, or would like guidance concerning a non-profit organization's fundraising methods, please do not hesitate to contact us.

William E. Hannum III Recognized As BTI Client Service All-Star

Schwartz Hannum PC is thrilled to announce that **William E. Hannum III** has been recognized as a BTI Client Service All-Star for 2015.

The 2015 BTI Client Service All-Stars report recognizes 354 lawyers for demonstrating excellence in client service. Will is among 29 labor and employment attorneys included on the list, which is published by **The BTI Consulting Group.**

The report is made up of a select group of attorneys nominated by corporate counsel for their standout client service. In the report, corporate counsel cite six attributes in identifying a BTI Client Service All-Star: client focus, innovative thought leadership, unmatched business understanding, legal skills, outsized value, and outstanding results.

Congratulations to Will for this great honor!

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NLRB Bolsters Union Organizing Through Email Ruling And "Quickie" Election Rules

ganization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." As such, the Board's ruling creates a broad right to use employer email systems for union organizing, to discuss wages, hours, and other terms and conditions of employment, and to air grievances.

…"[a]n employer that changes its monitoring practices in response to union or other protected, concerted activity, however, will violate the Act."

An employer may rebut the presumption that employees have a right to use its email system for such purposes "by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights." However, the Board gives no examples and notes that "it will be the rare case where special circumstances justify a total ban on nonwork email use by employees."

Similarly, while employers may monitor employee emails for "legitimate management reasons," the Board cautions that "[a]n employer that changes its monitoring practices in response to union or other protected, concerted activity, however, will violate the Act."

The Board's ruling overturns its 2007 decision in *Register Guard,* 351 NLRB 1110 (2007), *enforced in relevant part and remanded sub nom. Guard Publishing v. NLRB,* 571 F.3d 53 (D.C. Cir. 2009). In *Register Guard,* the Board ruled 3-2 along party lines that employers may restrict the nonbusiness use of their email systems because these systems are employer property. The Board now claims that *Register Guard* gave too much weight to employers' property rights and too little weight to employees' communication rights.

"Quickie" Election Rules

The day after issuing its email ruling, the Board adopted rules for expedited representation elections. These rules are known as the "quickie" election rules because they dramatically reduce the time between a union's petition for an election and the election itself. Absent a successful court challenge, the rules will take effect April 14, 2015.

The following features of the new rules illustrate the difficulties they will pose for employers:

Posting Requirement. Upon receipt of a union's representation petition, the NLRB will send the employer a Notice of Petition for Election, which must be posted in the workplace within two business days. This notice will provide information about employees' rights to organize under federal law. Employers that use email to communicate with employees also must distribute the notice electronically. The Board's prior rules contained no such posting or distribution requirement.

…"it will be the rare case where special circumstances justify a total ban on nonwork email use by employees."

Pre-Election Hearing. If an employer wishes to challenge the appropriateness of an election petition, then a pre-election hearing will be scheduled for eight days after the petition is filed. Within seven days, the employer will be required to file a detailed Statement of Position raising *all potential challenges.* The employer will be deemed to have waived any challenge not raised in the Statement of Position. The prior rules did not require employers to promptly identify issues in dispute or be barred from raising them later.

Deferral Of Certain Challenges Until After The Election. Litigation over the inclusion of specific employees in the bargaining unit or their eligibility to vote will generally be deferred until after the election, as such issues could be mooted by the election results (*e.g.,* if the union were to win by a large margin, then the disputed ballots might be insufficient to change the result). Under the former rules, employers could insist on litigating voter eligibility and inclusion issues prior to the election.

Elimination Of Right To Submit Legal Briefs. At the conclusion of the pre-election hearing, the employer may not submit a written brief unless the Regional Director deems it "necessary." Under the prior rules, the employer could file a written brief within seven days, with permissive extensions of fourteen days or more.

Elimination Of Automatic Stay Of Election. Representation elections will no longer be stayed for twenty-five to thirty days after the Regional Director rules on the issues presented at the pre-election hearing. Previously, elections were routinely stayed to allow the Board to consider any request for review of the Regional Director's decision that might be filed.

New Voter List Requirements. Within two business days after an election is scheduled, the employer must provide a voter list to the union. The list must include not only the names and home addresses of all employees in the petitioned-for unit, but also their per-

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NLRB Bolsters Union Organizing Through Email Ruling And "Quickie" Election Rules

sonal phone numbers and email addresses. The prior rules required employers to provide only names and home addresses, and gave employers seven days to do so.

