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Labor and Employment Lawyers Guiding Management

Labor and Employment Law Update

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Obamacare In A Nutshell? Health Care Law Compliance Requires Immediate Attention From Employers

By William E. Hannum III and Hillary J. Massey [1]

With the second term of President Obama well under way, employers need to take seriously the job of preparing for Obamacare, a.k.a. the Patient Protection and Affordable Care Act (the "Act"), particularly in light of the United States Supreme Court's June 2012 decision upholding the Act. Employers must ensure they are complying with the Act's requirements that are already in effect and preparing for the requirements that will take effect in the near future.

The Act requires nearly all Americans to obtain health insurance through their employer or a government exchange, using penalties and tax credits as incentives. In this article, we offer a general overview of the requirements of the Act from the employer's perspective.

The Act's requirements are still evolving. For example, on January 2, 2013, the Internal Revenue Service ("IRS") issued new *proposed* regulations concerning the Act's implementation. Before the proposed regulations become final, there will be a review and comment period, culminating in a public hearing currently scheduled for April 23, 2013. Employers may rely on these proposed regulations until they are issued (possibly with changes) in final form.

A. Covered Employers

The Act requires covered employers to provide "minimum essential" health care coverage to employees – or pay a penalty for failing to do so. In this regard, the Act also requires individuals, with limited exceptions, to obtain "minimum essential" coverage or pay a penalty, calculated as a percentage of their adjusted gross income (this is the "tax" that the U.S. Supreme Court upheld in June 2012).

The Act applies to employers with 50 or more full-time employees, as defined by the Act. Generally, full-time employees are defined as employees working on average at least 30 hours per week, in any given month. Employers must determine their number of full-time equivalent employees based on the hours worked by all employees (full and part-time) in the prior year. Unfortunately, though, determining how many full-time employees an employer has is not always simple, especially for employers with part-time and seasonal workers.

For example, employers must include the hours worked by part-time employees (*i.e.*, those working fewer than 30 hours per week) in the calculation by dividing their total number of monthly hours worked by 120 hours (thereby converting them into a fraction of a full-time employee).

There is a special rule for seasonal workers as well. If an employer had 50 or more full-time employees for no more than 120 days (or four months) during the prior calendar year, and the employees causing the employer to have 50 or more employees for that period were seasonal workers, the employer is not covered by the Act. Seasonal workers are those who perform labor or services on a seasonal basis. Until further guidance is issued, employers may use a reasonable, good faith definition of seasonal worker based on existing Department of Labor regulations.

Because employers must determine whether the Act applies to them for the first time for 2014, the new proposed regulations provide transitional

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1 *An earlier version of this article appeared in the December 2012 edition of* New England In-House (NEIH). *The Firm is grateful to* NEIH *for its support in publishing this article.*

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Safety Audits For Independent Schools

By Sara Goldsmith Schwartz and Arabela Thomas [1]

Imagine you are an independent school administrator sitting in your office, enjoying your morning cup of coffee, when you receive a telephone call from the school's security officer informing you of two odd events: There is a strange pickup truck parked in front of the administration building, and a student just reported seeing an unkempt man walking around campus carrying a large duffle bag. Do you know what steps you would take next? Do you know whom you would call and what you would say? How would you ensure the safety of the students, employees, and others on campus?

The above scenario is based on events that recently occurred at an independent school in New England — the events, in fact, required a campus lockdown and a comprehensive search of the campus by local and state police, including K–9 units. In a matter of hours, a quaint New England independent school campus was under siege by local and state police, including several helicopters searching the campus and nearby wooded areas. While the police (with their weapons drawn) searched for the intruder, those on campus were shepherded to one location, and students, parents, and visitors attempting to enter the campus were turned away.

Events like this serve as an important reminder that independent schools ought to frequently evaluate the safety, security, and emergency preparedness of their campuses. One of the best ways to do so is through a comprehensive safety audit. In essence, such audits help schools identify areas of security strength and weakness, make improvements to policies and procedures, and prepare schools to respond to a variety of crises. They also offer school administrators a greater peace of mind.

What should your school focus on in a safety audit? Ultimately, each school should determine its own safety audit strategy based on its unique circumstances, including the type of community within which it is located, the age of the students it serves, and the types of safety and security issues that arise most frequently on campus. In general, however, we recommend that schools address at least the following topics: (1) physical security and surveillance on campus; (2) safety-related policies and procedures applicable to students; (3) safety-related policies and procedures applicable to employees, volunteers, visitors, and contractors; and (4) crisis management plans.

Physical Security And Surveillance On Campus

An assessment of physical security and surveillance on campus can be an ideal starting point for a comprehensive safety audit. We recommend that the assessment include a review of the physical plant and grounds, with a particular focus on the areas that may create a heightened risk to safety and security on campus. For example, the safety audit should note if there are any secluded areas on campus that may require additional lighting, access controls, or monitoring.

The cornerstone of a safety audit is often an assessment of whether or not the school has adequate security personnel for its operations. It can also be helpful to assess if the security personnel have received appropriate training and actually serve to deter wrongful conduct on campus. For those schools that do not have security personnel, the safety audit provides an opportunity to assess whether or not the presence of security personnel could improve safety. For example, if an intruder entered a campus that lacked security personnel, how long would it have taken for the intruder to be identified as such and for his presence to be reported to the appropriate personnel on campus?

