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SHPC Legal Update

THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

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IN THIS ISSUE

Sexting At School: The Increasing Need To Promote Cyber Safety And Good Citizenship

By Brian B. Garrett

You may have observed the recent increase in news coverage of sexting incidents involving teenagers. For example, in Duxbury, Massachusetts, high school boys collected revealing or nude photos of over 50 female students into a Dropbox account. In Montgomery, Ohio, an 18-year-old girl committed suicide after her ex-boyfriend circulated nude pictures of her to hundreds of other high school girls, many of whom allegedly harassed the victim at school, calling her a "slut" and "whore." And there have been countless criminal investigations launched into "sexting rings" in states including Virginia, Colorado, Nevada, and Connecticut, some focusing on students as young as 12 and 13 years old.

While stories such as these have been in the national spotlight for years, a recent study shows that teenage sexting is on the rise. The results of the study, published in *The Journal of the American Medical Association,* were revealing: more than one in four teenagers reported that they had received a sext, and 12 percent of participants in the study reported that they had forwarded

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Non-Compete Reform Statute Poses Challenges For Massachusetts Employers

By Jaimeson E. Porter

For years, the business and legal communities of Massachusetts watched and waited for proposed reforms regarding non-competition agreements to become law. Numerous attempts by the Legislature to pass legislation in this area proved unsuccessful, with efforts to work out a bill that both the House and Senate could agree on repeatedly falling short.

This past July, non-compete reform legislation finally passed the Legislature and was signed by Governor Baker. The new Massachusetts law, which went into effect on October 1, 2018, implements significant changes that employers in the Commonwealth need to be aware of.

Background

Non-competition agreements restrict employees from working for business competitors for some period of time after their employment terminates. Up until now, Massachusetts did not have any comprehensive statute relating to non-competition agreements, leaving the courts to develop, on a case-by-case basis, the legal principles governing their enforceability.

Most lawsuits in Massachusetts involving attempted enforcement of non-competition agreements have been resolved at the trial court level, as the crux of such disputes is generally whether a preliminary injunction will be issued prohibiting an individual from accepting a competing position. With little guidance from the appellate courts, employers and employees alike have often

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Sexting At School: The Increasing Need To Promote Cyber Safety And Good Citizenship

a sext without consent. The study further reported that teens were more likely to send and receive sexts with each year they age, a conclusion that "lends credence to the notion that youth sexting may be an emerging, and potentially normal, component of sexual behavior and development."

Legal Considerations

These examples and trends are a sobering reminder that although sexting may be a spur-of-the-moment action by a teenager with no criminal intent, sexting can quickly spin completely out of the teenager's control, and is increasingly being construed as a criminal act under the law.

All 50 states have laws criminalizing the production, possession, and distribution of images depicting sexually explicit activities involving a minor. Many states, however, do not have specific laws related to minors sexting. Therefore, a teen who produces, possesses, or distributes nude photos – even a selfie – could technically be charged with a felony count of child pornography. The same is true of students who tape a sexual encounter, even if the encounter (and the taping of it) was consensual.

In response to such concerns, since 2009, roughly half of the states have enacted laws to address youth sexting. While these laws vary from state to state, they primarily serve to reduce the criminal implications of minors engaging in sexting.

Regardless of whether your state has enacted sexting legislation, teenagers are generally unaware that sending nude or sexually explicit photographs of themselves or other minors may subject them to serious legal consequences, the impact of which could endure for many years. Indeed, to the extent there is no sexting law in your state, prosecution for possession or transmission of child pornography can lead to an individual's being included on the national sex offender list.

Not only does teenage sexting implicate potential child-pornography crimes, but it often falls under states' bullying protection and prevention laws. Bullying – including cyberbullying and related behaviors – is now squarely addressed by laws in every state and the District of Columbia. In addition to prohibiting various forms of bullying, many of these laws require schools to implement communication plans, training, and preventive education. Further, some states, such as Massachusetts, require specified bullying intervention and prevention plans that must be updated biennially.

