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SHPC Legal Update

THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

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IN THIS ISSUE

Labor Law In Flux: Looking Back And Ahead

By Brian M. Doyle

Throughout President Obama's final year in office, the National Labor Relations Board (the "NLRB" or "Board") continued to apply the federal National Labor Relations Act (the "NLRA" or "Act") in a strongly pro-union fashion. The Board issued a number of significant decisions in 2016 holding employer personnel policies unlawful and strengthening workers' ability to organize.

The unexpected election of President Trump, however, portends potentially dramatic changes in the course of labor law over the next four years. Some of those anticipated developments are outlined below, following a look back at some of the major Board and court decisions under the NLRA over the past year.

Employee Concerted Activities

Several notable decisions issued by the NLRB in 2016 broadened employees' rights to engage in concerted activities aimed at bettering terms and conditions of employment. For instance:

Non-Compete Agreements. In a July 2016 decision, the Board found an employer's standard non-compete agreement unlawful, on the ground that it interfered with employees' rights, under Section 7 of the Act, to engage in protected concerted activity. *Minteq International, Inc.*, 364 NLRB No. 63 (July 29, 2016). In particular, the

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Employment Offer Letters: Tips For Independent Schools

By Jessica L. Herbster

For independent schools, like other employers, employment offer letters are a vital means of defining the terms of the employment relationship. There are a number of different forms that offer letters can take, ranging from providing one-time documents at the outset of employment to sending letters on an annual basis.

Regardless of which approach your school follows, it is vital that your offer letters be drafted carefully and reviewed regularly, to ensure compliance with legal requirements and best practices and to avoid creating unintended contractual obligations.

Disadvantages Of Fixed-Term Contracts

Historically, many schools have employed their faculty, administrators, and even staff members under annual contracts (often in the form of letter agreements) with fixed, one-year terms. From a school's perspective, the primary goal of this approach likely has been to minimize turnover and disruption during the school year, by inducing employees to commit to remaining employed through the end of the year. Further, it may be perceived that following practices similar to other independent schools is necessary to compete for the top candidates.

In practice, however, a court is highly unlikely to order an employee to continue working through the end of a school year, even if the employee has explicitly agreed to do so. The most a school might reasonably hope to obtain is a court injunction

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agreement – which all employees, union and non-union, were required to sign – prohibited employees from interfering with the employer's business relationships with its customers. The Board held that this provision unlawfully restricted employees from seeking to "improve terms and conditions of employment," such as by asking customers to boycott the employer's products or services.

Social Media. The Board also continued to strike down employer personnel policies on the basis that they improperly restricted employees' Section 7 rights. For instance, in *Chipotle Services LLC, d/b/a Chipotle Mexican Grill,* 364 NLRB No. 72 (Aug. 18, 2016), the Board found fault with Chipotle's social media policy, which prohibited employees from posting "incomplete, confidential, or inaccurate information" or making "disparaging, false, [or] misleading" statements, because the term "confidential" was not defined and the prohibition on "false" statements was overly broad. Even though Chipotle had included a disclaimer in the policy specifically carving out protected activity under the NLRA, the Board held that the disclaimer was insufficient to cure the unlawful provisions.

Employer Intellectual Property. In addition, the Board took issue with Chipotle's prohibition on employees' "improper use of Chipotle's name, trademarks, or other intellectual property." The Board found that this provision could unlawfully prohibit employees from using Chipotle's name in connection with protected concerted activities, such as wearing a T-shirt with the company's name or logo during a group protest of working conditions. While leaving open the possibility that an employer could prohibit specific, unprotected uses of its logo or other trademarks, the Board held that a general prohibition on employees' use of its name or logo is unlawful.

Union Organizing

Similarly, a number of important 2016 Board and court decisions strengthened union organization rights. In particular:

Striker Replacements. In May 2016, the Board issued a ruling making it more difficult for employers to permanently replace workers who strike in support of economic demands. Under longstanding Board precedent, the hiring of permanent replacement workers has been deemed a legitimate economic weapon that an employer may exercise in order to maintain its normal operations during a strike and force the union to compromise on economic demands. But in *American Baptist Homes of the West, d/b/a Piedmont Gardens,* 364 NLRB No. 13 (May 31, 2016), the Board held that an employer violates the Act if its hiring of permanent replacements is also motivated by "an independent unlawful purpose." In the case at hand, the Board found that the employer was motivated by two such unlawful purposes: to punish the strikers and to dissuade them from engaging in future strikes.