Fast-Track Timeline. Under the new rules, elections could be scheduled for as soon as ten days after the election petition is filed. By contrast, the median time from petition to election over the past decade has been thirty-eight days, with most elections taking place within fifty-six days.

As this article was being written, federal lawsuits to enjoin the new rules were filed in the District of Columbia and Texas. The lawsuits allege that the new rules are unconstitutional and exceed the Board's authority. However, unless and until a legal challenge prevails, employers should anticipate that the April 14, 2015, effective date will remain intact.

Recommendations

In light of these developments, employers should consider the following measures.

Regarding Email Usage

- Review and revise policies concerning employee use of the company's email system to ensure that they do not, on their face, restrict the rights afforded employees under the Board's *Purple Communications, Inc.* ruling;
- Train managers and human resources personnel on how to identify emails implicated by the Board's ruling and what to do (and not do) next;
- Ensure that the training covers the type of email content that the Board may deem "protected" under its ruling, as well as the line between permissible email monitoring and impermissible surveillance; and
- Establish a chain of communication so that managers and human resources personnel know exactly how, when, and whom to notify when email issues arise, so that the company can immediately confer with labor counsel as to the most appropriate handling of the matter.

Regarding Union Organizing

- Take stock of whether non-supervisory employees may have reason to explore unionizing – *e.g.*, substandard wages or benefits, poor working conditions, or abrasive reporting relationships – and consider whether changes may be warranted (note, however, that it is generally unlawful to change, or to promise to change, wages, hours, and working conditions after organizing activity begins);
- As part of this assessment, review compensation and benefits, including what is offered in the relevant market; conduct a wage-and-hour audit and rectify potential violations; and address any rifts or unresolved workplace complaints (as strained employee-management relations is a leading cause of successful union organizing);
- Train managers and human resources personnel in how to lawfully respond to union organizing activity – and how to avoid unlawful knee-jerk reactions that may expose the company to liability under federal labor law; and
- Prepare campaign strategies and communications *now,* as there will be little time to act after an election petition is filed.

Please let us know if you have any questions about the NLRB's email ruling and "quickie" election rules, or if you may need assistance in preparing for actual or potential union organizing at your facility.

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The Risk Of Waiving Arbitration Rights Through Litigation Activity

Recommendations

In light of the *Shalaby* decision, an employer sued in court by an employee (or former employee) should:

- Immediately review all applicable employment contracts, handbook provisions, and policies to determine if an arbitration provision may cover the dispute;
- If so, then together with employment counsel, review the advantages and disadvantages of arbitration (as compared with litigation), based on such factors as the nature of the dispute, the applicable arbitration rules, budgetary considerations, and whether it would be preferable to keep the matter out of the public eye;
- If arbitration is determined to be the forum of choice, then bring the arbitration provision to the attention of plaintiff's counsel and request that the lawsuit be withdrawn in favor of arbitration; and
- If that fails, then respond to the plaintiff's complaint with a motion to compel arbitration or by immediately providing the court with some other appropriate notice that a binding arbitration provision appears to cover the dispute.

As *Shalaby* illustrates, remaining silent about arbitration while participating in litigation activity – even preliminary and seemingly unavoidable litigation activity – could result in a ruling that arbitration rights have been waived.

Please feel free to contact us if you have any questions about the Shalaby *case, or if you may need assistance in arbitration or litigation proceedings.*

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Massachusetts Maternity Leave Act Now Applies To Men

as opposed to recovery from birth. Thus, in revising their policies, employers should consult with employment counsel about any differences in leave entitlements for male and female employees.

Parents Working For Same Employer

The Parental Leave Law clarifies that if two employees of the same employer seek leave for the birth or adoption of the same child, then they will be entitled to an aggregate of eight weeks of leave. The law does not limit this provision to employees who are spouses.

Job Restoration Rights

The Parental Leave Law provides greater job restoration protection. Under the new law, an employer that allows more than eight weeks of parental leave is presumed to extend job protection for the entire leave period, unless the employer provides written notice *before* the start of the leave and *before* any subsequent extension that job protection will cease after eight weeks. In contrast, under the MMLA and related case law, an employer had to restore an employee to her previous or a similar position only if the leave was completed within eight weeks.

Leave For Court-Ordered Placement Of Child

The new law also expands the reasons for taking leave. In addition to providing leave for birth or adoption, the Parental Leave Law provides leave for the placement of a child with an employee pursuant to a court order.