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Recommendations For Schools

In an effort to help prevent sexting and related bullying claims, and to better respond when such instances arise, we recommend that independent schools take the following measures:

- Ensure that their policies clearly define sexting, including prohibiting such conduct by both the sender and the recipient of the explicit material. A school's policy should outline the potential consequences of engaging in sexting, including possible criminal charges.
- Ensure that their policies and procedures adequately address sexting involving students, employees, volunteers, and all other individuals associated with the school. In particular, a school's policy should prohibit sending or creating any written message, image, or video that contains explicit representations of, or references to, sexual conduct, sexual excitement, or nudity.
- Develop comprehensive protocols for responding to allegations of sexting, including, for instance, limiting the number of people (including school administrators) who possess copies of the sext, addressing the conduct with the students involved, any bystanders, and their families, and evaluating whether to notify appropriate local law enforcement.
- Audit their policies on related topics, such as electronic communications, acceptable use, sexual abuse, sexual harassment, bullying, harassment, retaliation, and intimidation.
- Educate students, parents, employees, and volunteers regarding the school's policies and procedures pertaining to electronic communications, including sexting, and the serious consequences that may result from it.

If you have any questions regarding policies and procedures that may help your school prevent and effectively respond to incidents of sexting, please do not hesitate to contact one of the Firm's experienced education attorneys.

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Non-Compete Reform Statute Poses Challenges For Massachusetts Employers

found it difficult to predict whether a particular non-competition restriction will be upheld.

The state's new non-compete law provides some much-needed clarity in this area. It codifies some basic legal principles that have long been in place, while also incorporating some new and specific limitations on the permissible scope of non-compete agreements.

Summary Of The New Law

The most significant provisions of the new Massachusetts non-compete statute are summarized below:

Limits On Duration

The law now sets, for the first time, a one-year limit on the period of time over which an employer can require a former employee to refrain from competition. Non-compete clauses will be valid for only one year after an employee's departure, *except* where the employee misappropriates trade secrets or otherwise breaches a fiduciary duty to his or her former employer, in which case the non-compete may be enforced for up to two (2) years after the employee's departure.

Limits On Scope

In line with established common-law principles, the new statute provides that a non-compete can be only so broad as is necessary to protect the employer's legitimate business interests. In particular, a non-compete must be "reasonable" in temporal and geographic scope, as well as in the scope of activities prohibited. The statute specifies that a non-compete will be considered presumptively valid if it is limited to (a) those locations where an employee provided services or otherwise had a "material presence or influence" within his or her final two years of employment, or (b) the specific types of services provided by the employee during those final two years.

Garden Leave And Independent Consideration

Perhaps the most significant change brought about by the new statute is a requirement that an employer pay a former employee during any post-employment restricted period. Specifically, an employer must pay a former employee either (a) at least 50% of his or her annual salary for the duration of the restricted period (so-called "garden leave"), *or* (b) "some other mutually agreed upon consideration." In either event, the post-employment consideration must be specified in the non-competition agreement.

Additionally, a non-compete entered into after the start of the individual's employment is valid only if it provides for "fair and reasonable" independent consideration at the inception of the agreement, beyond mere continued employment. This new requirement overturns longstanding Massachusetts court precedents holding that continued employment is sufficient consideration for a non-compete.

Restrictions On Categories Of Employees Subject To Non-Competes

Employers are prohibited under the new law from enforcing non-competes against (a) employees who are non-exempt (*i.e.*, overtime-eligible) under the FLSA, (b) employees age 18 or younger, (c) undergraduate and graduate students working part-time, and (d) employees who are laid off or terminated "without cause." As "cause" is not defined in the statute, it will likely be left to the courts to delineate the scope of this exception.