Union Election Rules. In June 2016, the Board obtained a favorable ruling from the U.S. Court of Appeals for the Fifth Circuit, which upheld the Board's 2015 amendments to its union election rules, known as the "quickie election" rules. *Associated Builders & Contractors of Texas, Inc. v. NLRB,* 826 F.3d 216 (5th Cir. 2016). The Fifth Circuit held that the amendments were neither arbitrary nor capricious, and did not impermissibly limit parties from litigating pre-election issues.

"Micro" Bargaining Units. The Fifth Circuit gave the NLRB another victory by upholding the Board's *Specialty Healthcare* decision allowing "micro-units" to organize. *Macy's v. NLRB,* 824 F.3d 557 (5th Cir. 2016). The Fifth Circuit held that a group of employees at Macy's comprising only of cosmetics and fragrance employees was an appropriate unit for a union representation election. Employers have argued that *Specialty Healthcare* opens the door to chaos in the work environment by permitting any number of bargaining units to exist within a single work facility. Like several other federal appeals courts, the Fifth Circuit rejected this argument, finding that any potential disruption to Macy's business was immaterial.

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Unionization of Temporary Workers. In July 2016, the Board held that employer consent is no longer required for a union to organize a single bargaining unit consisting of both the employer's regular employees and temporary workers supplied by third parties, such as staffing agencies. *Miller & Anderson, Inc.,* 364 NLRB No. 39 (July 11, 2016). As is frequently the case in labor law, the Board has gone back and forth on this issue numerous times in recent years. For approximately 30 years, beginning in the 1970s, the Board took the position that bargaining units containing both permanent and temporary employees required the consent of both the permanent employer and the staffing agency. In 2000, under a majority-Democrat Board, the Board overruled those precedents, finding

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that employer consent is not required if the permanent and temporary employers are "joint employers" and the employees share a community of interest. Four years later, a majority-Republican Board overturned that decision and returned to the prior standard. With the *Miller & Anderson* decision, the Board's pendulum has now swung back again.

Graduate Assistants. Finally, the Board overruled its 2004 *Brown University* decision by holding that graduate teaching assistants at Columbia University were employees within the meaning of the Act, and thus had a right to unionize. *Columbia University,* 364 NLRB No. 90 (August 23, 2016). The Board found that Columbia exercised sufficient control over the graduate assistants to make them employees, emphasizing the degree of oversight provided by the university and its right to dismiss graduate assistants from their teaching responsibilities. The Board also stressed that graduate assistants perform the overwhelming bulk of Columbia's undergraduate teaching, finding that this placed graduate assistants in a primarily economic relationship with the university.

Possible Changes Ahead

With the advent of the Trump Administration, federal labor law is likely to begin taking a sharply different course from the past eight years, in a number of areas.

NLRB Composition. President Trump recently elevated current Board Member Philip Miscimarra to Chairman of the NLRB, replacing Mark Gaston Pearce, who will remain on the Board until his term expires on August 27, 2018. In addition, there are currently two vacancies among the NLRB's five slots, which the President is expected to fill with Republican appointees.

Prospective Reversals of Recent Board Rulings. Once a Republican majority takes control of the NLRB, numerous pro-union rulings handed down by the Board during the Obama years are likely to be overturned or substantially narrowed. For example, the *Miller & Anderson* decision, relating to bargaining units containing both permanent and temporary workers, seems primed for reversal when this issue reaches a Republican-majority Board. The NLRB could also reconsider its 2014 *Purple Communications* decision, under which employees generally have a right to use an employer's e-mail system for purposes of union organizing. In addition, it will not be surprising if the Board begins giving much more leeway to employer social media, confidentiality and similar personnel policies than was the case under the Obama Administration.