In addition, a safety audit should include a review of the school's policies and practices regarding security and surveillance. Specifically, we recommend that schools review their policies on visitors, weapons, and security camera surveillance, and their protocols for responding to a discovery of weapons on campus — including the procedure for notifying law enforcement, members of the crisis management team, parents, and students. In the scenario described at the start of this article, the school was able to quickly inform all relevant constituents of the situation and provide frequent updates through the use of text messages, email, and telephone. While this school did not use social media, other schools might want to consider using Facebook, Twitter, and the school's website to quickly disseminate information. While, thankfully, no weapons were discovered on campus, the school was able to communicate quickly with concerned parents, students, and other constituents. The ability to alert relevant constituents to danger in a timely manner can make a difference between life and death, and can also be highly relevant when courts are assessing whether a school appropriately responded to the discovery of weapons on campus.

While a school may have a sense of security because it has been fortunate enough to avoid any significant safety-related problem in recent years, it is essential to avoid falling into a false sense of security. A school that has not confronted significant safety issues in recent years may want to conduct an intruder assessment as part of its audit, to help determine how the school community would react in case of an attempted breach of security. For example, as a part of the audit, a stranger could be sent to campus to document which areas of the school are easily accessible, the amount of time that passed before an employee approached him or her to inquire about his or her reason for being on campus,

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1 *This article is adapted slightly from a version previously published in the Winter 2013 edition of* Independent School. *The Firm is also grateful to* Independent School *for its support in publishing this article.*

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and the effectiveness of the visitor procedures used by the school. The use of such an assessment tool may help schools identify weaknesses in security, thereby preventing crises in the future.

When conducting an assessment of physical security on campus, the focus should not only be on the safety of students and other members of the school community, but also on whether the school adequately stores and protects sensitive documents, such as student records, donor records, applicant files, and personnel files. Consequences associated with unauthorized access to sensitive records can be devastating to institutions, especially because many states require that notification be provided to those individuals whose personal information (such as social security numbers) may have been accessed by unauthorized parties. For example, if an intruder breaks into the admissions office and views applicant files on the admissions officer's desk, the school may be legally required to notify the applicants whose admissions files were accessed. Such notifications are not only time consuming and costly for the school, but may also damage the school's relationship with the affected individuals as well as its general reputation in the community.

Safety-Related Policies And Procedures Applicable To Students

The ideal starting point for an audit of safety-related policies and procedures applicable to students is a comprehensive review of the school's student/parent handbook. Policies included in the handbook regarding key issues (*e.g.*, student discipline, bullying, hazing, driving on campus, drug and alcohol use, and acceptable uses of technology) should provide insight into whether the school is establishing clear and consistent expectations with respect to the safety of its students. The audit should also assess whether the school has the flexibility to customize its responses to violations of policies. For example, if a group of students violates a particular school policy, is the school able to employ a range of disciplinary actions, depending on the extent of the violation and the circumstances surrounding it?

In addition, we recommend that schools assess whether students are following safety-related policies and whether school employees are enforcing them, identify common causes of student failure to follow safety-related policies, and assess whether students are receiving appropriate training and education regarding key policies. For example, if your students saw an unkempt man walking on campus with a large duffle bag, would they report the situation to a school employee or would they open the dorm door for the man?

In general, we find that even schools with well-drafted safety policies often fail to provide an adequate level of training to students regarding key policies. In particular, schools often have detailed bullying prevention plans, but do not provide the students with adequate training so they will know how to respond if they witness bullying or if they are being bullied. As part of the safety audit, schools may find it helpful to solicit information from their students about whether the students would feel comfortable reporting to their teachers or school administrators if they thought that one of their classmates posed a danger to the safety of the school.

How To Conduct A Safety Audit

Once you have decided that your school would benefit from a safety audit, how do you go about conducting it? Here are a few essential tips:

- **Decide who will lead the process:** in-house staff, legal counsel, a safety audit professional? Select an expert who is detail-oriented, has great team-building and communications skills, and is able to complete projects in a timely fashion.
- **Decide who will be on the safety audit team:** administrators, faculty, parents, legal counsel? Make sure that the safety audit team represents a diversity of perspectives. Consider partnering with local law enforcement, emergency responders, and experienced legal counsel. Each of these experts can provide valuable assistance in identifying areas of greatest risk to the school and suggesting ways to efficiently and economically make improvements.
- **Determine the scope of the safety audit.** Will your team conduct an assessment of the overall safety at the school, or will it focus on a limited area, such as workplace safety? Identify the policies and procedures to be reviewed and assessed by the safety audit team. Crisis management plans should be included on the list.
- **Select a variety of audit tools and methods** — including surveys, focus groups, interviews, observations, and trial exercises. Trial exercises can be a particularly powerful method of assessment when evaluating the school's level of emergency preparedness.
- **Establish a timeline for the audit** — one that is reasonable, given your school's schedule and the schedules of your team members — and do your best to abide by it.
- **Involve representatives** from various campus constituencies in the process. For example, schools that choose to involve student representatives in safety audits often find that the students are able to provide highly relevant information regarding key issues, such as the true effectiveness of the school's bullying prevention programs and alcohol and illegal drug policies.
- **Prepare an audit report** that lists the safety audit team's findings and recommendations. Include legal counsel in the drafting so that the attorney-client privilege may cover the process.
- **Prioritize needed improvements** with the assistance of legal counsel, local law enforcement, and/or a safety expert.
- **Implement the suggested improvements!**

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Employers Ignore Union Information Requests At Their Peril

By Todd A. Newman and Brian D. Carlson [1]

The National Labor Relations Board ("NLRB" or "Board") recently ruled that an employer committed an unfair labor practice ("ULP") by failing to respond "in a reasonably timely manner" to a union information request concerning bargaining-unit employees – even though the information sought by the union was ultimately found to be irrelevant to the union's role as bargaining representative.