Review Periods

The new statute mandates that an employer allow a minimum time period for an employee to review a non-competition agreement before being required to sign and return it. For a new employee, a non-compete must be provided either (a) with the formal offer of employment, or (b) at least 10 business days before the employee's first day of work, whichever occurs first. For an existing employee, a non-compete must be presented to the employee at least 10 business days before the agreement is to become effective.

Additionally, for both new and existing employees, a non-compete must state that the employee has the right to consult with counsel before signing the agreement, and the non-compete must be signed by both the employee and the employer.

Effective Date

The new law applies only to non-competes entered into on or after October 1, 2018. Thus, non-competition agreements signed before October 1, 2018 will continue to be evaluated under established common-law principles.

Recommendations For Employers

Massachusetts employers that rely on non-competition agreements should act now to ensure that any non-compete agreements entered into after the statute's October 1, 2018 effective date comply with these new requirements.

Employers should also consider how the new statute may impact their view of non-competes as a business matter. For example, an employer should evaluate whether the value of a given non-compete outweighs the cost of the additional consideration that must be provided to obtain it. Such determinations will depend on a myriad of factors – many of which already inform an employer's decision whether to try to enforce a non-compete, including the nature of the business secrets held by the employee, and the costs of seeking to enforce the restriction.

In analyzing these issues, and in drafting future non-competition agreements, employers would be wise to confer with experienced employment counsel.

Please feel free to contact us with any questions about the Massachusetts non-compete reform statute or non-competition agreements generally.

NLRB Finds Employer's Single Question To Employee About Unionization Unlawful

By Kirsten B. White

A recent decision by the National Labor Relations Board ("NLRB" or the "Board") illustrates the challenges employers face in communicating with their employees during union organizing campaigns. Under Board holdings in this area, employers long have walked a fine – and occasionally unclear – line between lawful free expression and impermissible coercion.

On June 7, 2018 the NLRB ruled, in *Bristol Industrial Corp.*, that a construction contractor unlawfully interrogated an employee by asking the employee whether he had signed a union authorization card. The *Bristol* decision confirms that, in certain circumstances, a *single* question by an employer to an employee about union organizing activity may constitute unlawful interrogation in violation of Section 8(a)(1) of the National Labor Relations Act (the "Act").

Legal Framework

Section 8(a)(1) of the Act forbids employers to "interfere with, restrain or coerce" employees in the exercise of their rights to engage in union organizing or other protected concerted activity.

Under longstanding Board precedent, during the post-petition period before a union election, an employer's interrogation of employees as to their union support or affiliation will violate Section 8(a)(1) if the employer's questions are coercive in light of the surrounding circumstances. In particular, if an employer seeks to force employees to reveal their union sentiments without assurances that no retaliation will result, and without disclosing a valid purpose for the inquiry, the employer will generally be found to have acted in an unlawfully coercive manner.

In determining the lawfulness of employer questions to employees about their union activity, the Board applies a case-by-case analysis of various factors, including (i) whether the employer has a history of hostility toward union activity; (ii) the nature of the information sought; (iii) the identity of the interrogator; (iv) the place and method of the interrogation; (v) the truthfulness of the interrogated employee's reply; and (vi) whether the interrogated employee is an open and active union supporter.

Did You Sign A Union Card?

The *Bristol* decision arose from union organizing activity that took place among employees of Bristol Industrial Corporation, a general contractor in Delaware, in early 2015.

In late February 2015, Bristol's two carpenters signed cards authorizing the Metropolitan Regional Council of Carpenters (the "Union") to act as their collective bargaining representative. About two weeks later, after learning that the Union had filed a petition to represent the carpenters, Bristol's owner asked one of the two employees at issue whether he had signed a union authorization card, which the employee denied. On a later occasion, Bristol's owner told that employee, "I don't want no f****** union on my job site…I don't want a union here."

Within three weeks of those latter statements by its owner, Bristol terminated both carpenters. The Union then filed an unfair labor practice charge with the NLRB challenging Bristol's actions.