Election Rules. It also seems possible that a GOP-majority Board could seek to rescind the recent changes to the NLRB's union election rules. If so, employers would be given more time and potential legal avenues for fighting union election campaigns.

Expansion of Right-to-Work Laws. Many states have "right to work" laws, under which employees cannot be forced to pay union dues or fees, even if they are part of a bargaining unit represented by a union. In recent years, a number of states (including Michigan, Indiana, Wisconsin and Kentucky) have joined the ranks of those with right-to-work laws, and other states are considering similar bills. It is even possible that the GOP-controlled Congress could pass a federal right-to-work statute, which could lead to a profound shift in the labor-management power balance nationally. Democrats and their union allies can be expected to resist any such effort with all of their might.

On a similar note, in November 2016, the U.S. Court of Appeals for the Sixth Circuit upheld right-to-work measures passed by a number of Kentucky counties (prior to the adoption of Kentucky's statewide right-to-work law). The Sixth Circuit's decision is significant, because unions have argued that under the NLRA, only states, and not municipal subdivisions, may adopt right-to-work legislation.

Persuader Rule. Finally, the Department of Labor's ("DOL") "persuader rule," under the Labor-Management Reporting and Disclosure Act, has long required employers to disclose certain information related to consultants hired to assist with opposition to union organizing efforts. For many years, the DOL recognized an "advice exemption" to the persuader rule, under which assistance provided by consultants (including attorneys) who simply advise management and have no direct employee contact need not be reported. In 2015, the DOL issued a new rule aimed at gutting the advice exemption by requiring employers to report all communications with legal counsel and other consultants aimed at persuading employees not to unionize, regardless of whether consultants communicate directly with employees.

The DOL's revised persuader rule was challenged by numerous employer groups, and was struck down, on a nationwide basis, by a Texas federal district court in June 2016. Although the DOL appealed that decision to the Fifth Circuit, the DOL is expected to drop the appeal under the Trump Administration. If so, the persuader rule will revert to its previous, more employer-friendly form.

If you have any questions about these developments or other anticipated changes under the NLRA, please feel free to contact one of our experienced labor lawyers. We regularly assist employers with all types of union-related issues and would be pleased to help.

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Employment Offer Letters: Tips For Independent Schools

preventing the employee from working for another institution before the term of the contract has concluded. But even such a limited injunction is far from a certainty, and the costs of seeking such an order are likely to outweigh the benefits of obtaining it.

In addition, a fixed-term contract can severely restrict a school's ability to terminate the employment relationship early if an employee's performance is unsatisfactory. Unless an employee engages in some type of egregious misconduct (such as theft or workplace violence), a school is likely to find it difficult to avoid paying the employee through the remainder of the school year, even if it decides to part ways with the employee early.

At-Will Offer Letters

For these reasons, more and more schools have moved away from annual, fixed-term employment contracts, to more flexible employment offer letters. Offer letters can take a number of different forms, as outlined below. But, however it is drafted, an offer letter should make clear that the employment relationship is "at will" – *i.e.,* that the individual is not being employed for any definite term and that either the school or the employee may terminate the employment relationship at any time, with or without notice, and for any reason or no reason at all (other than an unlawful reason such as discrimination).

Within these overall parameters, a school's employment offer letters commonly take one of the following approaches:

- One-Time Offer Letters. Some schools provide offer letters only when individuals first become employed. (This is the prevailing practice among non-school employers.) Employees receive detailed offer letters prior to commencing employment, followed by shorter, annual updates that reference the "original" offer and detail any changes (*e.g.,* subsequent changes in compensation, job title, job duties or other terms of employment) applicable to the upcoming school year.
- Annual Offer Letters. Other schools provide annual offer letters to employees, setting forth in detail their compensation, benefits and other terms of employment from year to year. This approach can also function well, so long as the annual offer letters are carefully drafted – in particular, to make clear that the employee will remain employed on an at-will basis, notwithstanding that the offer letter applies to a particular school year.