In *IronTiger Logistics, Inc.*, the employer waited four and one-half months to respond to the union's information request. The Board found this delay to be a breach of the employer's statutory duty to bargain in good faith with the union, regardless of whether the employer actually had an obligation to produce the information requested by the union. According to the Board, the employer "was required to timely provide that information or to timely present the Union with its reasons for not doing so" and therefore committed a ULP by doing "neither."

Further, in accordance with a standard policy adopted by the Board in 2010, the Board ordered that if the employer customarily communicated with its employees via electronic means (*e.g.*, e-mail or intranet postings), then the employer would be required to post the Board's remedial Notice to Employees electronically as well as physically.

The Board provided no guidance on how quickly employers must respond to union information requests in order to satisfy the "reasonably timely" standard. Clearly, though, responding within days, as opposed to weeks or months, should reduce an employer's potential exposure to liability under this decision.

Case Facts

The respondent in the case, IronTiger Logistics, Inc. ("ITL"), is an interstate freight shipper whose drivers are represented by the International Association of Machinists and Aerospace Workers (the "Union"). ITL is under common ownership with another shipping company, TruckMovers.com, Inc. ("TruckMovers"), whose employees are not represented by the Union.

Under an arrangement between these two companies, TruckMovers determined which loads would be assigned to ITL for delivery and which loads would be assigned to its own drivers for delivery. In this regard, ITL and the Union clarified in a Letter of Agreement that the loads assigned to TruckMovers's drivers were not ITL's, and that their delivery by TruckMovers would not be considered subcontracting.

On March 29, 2010, the Union filed a grievance under its collective bargaining agreement ("CBA") with ITL. The grievance alleged that ITL was violating the CBA by failing to list all available delivery assignments on its dispatch board.

Two weeks later, on April 12, 2010, the Union submitted an information request to ITL, asking for information concerning all units of work dispatched to ITL's and TruckMovers's drivers over the previous six months. On May 7, 2010, ITL provided a detailed 29-page response containing a list of all loads assigned to the companies' respective drivers over that time period.

Nevertheless, on May 11, 2010, only four days after receiving ITL's response, the Union submitted a supplemental information request to ITL, seeking detailed responses to ten specific inquiries. Eight of these ten inquiries concerned TruckMovers's drivers, even though the Union did not represent those drivers.

Viewing the Union's supplemental information request as harassing and burdensome, ITL did not promptly respond. Consequently, on July 15, 2010, the Union filed a ULP charge against ITL, contending that ITL's failure to promptly respond constituted a failure to bargain in good faith under the National Labor Relations Act ("NLRA"). ITL eventually responded to the supplemental information request, but not until September 27, 2010.

In the course of the ULP pre-hearing proceedings, the Union conceded that ITL was not legally obligated to provide the requested information. Thus, the sole question presented to the administrative law judge ("ALJ") hearing the case (and, ultimately, the Board) was whether ITL had violated the NLRA by waiting more than four months before providing any response to the Union's supplemental information request.

NLRB's Decision

The ALJ concluded that ITL had violated the NLRA through its delay. In a 2-1 decision, by Chairman Mark Gaston Pearce and Member Sharon Block, the NLRB affirmed the ALJ's decision, holding that ITL "was required to timely provide [the requested] information or to timely present the Union with its reasons for not doing so."

In its holding, the Board relied and expanded upon some long-established principles under the NLRA. In brief, those principles hold that:

1. An employer generally must provide to a union, upon request, and in a reasonably timely manner, information relevant to the bargaining relationship;
2. Information relating to bargaining-unit employees is presumptively relevant and therefore must be provided unless the

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1 *This article previously appeared in the February 2013 edition of* New England In-House (NEIH). *The Firm is grateful to* NEIH *for its support in publishing this article.*

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employer can show that the information is not, in fact, relevant to the bargaining relationship;

3. If an information request does *not* relate to bargaining-unit employees, the employer need not produce the requested information unless the union demonstrates its relevance; and
4. An employer must provide a timely response to a union's request for relevant information even if the employer believes it has grounds (such as confidentiality concerns) for not providing the information itself, in which case the employer must at least respond by providing the basis for its objections.

In affirming the ALJ's decision, the Board clarified that the last of these longstanding principles encompassed union requests for *presumptively* relevant information. Thus, whenever a union requests information relating to bargaining-unit employees, the employer must now provide a timely response to the request, even if the employer is not required to produce the information itself.

Accordingly, the Board held that ITL had violated the NLRA by failing to provide a reasonably timely response to the Union's supplemental information request, as two of the ten inquiries contained in this supplemental request concerned ITL's drivers. In this regard, the Board opined that when a union requests presumptively relevant information, "it is reasonable for the union to expect production of the information, unless and until the employer notifies it otherwise."