Board's Decision

Following a hearing, a Board administrative law judge ("ALJ") ruled that Bristol had violated Section 8(a)(3) of the Act (which prohibits discrimination based on union activity) by terminating the carpenters. However, the ALJ concluded that the owner's question to one of the carpenters about signing a union card was not unlawfully coercive, in part because the questioned employee was one of only two bargaining unit members, both of whom signed authorization cards and were aware that the employer would be notified of the Union's petition.

Upon review, the Board affirmed the ALJ's finding of unlawful termination. In addition – and contrary to the ALJ – the Board held that the owner's question about signing a union authorization card was unlawfully coercive. While the NLRB agreed that there was no evidence of anti-union animus on the employer's part at the time of the owner's question, the Board concluded that all of the remaining factors supported a finding of unlawful interrogation.

In particular, the Board cited the following facts:

- The "interrogator" – who was the sole owner of the business and the employer's highest-ranking individual – directly asked the employee if he had signed a union authorization card.
- The questioning occurred at the worksite, "the source of [the interrogator's] supervisory authority," which the Board found "added to [the interrogation's] coercive tendency."
- The interrogated employee was not an open union supporter.
- The employer directed the question to the employee immediately after it had received notice of an election petition. The Board found that this fact, combined with the employee's untruthful response to the question, "heightened the accusatory tone of the questioning and further demonstrate[d] the coercive nature of the interrogation."

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NLRB Finds Employer's Single Question To Employee About Unionization Unlawful

Finally, the Board weighed the employer's later anti-union statements and discriminatory discharges as further evidence that the question was unlawfully coercive.

Recommendations For Employers

The *Bristol* decision serves as an important reminder to employers to be cautious in communicating with employees about unionization issues during the post-petition, pre-election period. Even a single inquiry about union activities may be deemed unlawfully coercive, particularly if the question seeks to compel an employee to disclose his or her sentiments about unionization. Since the Board can (and often does) order an election to be reheld if it finds that an employer's coercive questioning of employees may have contributed to their voting against unionization, particularly when combined with other unfair labor practices, the consequences of such employer inquiries can be significant.

To minimize these hazards, employers should consider conducting management training at the first sign of organizing activity, to ensure supervisors know how to lawfully communicate with employees about the realities of working in a union-represented workplace. Involving experienced labor counsel in such training and the evaluation of other employer campaign communications can also help an employer avoid common missteps during union organizing.

If you have questions regarding the Bristol *decision or would like assistance in evaluating the risks of potential employee communications in the union organizing context, please contact one of our experienced labor attorneys.*

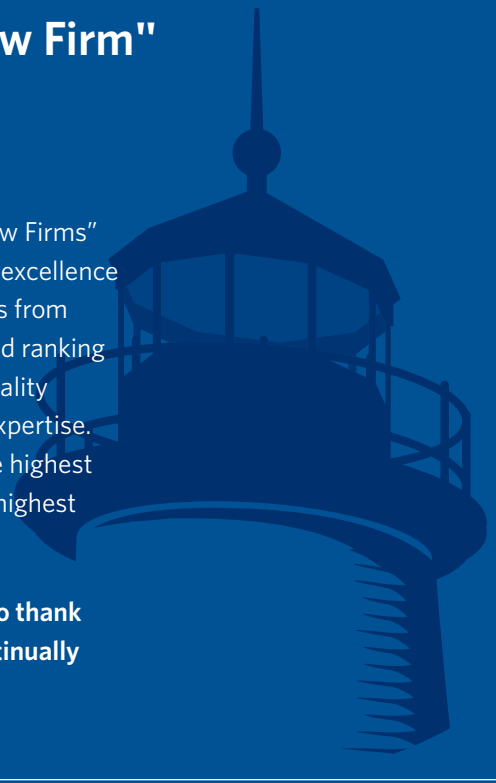
Schwartz Hannum PC Recognized As A **"Best Law Firm"** In U.S. News-Best Lawyers® 2019 Rankings