Whatever approach a school adopts, its offer letters should make clear that the employment relationship remains at will – *i.e.,* that employment is not for any definite duration and may be terminated by the employee or the school at any time and for any reason (or for no reason), with or without notice. In this regard, an offer letter should not refer to a specific "term" of employment or promise that the school will terminate only for "cause" or only after following specific procedures (such as a defined progressive discipline process).

Of course, offer letters (and contracts) should include important, employee-specific information, such as job duties, work schedule, compensation and benefits. For new employees, offer letters should also detail expected start dates and any hiring contingencies (*e.g.,* criminal background checks, reference checks, and proof of eligibility to work in the U.S.).

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Important Considerations For Schools

If a school is considering moving from contracts to at-will offer letters, it should carefully consider which of these general approaches is best-suited to its culture and goals. Likewise, a school should give careful thought to how any changes in its current structure can best be implemented.

For instance, while moving from annual offer letters to one-time offer letters may help to reduce administrative burden and paperwork, a school may be concerned that if employees no longer receive annual offer letters, they may feel less committed to remaining through the end of a school year, or, conversely, may fear that the school is planning to terminate employees mid-year. Thus, if a school decides to change its offer letter structure, it should consider how to communicate the decision to employees (*e.g.,* through letters and/or in-person meetings) in a manner that minimizes potential confusion or mistrust.

Finally, schools should ensure that their offer letters are consistent with their personnel policies, practices and documents, such as employee handbooks, job application forms and job descriptions.

Please feel free to contact any of our education lawyers if you have questions about your school's employment documents or would like our assistance with reviewing and updating your practices in this area.

It's That Time Again: FY2018 H-1B Filing Is Almost Here

By Julie A. Galvin

Beginning April 3, 2017 (as April 1 falls on a Saturday this year), U.S. Citizenship and Immigration Services ("USCIS") will begin accepting petitions for H-1B visas with start dates of October 1, 2017, the beginning of fiscal year 2018 ("FY2018").

Based on the unprecedented number of H-1B petitions – over 236,000 – submitted during last year's filing window, it is expected that the 65,000 annual cap for H-1B visas will be reached shortly after the upcoming filing window opens on April 3, 2017. If so, USCIS will once again make use of a computer-generated random selection process (known as the H-1B lottery), into which all petitions received during the first five business days beginning on April 3 will be entered.

"…employers who intend to use the H-1B program to hire foreign workers for FY2018 should begin planning now, to ensure that they are ready to file within this short window."

Therefore, employers who intend to use the H-1B program to hire foreign workers for FY2018 should begin planning now, to ensure that they are ready to file within this short window.

H-1B Visas

H-1B visa petitions are filed on behalf of foreign nationals who work in "specialty occupations" - those that require the application of highly specialized knowledge and completion of a Bachelor's degree or higher in the specialty occupation. Common examples of such occupations include, but are not limited to, software engineers, accountants, teachers, and physicians.

The types of individuals for whom employers commonly file H-1B visa petitions include:

- Individuals residing outside of the United States who are subject to the annual H-1B cap (and who do not fall within the "remainder option" exception);
- F-1 student status holders who need H-1B status to continue working after their optional practical training has expired;
- Individuals who currently hold "TN" status under the North American Free Trade Agreement ("NAFTA") and need to commence the green card process;
- L-1s who want to pursue green cards and need the ability to extend their work authorization beyond six years;
- J-1s who are not subject to the two-year home residence requirement or have waived this requirement, and who have limited practical training time remaining and/or live outside the United States; and
- H-4s who are seeking H-1B status in order to work in the United States.

Notably, the annual 65,000 cap on H-1B visas does *not* apply to H-1B visa transfers or extensions, or to foreign nationals working for educational or non-profit research organizations that are exempt from the cap.

Also, 20,000 additional visas (commonly referred to as "advanced degree" H-1B visas) will be made available during FY2018 to foreign nationals who hold advanced degrees from U.S. academic institutions. Employers should consider using this category for candidates who meet the educational requirements of the advanced degree H-1B. However, employers should *not* file multiple H-1B applications for a single employee under different filing categories, as this would violate the filing rules.