The Board added that there are "good policy reasons" for requiring an employer to respond in a timely manner to a request for presumptively relevant information, even if the employer is not actually required to produce the information. The Board explained that requiring such responses could help to avoid unnecessary ULP charges by "encouraging the parties themselves to address potential disputes before they disrupt the collective-bargaining relationship and burden the parties and the public with the cost of administrative investigation and litigation."

Dissenting from the majority's holding, Member Brian Hayes emphasized that the Board had never previously required employers to respond to union requests for irrelevant information. In Member Hayes's view, by requiring employers to respond to every request for information relating to bargaining-unit employees, the *IronTiger Logistics* decision "gives even greater latitude for unions to hector employers with information requests for tactical purposes that obstruct, rather than further, good-faith bargaining relationships."

ITL has appealed the Board's decision to the U.S. Court of Appeals for the D.C. Circuit, so it is possible that the holding may ultimately be reversed or modified – particularly in light of the D.C. Circuit's recent holding that President Obama's recess appointments to the Board in January 2012 were constitutionally invalid. However, the NLRB has long asserted that it is not bound by decisions of the U.S. Courts of Appeals, apart from the specific cases in which they are issued. Thus, even if the D.C. Circuit reverses or modifies the *IronTiger Logistics* decision, the Board could take the same position in a subsequent case.

Recommendations For Employers

In light of the Board's decision, there are a number of important steps that unionized employers should consider taking.

First, employers should consider responding to *all* union information requests, irrespective of their subject matter. Although the *IronTiger Logistics* holding applies only to information requests relating to bargaining-unit employees, it is not always clear whether an information request falls into this category. Providing some type of response – however brief – to any union information request is unlikely to be unduly burdensome and can help protect an employer against a potential ULP charge.

Second, employers should bear in mind that the Board's decision requires a timely *response* to a union information request – and not necessarily production of the underlying information. If the information sought by the union is not relevant to the collective-bargaining relationship, or if there is some other legal basis for withholding it, then the employer is not obligated to provide the information. As noted, though, in such a case, it would be prudent for the employer to explain the basis for its objections in its response.

Third, employers should make certain to respond to union information requests in a reasonably timely fashion. Notably, the Board has declined to establish any *per se* rule as to how quickly an employer must respond. Rather, as the Board explained in a 2003 decision, an employer must respond "as promptly as circumstances allow," considering such factors as "the complexity and extent of information sought, its availability and the difficulty in retrieving the information."

Finally, employers should be aware that an information request need not be conveyed in any particular format, or even in writing. For instance, union representatives often request information orally during labor-management meetings and do not always confirm such requests in writing. Thus, employers should be vigilant for informal union information requests and provide reasonably timely responses.

Schwartz Hannum Is Thrilled To Announce That **Jessica L. Herbster** Has Become Managing Partner

The Firm is thrilled to announce that Jessica Herbster has been named **Managing Partner,** overseeing the management of day-to-day operations. (Sara continues as President, and Will as Managing Partner, as well.)

Please join us in welcoming her into this new role and extending a most sincere congratulations to Jessica!

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relief: in determining whether it must provide health care coverage in 2014, an employer may review any consecutive *six-month* period in 2013. The regulations suggest that an employer may wish to use March through August 2013 to determine its status, leaving September through December 2013 to make any adjustments to its plan (or to establish a plan).

The same coverage rules apply to non-profit and for-profit employers alike, *i.e.*, if a non-profit has 50 or more full-time equivalent employees, the non-profit must provide health insurance to all full-time employees.

B. Requirements Already In Effect

All health insurance plans offered by employers to employees must include the requirements of the Act that are already in place for all plans, including: (i) mandatory coverage of participants' adult children up to age 26; (ii) ban on lifetime caps on coverage; (iii) ban on exclusions for pre-existing conditions for children under age 19; (iv) restriction on annual limits on coverage; (v) mandatory provision of "medical loss" rebates to enrollees; (vi) mandatory provision of Summary of Benefits and Coverage; and (vii) all other requirements discussed below.

Summary Of Benefits And Coverage ("SBC"): The mandatory SBC is a concise and comprehensible description of health plan benefits. Generally, the SBC must not exceed four double-sided pages of 12 point font. Employers were required to provide SBCs on the first day of the first open enrollment period beginning on or after September 23, 2012, to participants in a group health plan. Where renewal is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year. The rule applies to all fully insured and self-insured plans, with limited exceptions such as HIPAA-excepted plans (including stand-alone dental or vision plans). The Departments of Labor, Health and Human Services, and Treasury have issued guidance on preparing an SBC, setting forth extensive requirements concerning content, form, and appearance, and providing model forms. The Act imposes a fine of up to $1,000 per day per enrollee for any entity that willfully fails to provide an SBC.

W-2 Disclosures For Larger Employers: Employers that file more than 250 W-2s were required to disclose the value of health care benefits on each employee's 2012 W-2 form, issued in January 2013. The Form was required to report the "aggregate cost" of "applicable employer-sponsored coverage," which includes the amounts paid by the employer and employee.

Contributions To Health Flexible Spending Accounts ("Health FSAs"): For plans beginning on or after January 1, 2013, the Act places a $2,500 limit on amounts an employee may defer by salary reduction to a Health FSA maintained under a cafeteria plan. The limitation is indexed to the Consumer Price Index for tax years beginning on or after January 1, 2014. Employers must ensure that open enrollment materials accurately reflect the new limit.