Schwartz Hannum is pleased to announce it has been ranked in the 2019 **"Best Law Firms" list by U.S. News & World Report and Best Lawyers®** for the third year in a row. The Firm was recognized in the following practice areas for Boston:

- **Labor Law**: Management (TIER 1)
- **Employment Law**: Management (TIER 3)
- **Litigation**: Labor & Employment (TIER 3)

Firms included in the 2019 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise. The 2019 rankings are based on the highest number of participating firms and highest number of client ballots on record.

Schwartz Hannum PC would like to thank its clients and entire team for continually striving for excellence.



New DOL Opinion Letters Provide Important Guidance For Employers

By Anthony L. DeProspo, Jr.[1]

After nearly a ten-year hiatus, the U.S. Department of Labor's Wage and Hour Division ("WHD") recently issued three formal Opinion Letters, setting forth its views on various wage-and-hour issues addressed to WHD by interested parties.

Opinion Letters represent official WHD policy, and are provided to help employers, employees, and other members of the public understand their rights and responsibilities under the law. The Obama Administration officially abandoned WHD Opinion Letters in 2010, but Secretary of Labor Alexander Acosta recently restored the practice of issuing these guidance documents.

The three recently released Opinion Letters address the following issues: (i) whether certain employee travel time qualifies as "work time" under the Fair Labor Standards Act ("FLSA"); (ii) whether an employer must compensate an employee for hourly fifteen-minute rest breaks required by an employee's serious health condition; and (iii) whether various types of lump-sum payments made to an employee constitute "earnings" subject to garnishment limitations under the Consumer Credit Protection Act ("CCPA").

Compensable Employee Travel Time

The first WHD Opinion Letter addresses whether an employee's travel time is compensable in three specific scenarios: (i) an hourly technician travels by plane on a Sunday to a different state to attend a training seminar running Monday through Friday; (ii) an hourly employee, using a company vehicle, travels from home to the company office and then travels to a customer location; and (iii) an hourly technician drives from home to multiple customer locations on any given day.

As to scenario (i), the WHD observes that "travel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties." Conversely, the WHD does not consider worktime to encompass "time spent in travel away from home outside of regular working hours … ." Accordingly, the central issue in this fact pattern is whether travel time is compensable when an employee does not have regular working hours.

Rather than providing a definitive answer as to how this question should be resolved, WHD's Opinion Letter states that whether travel time takes place during an employee's regular working hours should be determined on a case-by-case basis, based on the specific facts. In this regard, WHD carefully scrutinizes an employer's claim that its employees do not have regular working hours. Even if an employee's working hours vary from week to week, trends can be established, and consistencies may be found as to, for example, start and stop times.

…WHD opines that the use of a company vehicle generally does not make otherwise noncompensable travel time compensable.

As for scenarios (ii) and (iii), WHD emphasizes that "compensable worktime generally does not include time spent commuting to or from work," but that "travel from job site to job site during the workday must be counted as hours worked." It is of no consequence, therefore, whether an employee's initial trip takes him or her from home to the employer's office or from home to a customer location. That commuting time is not compensable. Thereafter, however, any travel between work sites *is* compensable.

Finally, WHD opines that the use of a company vehicle generally does not make otherwise noncompensable travel time compensable. This is true provided that "the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee … ."

Medically Required 15-Minute Hourly Breaks

In the second Opinion Letter, WHD opines on whether a non-exempt employee's hourly, 15-minute rest breaks – certified by a health care provider as required by a serious medical condition (and thus covered under the Family and Medical Leave Act ("FMLA")) – are compensable under the FLSA. The WHD concludes that such breaks are not compensable.