Next Steps For Employers

We strongly encourage employers to begin preparing new H-1B petitions promptly, as the annual allotment of visas is likely to be exhausted during the first five days of filing, beginning on April 3, 2017.

It is important to note that the H-1B visa program has come under scrutiny by the new Administration. Although we expect this year's program to move forward without substantial change, we will continue to monitor the situation closely. In addition, legislators have recently introduced bills into Congress that, if passed, would tighten the requirements for the H-1B program. Therefore, employers should be aware that changes to the H-1B program may well occur in the future.

Please feel free to contact us if you have questions or require assistance with the H-1B filing process. The Firm regularly assists employers with preparing and processing H-1B and other employment-based non-immigrant and immigrant visa applications, and we would be happy to help.

2017 Brings Increases In State Minimum Wage Rates

By Brian D. Carlson

As of January 1, 2017, many states – including Massachusetts – have increased their minimum hourly wage rates. In addition, increased minimum wage rates in several other states will take effect later this year.

Employers operating in states affected by these increases should adjust their payroll practices as necessary and prepare to display the requisite new workplace posters.

New Minimum Wage Rates

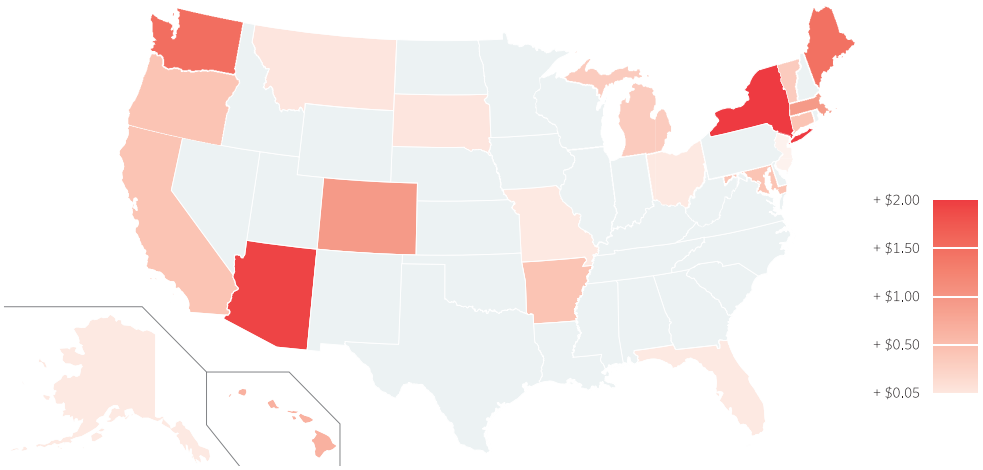
As of January 1, 2017, new minimum wage rates are in effect in the following states:

Alaska	$9.80	(↑ $0.05)	**Michigan**	$8.90	(↑ $0.40)
Arizona	$10.00	(↑ $1.95)	**Missouri**	$7.70	(↑ $0.05)
Arkansas	$8.50	(↑ $0.50)	**Montana**	$8.15	(↑ $0.10)
California	$10.50	(↑ $0.50)[1]	**New Jersey**	$8.44	(↑ $0.06)
Colorado	$9.30	(↑ $0.99)	**New York**	$11.00	(↑ $2.00)[2]
Connecticut	$10.10	(↑ $0.50)		$10.50	(↑ $1.50)[3]
Florida	$8.10	(↑ $0.05)	**Ohio**	$8.15	(↑ $0.05)
Hawaii	$9.25	(↑ $0.75)	**South Dakota**	$8.65	(↑ $0.10)
Maine	$9.00	(↑ $1.50)	**Vermont**	$10.00	(↑ $0.40)
Massachusetts	$11.00	(↑ $1.00)	**Washington**	$11.00	(↑ $1.53)

In a few other states, minimum wage rates will increase July 1, 2017, as follows:

District of Columbia	$12.50	(↑ $1.00)
Maryland	$9.25	(↑ $0.50)
Oregon	$10.25	(↑ $0.50)

[1] For employers with 26 or more employees
[2] For large employers
[3] For small employers



Federal And Municipal Minimum Wage Rates

Despite recent campaigns by service employees and worker advocacy groups to increase the federal minimum wage rate, that minimum rate currently remains at $7.25. President-elect Trump and some Republican leaders in Congress, however, have voiced tentative support for a modest hike, so some type of increase in the federal minimum wage rate appears possible.