Three-Month Probationary Period

The Parental Leave Law makes parental leave available after three months of employment, even if the employer has a longer initial probationary period. In contrast, the MMLA currently covers only those employees who have worked for the duration of the employer's initial probationary period, or, if there is no such period, at least three months.

Notice Forgiveness

Under the new law, an employee may provide less than two weeks' notice of his or her intent to take leave or return from leave, if the delay is for reasons beyond the individual's control. The MMLA currently requires two weeks' notice without exception.

Ongoing Requirements

The new law does not change other aspects of parental leave. As with the MMLA, employers are required to post a notice describing the parental leave and the employer's policies related to the leave. The leave may be paid or unpaid, at the employer's discretion. Finally, a violation of the Parental Leave Law continues to be a violation of the Massachusetts anti-discrimination law, known as "Chapter 151B."

Interaction With FMLA

The interaction between the Parental Leave Law and the federal Family and Medical Leave Act ("FMLA") may pose challenges for employers. The FMLA provides 12 weeks of job-protected leave to male and female employees for the purpose of birth or adoption, and requires the leave to be shared by spouses working for the same employer. However, the FMLA applies only if an employee has worked for the employer for at least 12 months and at least 1,250 hours in the year preceding a requested leave, and the employer employs at least 50 employees within a 75-mile radius of where the employee works. The FMLA does not provide leave for placement of a child pursuant to a court order. In light of these differences, some male employees who are not covered by the FMLA will be covered by the new Parental Leave Law. Accordingly, employers covered by the FMLA should consult employment counsel when revising their policies to ensure compliance with the new law.

Recommendations For Employers

To prepare for the Parental Leave Law, we recommend that employers do the following:

- Review their parental leave policies and procedures and revise them as necessary to ensure compliance with the new law by April 7, 2015;
- Post the required notice by April 7, 2015; and
- Provide training to managers and human resources personnel on the rights and obligations created by this new law.

Please feel free to contact us if you have any questions about the new Parental Leave Law or if you may need assistance with compliance or related litigation matters.

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2015 Is Here! Time To Review And Update Your Employment Policies

state employers are encouraged to review all applicable paid sick leave requirements to ensure full compliance.

Parental Leave: As detailed in another article in this Update, the Massachusetts Maternity Leave Act was recently amended, effective April 7, 2015, to cover male as well as female employees. The amendment also provides for other changes to the statute, including expanded job restoration rights.

NLRB Issues: 2014 was another busy year for the National Labor Relations Board ("NLRB"). The NLRB continued to invalidate employer policies dealing with such matters as social media; rules prohibiting insubordination or disrespect; restrictions on use of company logos and insignia; confidentiality; and at-will employment. We encourage all employers - both union and non-union - to take a closer look at such policies to determine whether they need revision in light of the NLRB's aggressive enforcement agenda.

Religious Accommodations: In response to an increase in religious discrimination claims, the U.S. Equal Employment Opportunity Commission ("EEOC") issued guidance last March regarding religious accommodations in the context of personal appearance (*i.e.*, dress and grooming) policies. The EEOC's guidance is an important reminder to all employers that state and federal laws require reasonable accommodations for employees' religious beliefs. We recommend that all employers carefully review their handbook policies related to personal appearance (as well as leaves of absence) to ensure that such policies address requests for reasonable accommodations by employees with sincerely held religious beliefs.

COBRA/ACA: Now that the ACA (a/k/a Obamacare) Health Insurance Marketplace is up and running, employees who separate from employment have two options for health insurance: (i) continuation coverage under state and federal COBRA laws, and (ii) new coverage through the Marketplace. However, there are important differences between these options, and departing employees can be caught short as to which option is better for them. It is very important for all employers to understand this important overlap between the ACA and COBRA and the differences between departing employees' health insurance options. In addition, employers should be aware that there is an updated model COBRA notice form that addresses these options.

Electronic Communications: With the increase in wearable technology and employees' continued preference for personal devices, it is time to dust off your Electronic Communications policies to ensure that they deal with "Bring Your Own Device" ("BYOD") issues, as well as wearable technology.

Intellectual Property: We have seen an increase in litigation dealing with post-employment restrictions, such as non-competition and non-solicitation covenants. Also, even when such formal covenants do not apply, employers that hire new employees from competitors often face claims such as aiding and abetting the breach of these employees' fiduciary duties and misappropriation of trade secrets. To minimize the risk of getting unwittingly caught up in such lawsuits, we encourage all employers to consider adopting a policy that explicitly prohibits employees from using the proprietary information of prior employers.