Medicare Tax Withholding: For tax years beginning with 2013, employers must withhold additional Medicare taxes from the wages of high-earning employees. The Medicare tax rate will increase by 0.9% (from 1.45% to 2.35%) on wages over $200,000 for single filers, over $250,000 for joint filers, and over $125,000 for persons who are married but filing separately. There is no employer match for the tax and no requirement for employers to notify employees of the increase.

Grandfathered Plans: Other current requirements of the Act do not apply to "grandfathered plans," *i.e.*, group health plans in which individuals were enrolled on March 23, 2010. The Act's grandfathering provision protects the ability of individuals and businesses to keep their grandfathered coverage, while ensuring the additional protections outlined above. Plan sponsors must provide a specific notice in any plan materials of its status as a grandfathered plan. Plans lose their "grandfathered" status if they significantly cut benefits below those provided on March 23, 2010. New employees and their family members may enroll in grandfathered plans as well.

Requirements For New Plans Only: The Act's requirements that currently apply to *new* plans but not grandfathered plans include: (i) free in-network preventive health care and immunizations; (ii) mandatory internal and external appeals processes for adverse benefits determinations; (iii) limits on deductibles that may be imposed by employer-sponsored plans; and (iv) rules prohibiting discrimination as to eligibility or benefits in favor of highly compensated individuals.

C. Required "Exchange Notice" To Be Provided To Employees In 2013

On January 24, 2013, the Departments of Labor, Health and Human Services, and Treasury issued Frequently Asked Questions ("FAQs") concerning the Act. The FAQs postponed a requirement for employers to provide written notice to their employees of the existence of the state and federal health insurance exchanges. The Act required employers to provide, by March 1, 2013, an "exchange notice" to current employees, notifying them of the existence of a state or federal health insurance exchange. (The Act provides federal funding for each state to create a health insurance marketplace offering qualified health insurance plans at four different levels. States are not required to create an exchange, and any voids will be filled by the federal government.)

Because some states had not yet finalized their plans with respect to establishing an exchange, the FAQs announced an extension of this notice requirement to the "late

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summer or fall of 2013." The employee notice must be tailored to the circumstances in each state and include a description of the services provided by the relevant exchange and contact information for the exchange. Employers must also provide the notice to new employees at the time of hiring. The FAQs stated that the Department of Labor likely will provide a model notice and additional guidance before the requirement takes effect.

D. Deadlines In 2014 That Require Employers' Attention Now

Employers should also begin to prepare now for a number of requirements that will become effective in 2014.

"Play or Pay" Employer Requirement: Beginning January 1, 2014, employers with 50 or more full-time equivalent employees must "play or pay" – meaning that employers must either:

- "Play" – *i.e.*, offer at least 95% of its full-time employees (i) an "affordable" health plan (a plan for which the premium for single coverage does not exceed 9.5% of employees' W-2 income) that (ii) provides "minimum value" (employer covers at least 60% of the costs of benefits). Federal regulators have preliminarily approved three approaches for determining whether health coverage provides "minimum value," including the use of a "minimum value calculator" (to be provided by a federal agency), compliance with safe harbors, or certification by an actuary; or
- "Pay" – *i.e.*, if (i) an employer fails to "play" and (ii) any full-time employee purchases insurance through an exchange and receives a subsidy, then the employer will "pay" a penalty. The penalty amount depends on which requirement is violated, *i.e.*, whether the employer fails to offer any health insurance, or offers a plan that is not "affordable" or does not provide "minimum value." The penalty in 2014 for failing to offer any coverage equals the number of full-time employees minus 30 multiplied by $2,000. The penalty in 2014 for failing to offer coverage that is "affordable" and provides "minimum value" is $3,000 per year (assessed on a monthly basis) for only those full-time employees who actually receive subsidized health coverage through an exchange.

For certain employees, including new variable hour and seasonal employees and certain ongoing employees, an employer may not be able to easily determine whether the employee will work (or already works) an average of at least 30 hours per week. To address this issue, the IRS and Departments of the Treasury, Labor and Health and Human Services have established a "safe harbor" that relieves employers of the need to monitor the hours of each employee on a monthly basis. In short, an employer may monitor the hours of

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Schwartz Hannum Is Thrilled To Announce That **Susan E. Schorr** Has Joined The Firm As An Associate

Susan received her Juris Doctor Degree from Boston College Law School. She obtained her MPA from the Columbia University School of International and Public Affairs and her MSW from the Columbia University School of Social Work. Susan received her undergraduate degree from Yale University with a Bachelor of Arts in English. After receiving her law degree, Susan clerked for the Honorable Justices Donald H. Marden, Nancy Mills and S. Kirk Studstrup of the Maine Superior Court.

Susan is a member of the Firm's Education Practice Group. Prior to working at the Firm, Susan was part of the in-house legal team at Boston Children's Hospital, where she advised clinical staff on a variety of patient care issues on a real-time basis, in addition to supporting counsel handling malpractice and employment litigation. Susan also handled a range of civil litigation and administrative law matters while in private practice at Curtis Thaxter LLC in Portland, Maine.

In the school context, Susan is particularly experienced in counseling heads of school on parent, child, and institutional relationships and conflicts, updating enrollment agreements, and staff, faculty and parent/student handbooks. Susan advises clients on school governance and administration; and employee hiring, discipline and termination. She is seasoned at mediation and at shepherding clients through crisis management situations.