As of January 1, 2017, federal contractors must pay covered workers at least $10.20 per hour, while covered tipped employees performing work on or in connection with covered federal contracts must be paid a

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cash wage of at least $6.80 per hour. (These minimum wage rates for federal contractors, however, were adopted under a 2014 executive order issued by President Obama, which the new administration conceivably might modify or rescind.)

Finally, a growing number of municipalities have established their own minimum wage rates in recent years, frequently well in excess of the applicable state minimum wage rates. Thus, businesses that employ workers within such municipalities need to ensure that employees' wages are consistent with those local minimum wage rates.

Recommendations For Employers

In light of these developments, employers are advised to:

- Update their payroll practices as necessary to comply with recent increases in minimum wage rates;
- Ensure that current versions of all required workplace posters relating to minimum wage rates and other employment matters are displayed in the appropriate locations;
- Carefully review all written job descriptions to ensure that employees are appropriately classified as exempt or non-exempt, and that workers are not improperly treated as independent contractors rather than employees; and
- Continue to monitor developments at the federal, state, and local levels regarding minimum wage rates.

Please feel free to contact us if you have any questions regarding recent increases in minimum wage rates or any other wage-and-hour issues.

Jaimie A. McKean Named Partner At Schwartz Hannum PC

Schwartz Hannum PC is thrilled to announce that Jaimie A. McKean has been named a Partner of the Firm. Jaimie's practice focuses on representing employers and educational institutions in litigation matters.

She routinely represents employers and schools before state and federal courts and agencies and has extensive experience in employment matters, claims involving educational institutions, consumer protection cases, internal business disputes and other claims.

Jaimie is a *magna cum laude* graduate of Suffolk University Law School, and a *cum laude* graduate of Framingham State University. Since 2014, she has been selected as a Massachusetts Super Lawyer®, and was named a New England Super Lawyers® Massachusetts Rising Star from 2008 - 2013. She is a member of the Boston Bar Association, Massachusetts Bar Association and the Women's Bar Association.

Prior to joining Schwartz Hannum PC, Jaimie was a senior litigation associate at Cooley Manion Jones LLP in Boston.

What Marijuana Legalization Means For Massachusetts Employers

By Jessica L. Herbster & Gary D. Finley

As of last December, the recreational use of marijuana became legal in Massachusetts, leaving many employers wondering how the new law might impact the workplace. With proper policies in place, the new law should not substantially limit the ability of employers to make hiring and employment decisions based on an employee's recreational marijuana use.

Background

On November 8, 2016, a majority of Massachusetts voters, through a statewide ballot initiative, approved "The Regulation and Taxation of Marijuana Act" (the "Act"). Key provisions of the Act include the following:

- Outside the home, adults ages 21 and over can possess up to one ounce of marijuana for their personal, recreational use.
- Inside the home, adults ages 21 and over may possess up to 10 ounces of marijuana for their personal, recreational use *and* may possess any marijuana produced by up to 6 plants cultivated on the premises.
- An adult may give up to one ounce of marijuana to another adult, but may not legally sell marijuana to another individual.
- Using marijuana in any public place remains illegal.
- Using marijuana in any place where tobacco is banned remains illegal.
- Retail sales of recreational marijuana may begin as early as January 1, 2018, depending on the pace of the state regulatory and licensing process.

Impact On Employers

The new law does not limit the ability of Massachusetts employers to set or enforce policies prohibiting employees' use of marijuana at work. Specifically, the Act provides that it does not "require an employer to permit or accommodate conduct otherwise allowed [by the new law] in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees." Thus, for example, an employer may prohibit employees from using, possessing, or being under the influence of marijuana at work and may require drug testing under

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collective bargaining agreements between employers and unions – the parties simply designate a particular individual to arbitrate all disputes arising under the contract.