Bullying Policies: There continues to be a significant public focus on the issue of bullying in the workplace. While no state specifically requires employers to adopt a no-bullying policy, California has taken the first step in that direction by requiring employers to address "abusive" conduct when doing harassment training. Although many employers prohibit "inappropriate" conduct, this may not be explicit enough to curb bullying behaviors. We encourage all employers to take a close look at their conduct policies to ensure that there is broad language prohibiting conduct that is offensive, even if the conduct does not rise to the level of unlawful sexual or other harassment.

Leave Issues: We continue to see significant confusion regarding the overlap of Family and Medical Leave Act ("FMLA") and maternity/parental leave policies. Given the recent increase in litigation regarding pregnancy, such confusion can create exposure to liability for employers. This is a great time to take a closer look at your FMLA, pregnancy, and maternity/parental leave policies to ensure that they are clear and fully comply with applicable state and federal law.

Gender Identity: If you have not already done so, it is time to update your list of protected characteristics to include gender identity. The EEOC has filed its first transgender lawsuits and has made clear that preventing discrimination based on sexual orientation and gender identity is a top enforcement priority.

General: In addition to the issues identified above, multi-state employers should be sure to address changes in the laws of all states in which they operate.

As a reminder, when you update your employee handbook to address the issues identified above, don't forget to retain a copy of your prior handbook. Employee handbooks are often essential evidence in employment litigation, and we encourage all employers to keep prior versions for several years. (In addition, under the Massachusetts personnel records law, employers with 20 or more employees are required to retain written personnel policies.)

Although we believe it is crucial to update employment policies annually, we also know that updating your organization's employee handbook each year can be a daunting task. We want to help! We would be happy to audit your current handbook and make specific recommendations about updates and revisions. Please contact us for more information about our handbook audit process, or if you have questions about any of the issues identified above.

2015 Is Here! Time To Review And Update Your Employment Policies

By Suzanne W. King

As we do each year, we have compiled a list of the updates and revisions we recommend for employee handbooks as a result of developments in labor and employment law and best practices during the past year. We encourage you to add these updates and revisions to your to-do list for 2015.

Domestic Violence Leave: Massachusetts now requires employers with 50 or more employees to provide unpaid leave for various purposes related to domestic violence (*e.g.*, to obtain medical care, receive counseling, attend legal proceedings, or obtain housing).

Paid Sick Leave: Effective July 1, 2015, Massachusetts employers with at least 11 employees (including full-time, part-time, casual, and temporary employees) will be required to provide each employee with up to 40 hours of paid sick leave per year. Smaller employers will be obligated to provide the same amount of sick leave on an unpaid basis.

In addition, two other states (California and Connecticut), as well as a number of cities (including D.C., New York, Seattle, Philadelphia, and San Francisco) have enacted similar paid sick leave laws. Multi-

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Spring Seminar Schedule For Independent Schools

April 14, 2015
Getting It Write – Employee Handbooks
8:30 a.m. – 10:30 a.m.

April 23, 2015
Getting It Write – Student Handbooks
8:30 a.m. – 10:30 a.m.

May 7, 2015
Risk Management For Off-Campus Trips And Activities
8:30 a.m. – 10:30 a.m.

May 14, 2015
GLBTQA Students And Employees In Independent Schools: Best Practices Related To Gender Identity And Expression
8:30 a.m. – 10:30 a.m.

Spring Seminar Schedule For Higher Education

April 9, 2015 And July 15, 2015
Title IX: Creating Effective—And Legally Compliant—Complaint Resolution Procedures
8:30 a.m. – 10:30 a.m.

Spring Seminar Schedule

April 7 & 8, 2015
Employment Law Boot Camp (Two-Day Seminar)
April 7: 8:30 a.m. – 4:00 p.m.
April 8: 8:30 a.m. – 4:30 p.m.

May 6, 2015
Mastering An Effective Investigation Of Alleged Workplace Misconduct
9:00 a.m. – 1:00 p.m.

May 20, 2015
Wage And Hour: Top 10 Compliance Issues
8:30 a.m. – 10:00 a.m.

June 17, 2015
Understanding The New Laws: Sick, Parental And Domestic Violence Leave In Massachusetts
8:30 a.m. – 10:30 a.m.

July 22, 2015
Disability And Religious Accommodations In The Workplace: Best Practices
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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