Susan also has significant professional experience as a social worker and public administrator, having worked at public child welfare and social service agencies in New York City, Oakland, and San Francisco.

Susan is a member of the bars of the Commonwealth of Massachusetts and State of Maine. She is also admitted to practice before the United States District Courts for the District of Massachusetts and the District of Maine, and the United States Court of Appeals for the First Circuit.

Susan is a member of the Boston Bar Association and the Maine State Bar Association.

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such employees over a three-to-twelve month "measurement" period in order to determine whether coverage must be offered to those employees during a subsequent "stability" period. The permissible length of the "stability" period depends on the type of employee (*i.e.*, ongoing employees versus new variable hour or seasonal employees) and whether the employee is determined to be a full-time employee during the measurement period. The proposed regulations establish a special transitional rule pertaining to the length of stability periods beginning in 2014.

Because employers may need time between the end of the measurement period and the beginning of the ensuing stability period to determine which employees are eligible for coverage, and to notify and enroll employees, the proposed regulations allow an employer the option of having an administrative period between the end of the measurement period and the start of the stability period. The administrative period may last up to 90 days.

Employers are *not required* to use this measurement period safe harbor. If they do, however, they may not modify the measurement period or stability period once the measurement period has begun. In addition, the length of the periods must be uniform for all employees. An employer may, however, apply different measurement periods, stability periods, and administrative periods for the following categories of employees: (1) each group of collectively bargained employees covered by a separate collective bargaining agreement, (2) collectively bargained and non-collectively bargained employees, (3) salaried employees and hourly employees, and (4) employees whose primary places of employment are in different states.

The proposed regulations provide that for fiscal year plans, employers are required to comply with the "play or pay" requirement by the first day of the 2014 plan year (as opposed to having to comply by January 1, 2014). This transitional relief applies to employers who maintained a fiscal year plan as of December 27, 2012, and applies with respect to employees (whenever hired) who would be eligible for coverage under the eligibility terms of the plan as in effect on December 27, 2012.

The proposed regulations further clarify that, in calculating hours of service to determine whether an employee is full-time, an employer must include all hours worked as well as all hours for which an employee is entitled to payment (including vacation, holiday, and sick time). All periods of paid leave must be included.

The proposed regulations address the treatment of new variable hour or seasonal employees who have a change in employment status during the initial measurement period (for example, in the case of a new variable hour employee who is promoted during the initial measurement period to a position entailing more than 30 hours of service per week), establishing when they must be treated as full-time employees for purposes of the "play or pay" requirement. The proposed regulations further establish rules to determine when employees who have had a break in service during a measurement period may be treated as terminated and rehired (*i.e.*, as new employees), and when they must be treated as having merely resumed service.

In order to avoid paying penalties, employers must begin to prepare for the "play or pay" requirement now, by (i) analyzing which employees are eligible for coverage, (ii) tracking employees' hours to determine which employees work 30 or more hours per week, (iii) monitoring the W-2 income of employees to make sure the premiums for the most affordable single option equal less than 9.5% of their W-2 income, and (iv) confirming that the employers' plans provide "minimum value." After this analysis, some employers may decide to pay a penalty rather than offer fully compliant health insurance coverage.

Limitations On Waiting Periods: For plan years beginning on or after January 1, 2014, employers with at least 50 full-time employees may not impose waiting periods of greater than 90 days for participation in employer-sponsored plans, and will face a penalty if they do so. For variable hour and seasonal employees, employers must review and comply with the guidance concerning "measurement" periods in order to ensure compliance with the 90-day limitation.

Automatic Enrollment: After the government issues applicable regulations, which are expected in 2014, employers with more than 200 employees will be required to automatically enroll new employees in a health care plan and provide notice of the employees' right to opt out.

Limitations On Health Reimbursement Arrangements ("HRAs"): The FAQs address the use of employer-provided HRAs to fund employee purchases of individual coverage on the government-run health care exchanges. The FAQs distinguish between HRAs that are "integrated" with other coverage as part of a group health plan and HRAs that are not integrated. When an HRA is integrated and the other coverage complies with the Act's prohibition (effective January 1, 2014) on lifetime or annual limits on the dollar value of "essential health benefits" (which will be defined in each state), the fact that benefits under the HRA may be limited does not violate the Act. However, an HRA that is *not* integrated with group health plan coverage *is* subject to the Act's prohibition on annual dollar limits. The FAQs establish that an employer-sponsored HRA cannot be integrated with individual coverage, such as coverage obtained through an exchange.

E. Tax Credits For Smaller Employers

Employers, including non-profits, with fewer than 50 employees are not required to provide health insurance coverage to their employees. Tax credits for doing so have been in effect since 2010 for employers who

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Obamacare In A Nutshell? Health Care Law Compliance Requires Immediate Attention From Employers

(i) have fewer than 25 full-time employees, (ii) have average annual wages of less than $50,000 per full-time employee, and (iii) pay at least 50% of the premium cost for each employee. The maximum tax credit is 35% for eligible small employers and 25% for eligible tax-exempt organizations. In 2014, the maximum credit will increase to 50% and 35%, respectively. The credit is refundable for tax-exempt organizations. Smaller employers should contact their tax adviser to determine the tax implications of providing coverage.