Following the conclusion of the hearing, the arbitrator renders a written decision (known as an "award"), setting forth his or her view of the evidence and resolution of the dispute. Generally, an arbitration award is final and binding, and a party may, if necessary, ask a court to enforce the award. Only in very narrow circumstances – for instance, where the arbitrator had an undisclosed conflict of interest or blatantly disregarded the law – will a court overturn or modify an arbitration award.

Advantages Of Arbitration

Resolving disputes through arbitration rather than litigation can offer a number of advantages, including the following:

- Typically, if a specific arbitrator has not been designated in advance, the parties jointly select the arbitrator, from a list of candidates provided by the AAA or other dispute-resolution organization. Because each party is able to "veto" a certain number of candidates, this enables them to avoid those arbitrators they consider least acceptable.
- The interval between the submission of an arbitration demand and the commencement of the arbitration hearing is typically much shorter than the span between the filing of a civil complaint and a court trial. For this reason, disputes often can be decided more swiftly through arbitration than litigation.
- Pretrial motions – a major component of civil litigation – are uncommon in arbitration. This can help make arbitration swifter and less expensive than litigation.
- Similarly, pretrial discovery (*e.g.*, witness depositions and exchanges of documents) normally does not occur in arbitration. (However, the AAA rules provide that an arbitrator may order pre-hearing discovery "consistent with the expedited nature of arbitration.")
- As noted above, an arbitration award may be overturned or modified by a court only in very limited circumstances. Thus, the possibility of a lengthy and expensive appeal and retrial does not loom nearly as large in arbitration as in court litigation.

Downsides To Arbitration

At the same time, parties should consider potential disadvantages to agreeing to resolve disputes through arbitration.

- Arbitration may not necessarily prove less expensive than litigation. For instance, the

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certain circumstances in accordance with the employer's policies and applicable law.

Similarly, there is reason to anticipate that courts will continue to give Massachusetts employers leeway in taking adverse employment actions against employees for *off-duty* use of marijuana. For example, in a 2016 case involving the Massachusetts Medical Marijuana Law, *Barbuto v. Advantage Sales and Marketing, LLC.*, a Massachusetts state trial court found that an employer was not required to accommodate an employee's lawful after-hours use of medical marijuana. Given that use of marijuana for both medical and recreational purposes is now legal, it is quite possible that new challenges will be mounted to terminations prompted by off-duty use. However, marijuana possession and use remain unlawful under federal law, and Massachusetts (unlike certain other states) has no general statute shielding employees from discipline for engaging in lawful off-duty activities. Thus, the likelihood is relatively low of such challenges succeeding.

Practically speaking, it may be difficult for employers to determine whether an employee is impaired by marijuana *during work hours*. The symptoms and indicators of marijuana use are not as obvious as alcohol. Further, unlike with alcohol, traces of THC – the psychoactive chemical in cannabis – may remain in the body for weeks. Under current testing methods, it is often impossible for an employer to determine – based solely on test results – whether an employee was impaired at work or whether, for example, the employee had used marijuana over the weekend. We understand that scientists are currently working on developing a more accurate testing method, but for now, these uncertainties will remain.

Independent schools should note that the Act specifically provides that it does not "authorize the possession or consumption of marijuana or marijuana accessories on the grounds of or within a ***public or private school*** where children attend preschool programs, kindergarten programs, or grades 1 to 12 inclusive . . ." (Emphasis added.) Furthermore, a school, like any Massachusetts employer, may continue to prohibit the use of marijuana by employees in the workplace and schools have latitude to prohibit possession and use in school-provided housing. Of course, the overlay of the Massachusetts Medical Marijuana Law may be relevant.

What Employers Should Do

First and foremost, Massachusetts employers should review their relevant handbook policies. Any drug use policy should specifically address the use of marijuana, focusing on the issue of impairment and identifying prohibited conduct. Employees may not realize that marijuana is still an illegal drug under federal law. Thus, specifically listing marijuana as a prohibited substance is strongly recommended. For independent schools, it will be important to specifically note the law's prohibition of marijuana on campus.