F. Recommendations For Employers

Some of the Act's requirements will be quick for employers to address, while others will require substantial time and effort on the part of employers. We recommend beginning with the following steps:

1. Designate a health care compliance champion in the organization;
2. Determine whether your organization is a covered employer;
3. Determine which requirements currently apply to your organization, and ensure you have met them (*e.g.*, providing an SBC to employees);
4. Develop a plan for compliance with the upcoming mandatory notice of health insurance exchanges;
5. Review your plan(s) and prepare for the "play or pay" requirement, including tracking and reviewing relevant data, such as employees' hours;
6. Review the status of any grandfathered plans, *i.e.*, whether any changes have caused a plan to lose grandfathered status;
7. Verify that at least one single coverage plan is "affordable" and offers "minimum value";
8. If the organization does not have at least one plan that complies with the "play or pay" requirement, then estimate potential penalties, tax impact and other factors (*e.g.*, employee morale) to determine whether to increase coverage to satisfy the requirements, to pay a penalty, or to pursue other options, such as reducing the number of full-time employees and increasing the number of part-time employees; and
9. Continuously monitor ongoing government guidance for changes, updates and developments in the law (*e.g.*, new regulations are coming out frequently) to ensure your organization remains in compliance and meets applicable deadlines.

Please feel free to contact us if you have questions about the Act and related regulations and guidance, or any other labor or employment law issue.

Schwartz Hannum Is Thrilled To Announce That **Lori Rittman Clark** Has Joined The Firm As Of Counsel

Lori received her Juris Doctor Degree, *cum laude,* from Western New England College School of Law, Springfield, Massachusetts, where she was a Note Editor of the *Western New England Law Review.* She received her Bachelor of Arts in Economics and Political Science from the University of Connecticut. After receiving her law degree, Lori clerked for the Honorable Alfred V. Covello, then Chief Judge of the United States District Court for the District of Connecticut. Prior to joining the Firm, Lori was a Partner in the Labor & Employment Group at Hinckley, Allen & Snyder, LLP, in their Hartford, Connecticut office, where she represented management in employment-related claims in federal and state courts, before federal and state administrative agencies, and in alternative dispute resolution. Lori has significant experience counseling employers on a wide range of employment and labor issues, including, but not limited to, wage and hour, leave, anti-discrimination, general personnel issues and issues arising under collective bargaining.

During her years of practice, Lori has represented businesses in non-compete litigation, created and updated employee handbooks, and conducted employee training sessions on topics ranging from sexual harassment awareness and prevention to managing leaves of absence. Lori has also negotiated labor contracts and represented management in grievance and contract arbitrations. She has over 13 years of management-side employment and labor experience in several areas of employment and labor law.

Lori is AV® Rated by Martindale Hubbell, is listed in *Chambers USA America's Leading Lawyers* in the category of Labor and Employment Law, is recognized as a New England *Super Lawyer* in the field of Labor and Employment Law, was selected as a *Top Lawyer* by *Hartford Magazine* in Labor and Employment Law, and named as a *Women in the Law High Achiever* by the *Connecticut Law Tribune.*

Lori is admitted to practice in the State of Connecticut, as well as the United States District Court for the District of Connecticut. Her Massachusetts Bar admission is pending.

Lori is a member of the American Bar Association, the Connecticut Bar Association, and the Hartford County Bar Association.

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Safety Audits For Independent Schools

Safety-Related Policies And Procedures Applicable To Employees, Volunteers, Visitors, And Contractors

Recent media coverage has spotlighted the failures of school employees, contractors, and volunteers to adhere to safety-related policies. A safety audit should certainly include a comprehensive assessment of policies and procedures applicable to these constituencies. Such policies are often included in the employee handbook and, thus, the handbook is a logical starting point for this portion of the audit.

We recommend assessing the clarity of the relevant policies, the frequency with which they are violated, and whether additional education or training regarding specific safety issues may improve compliance. The adequacy of training regarding key safety issues — such as mandatory reporting requirements for child abuse and neglect, safety precautions to be used when transporting students, and plans for prevention of workplace accidents — should also be assessed.

Policies and protocols for selecting and screening employees, volunteers, and contractors can be crucial to ensuring the safety of the school community. In an effort to reduce the likelihood of harm to students, we recommend that each school carefully review its employee selection and background check processes, as well as the practical steps taken to reduce the likelihood of misconduct by employees, volunteers, and contractors. For example, the audit should assess whether delivery persons are required to use designated entrances and whether they have unmonitored access to students. Allowing individuals who have criminal backgrounds to be a part of the school community can have a devastating impact on the safety of the school community and on the school's reputation.

While it is essential to comprehensively screen potential employees, volunteers, and contractors, schools should ensure that their selection and screening protocols do not violate federal or state non-discrimination laws or other applicable legal mandates.

Crisis Management Plan

An obvious goal of conducting a safety audit is to reduce the likelihood of safety-related incidents. Another is to assess and ensure that the school is adequately prepared in case a crisis arises.

The crisis management plan should serve as the first line of defense in cases of security failures and when unforeseen events occur. Accordingly, the audit should assess whether the crisis management plan provides easy-to-follow instructions to be used when responding to a variety of crises. For example, the plan should clearly describe what to do in cases of a bomb threat, bus accident, power failure, severe weather, sexual assault or misconduct, a suicide threat, and an intruder on campus. If any member of administration receives a call regarding an intruder on campus, he or she should be able to quickly access your school's crisis management plan and implement the appropriate crisis response steps.