Employers should also revisit the issue of drug testing – both pre-employment and for current employees – and should make sure that any testing is conducted pursuant to a carefully drafted, consistently administered policy. Employers should make sure that – consistent with Massachusetts law – any *random* drug testing policy is narrowly tailored, taking into consideration the employee's job duties and the employer's interests. Conducting testing on a random basis is permitted only in limited circumstances in Massachusetts.

Employers with questions about the new law and its impact on handbook policies and workplace conduct are encouraged to consult counsel.

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fact that pre-hearing motions generally are not a part of arbitration means that the parties normally have to prepare for (and conduct) a full hearing. By contrast, civil lawsuits are frequently resolved through pre-trial motions, making full trial preparation unnecessary.

- Likewise, arbitrations are not always resolved more quickly than civil suits. In particular, when an arbitration hearing stretches over multiple days, as is fairly common, there can be significant intervals between the hearing dates, due to the difficulties of finding dates that fit the busy schedules of the witnesses, the attorneys and the arbitrator.
- An arbitrator generally does not have the ability to issue a preliminary injunction – *i.e.*, an order freezing the status quo in some manner pending the arbitration hearing and award. Thus, before agreeing to include an arbitration provision in a contract, the parties should consider adding a carve-out entitling them to seek preliminary injunctive relief in court.
- The general unavailability of pre-hearing discovery in arbitration can also be a disadvantage, as a party may be unable to obtain important information about its opponent's case in advance of the hearing.
- Finally, if the events giving rise to a dispute involve potential claims against third parties, it may be difficult or impossible to bring those parties into the arbitration proceeding. This could make obtaining full relief much more complicated and expensive.

As these competing factors suggest, whether to include an arbitration provision in a contract is not a simple decision. Our attorneys have a wealth of experience in court litigation as well as arbitration, and we would be happy to help guide your organization in making this determination.

Planning For The Worst: Litigation Or Arbitration?

By Brian D. Carlson

Employment and commercial agreements often include provisions designating how potential disputes between the parties will be resolved. One common term is a stipulation that any controversies arising from the agreement will be decided through binding arbitration, in lieu of court litigation.

Parties often agree to arbitration because they believe it will be a swifter and less expensive means of resolving a dispute than litigation. In many cases, that may well be true. At the same time, however, it's important to be aware that arbitration can also entail potential risks and disadvantages. For this reason, rather than taking a one-size-fits-all approach, organizations should carefully consider whether litigation or arbitration would be a better way of resolving potential disputes under each individual agreement they enter into.

Below, following a short description of the arbitration process, are some important factors to consider in deciding whether future disputes should be resolved through arbitration or litigation.

What Is Arbitration?

In its essence, arbitration is a voluntary, binding dispute-resolution process that takes the place of court litigation. Unlike in litigation, parties typically participate in selecting the arbitrator, pre-hearing proceedings are not extensive, and arbitration hearings are somewhat less formal than court trials.

Frequently, arbitrators are engaged through a professional organization, such as the American Arbitration Association ("AAA"), which assists with the logistical details of the proceeding. This is not required, however, and in some cases – such as many

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Independent Schools Webinar Schedule

March 29, 2017
3:00 p.m. to 4:30 p.m. (EST)
Drawing The Lines:
Exploring Disciplinary Policies
And Protocols

April 6, 2017
12:00 p.m. to 1:30 p.m. (EST)
Getting It Write:
Employee Handbooks

Labor And Employment Seminar Schedule

April 7, 2017
8:30 a.m. – 10:30 a.m.
Avoiding A Discrimination Claim
And Preparing Your Best Defense

April 26 & 27, 2017
April 26: 8:30 a.m. – 4:00 p.m.
April 27: 8:30 a.m. – 4:30 p.m.
Employment Law Boot Camp
(Two-Day Seminar)

May 8, 2017
8:00 a.m. – 11:30 a.m.
Annual Seminar: Hot Topics In
Labor And Employment Law

May 23, 2017
8:30 a.m. – 10:30 a.m.
Trump: The First 100 Days –
A Panel Discussion On The Current
And Future Impact On Employers

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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