Prompt and appropriate communication is a critical part of successful crisis management, and the audit should assess whether an appropriate communications strategy is in place in case a crisis arises. Schools should assess whether they have up-to-date contact information for all members of the crisis management team and all members of their community. In some cases, schools may find it valuable to perform drills involving scenarios listed in the crisis management plan so that they can assess how well employees adhere to the directions provided in the plan and identify areas where improvements can be made.

Using Results Of Safety Audits To Make Significant Improvements To Safety

The results and recommendations made by the safety audit team should be compiled and presented for review to the appropriate school administrators — typically, the head of school, the individual responsible for plant management, dean of students, and dean of faculty. The recommendations should generally indicate practical steps that the school can take to implement suggested improvements. The recommendations should also suggest time frames within which the improvements should be made.

We recommend that legal counsel help prepare the safety audit report by identifying and prioritizing those areas that pose the greatest legal risk to the school and that may need to be remedied first. Involving legal counsel in both the safety audit and the audit report can help the school protect information pertaining to the audit through the attorney-client privilege. While the attorney-client privilege generally cannot be asserted over the facts discovered during the audit, it should be helpful in protecting internal discussions and recommendations made in response to the audit. Involving security consultants who are not attorneys typically does not provide the school with such protection. Therefore, even if a school decides to use a security consultant to conduct the safety audit, legal counsel should be involved from the beginning of the process. Many schools have their legal counsel retain the safety consultant and oversee the audit.

Just as the entire audit does not have to be completed in one fell swoop, the suggested improvements can also be completed in steps. Time frames for completing improvements should be customized based on the extent of the weaknesses identified in the report and the resources available to make improvements.

Audits should be periodically repeated (we suggest every three years), with the time between audits used to make the necessary improvements. Repeating audits can provide the school with an opportunity to compare the results over time and determine whether the improvements were actually effective.

Remember, parents choose independent schools partially because they believe the schools provide a safe environment for their children. Properly executed safety audits, guided by experts, can go a long way toward supporting this view. Audits can also help prevent devastating incidents involving students and/or employees, minimize legal risks, and protect the school's reputation. In doing so, safety audits add greatly to the school leadership's peace of mind.

Employment Law Boot Camp

Schwartz Hannum PC has developed a thirteen-hour intensive human resources skills development program in response to the growing challenges confronting our clients.

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Expert attorney instructors will provide extensive written resources, engaging real-life role-plays, and valuable networking opportunities for participants.

Participants will receive a comprehensive Tool Kit containing essential compliance forms, checklists and guidance.

TOPICS WILL INCLUDE:

- Hiring Traps And Strategies
- Jumping Through The Pre-Employment Hoops: Background Checks, Substance Abuse Testing And I-9s
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- Critical Employment Policies – Limit Liability And Exposure While Serving Your Business Needs
- Limiting Exposure To A Wage And Hour Complaint
- Rights And Responsibilities Related To Family, Medical And Other Leaves Of Absence
- Mastering An Effective Investigation Of Alleged Workplace Misconduct
- Facebook, Google+, Twitter And Other Social Media: Friend Or Foe In The Workplace?

WHO SHOULD ATTEND?

Executives, managers, attorneys, and human resources professionals

LOCATION

Schwartz Hannum PC
11 Chestnut Street, Andover, MA 01810

DATES AND TIMES

April 3, 2013 — 8:30 a.m. - 4:00 p.m.
April 4, 2013 — 8:30 a.m. - 4:30 p.m.

REGISTRATION DEADLINE

March 28, 2013

TUITION

$950 *(Note: Tuition is non-refundable)*

Registration is limited.
There will be a maximum of 12 participants. To register, please contact **Kathie Duffy** at (978) 623-0900 or *kduffy@shpclaw.com*

Schwartz Hannum PC also presents ***Employment Law Boot Camp*** at client facilities, tailoring it as requested with some or all of the above-listed topics in single or multi-day programs.

REGISTRATION FORM

Please fill out this registration form completely and return it with payment to: **Kathie Duffy**, Schwartz Hannum PC, 11 Chestnut Street, Andover, MA 01810, T: (978) 623-0900, F: (978) 623-0908, *kduffy@shpclaw.com*

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PAYMENT OPTIONS

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Spring Seminar Schedule

April 3 & 4, 2013
Employment Law Boot Camp
(Two-Day Seminar)
April 3: 8:30 a.m. – 4:00 p.m.
April 4: 8:30 a.m. – 4:30 p.m.

May 8, 2013
Solutions To Legal Challenges Presented By The Digital Era: Tips And Traps For Surviving And Thriving In The BYOD (Bring Your Own Device) Revolution
11:30 a.m. – 1:30 p.m. (lunch provided)

May 14, 2013
Conducting An I-9 Audit: Tips, Traps And Best Practices
9:30 a.m. – 12:00 p.m.

Please visit the Firm's website for further details.

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.

Seminar For Independent Schools

April 23, 2013
Criminal Records Risk Management: Best Practices For Minimizing School Liability With Fingerprinting, SORI, FCRA And More
9:00 a.m. – 11:30 a.m.

Schwartz Hannum 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 represents hundreds of clients in industries that include financial services, healthcare, hospitality, manufacturing, non-profit, and technology, as well as handling the full spectrum of issues facing educational institutions. Small organizations and Fortune 100 companies alike rely on Schwartz Hannum for thoughtful legal solutions that help achieve their broader goals and objectives.

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