While the FLSA does not explicitly define "compensable" time, the Supreme Court has held that the compensability of an employee's time depends on "whether [it] is spent predominantly for the employer's benefit or for the employee's." The Opinion Letter references recent Third Circuit case law holding that short rest breaks of up to 20 minutes "primarily benefit[] the employer." Thus, according to WHD, "rest breaks up to 20 minutes in length are ordinarily compensable."

The Opinion Letter goes on to state, however, that "[i]n limited circumstances … short rest breaks primarily benefit the employee and therefore are not compensable." In the scenario at issue here, taking

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

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a 15-minute break every hour through an eight-hour shift would mean that the employee would perform a total of only six hours of work over that shift. As WHD indicates, this "differ[s] significantly from ordinary work breaks commonly provided to employees."

Further, WHD notes that the FMLA expressly provides that FMLA-leave may be unpaid, and "provides no exception for breaks up to 20 minutes in length." Thus, WHD concludes that because the "FMLA-protected breaks [at issue] are given to accommodate the employee's serious health condition, the breaks predominantly benefit the employee and are noncompensable."

…"[i]n limited circumstances…short rest breaks primarily benefit the employee and therefore are not compensable."

Earnings Subject To Garnishment Limitations Under The CCPA

The last Opinion Letter addresses whether the Consumer Credit Protection Act's garnishment limitations apply to certain lump-sum payments to employees. Title III of the CCPA limits the percentage of an employee's earnings that can be garnished for "the support of any person" – typically, child support.

There is little debate that an employee's regular earnings – whether paid weekly, biweekly, or monthly – fall within the CCPA's garnishment limitations. However, it is less clear whether the CCPA's garnishment limitations apply to infrequent, lump-sum payments made to employees.

In response to a request for specific guidance on this issue, WHD's Opinion Letter analyzes eighteen separate types of lump-sum payments that may be made to employees, including commissions, various forms of bonuses, profit-sharing distributions, moving and relocation expenses, attendance and safety awards, retroactive merit increases, workers' compensation, termination and severance pay, insurance settlements, and buybacks of company shares.

According to WHD, the determinative issue is "the compensatory nature of the payment, *i.e.*, whether the payment is for services provided by the employee." This standard applies regardless of whether a lump-sum payment is one-time or occasional.

The Opinion Letter concludes that the majority of the types of lump-sum payments considered do constitute "earnings" under the CCPA. For example, WHD considers commissions and bonuses to be earnings because they are intended to compensate an employee for personal services rendered. The same holds true for retroactive merit increases, holiday pay, and monies due upon termination.

WHD similarly opines that unusual lump-sum payments – such as signing and referral bonuses, moving and relocation expenses ,and profit-sharing distributions – constitute "earnings" because they are paid out in connection with the employee's provision of services to the employer. Even severance pay tied to an employee's length of service constitutes earnings under the CCPA, in WHD's view, because it is compensation related directly to the employee's service to the employer.

Certain portions of workers' compensation and insurance settlements, however, do not qualify as earnings under the CCPA. WHD observes that workers' compensation payments made to replace lost wages qualify as earnings under the CCPA, whereas reimbursements of medical expenses do *not* qualify. Likewise, WHD states that the portion of settlement proceeds for a claim of wrongful termination attributable to past and future earnings constitutes earnings under the CCPA.

The Opinion Letter concludes that only one of the types of lump-sum payments analyzed unconditionally does not constitute earnings under the CCPA – buybacks of company shares. WHD states that "[t]here is no nexus between personal services rendered and the company's decision to repurchase the stock." Accordingly, lump-sum payments made to an employee pursuant to a stock buyback are not earnings subject to the CCPA's garnishment limitations.

Recommendations For Employers

There are concrete steps employers can take to comply with these WHD guidelines. First, for non-exempt employees who travel and have undefined working hours, an employer may be able to establish regular working hours through time records, or negotiate with employees a reasonable amount of travel time that will be deemed to occur "outside" of regular working hours and, thus, be compensable.

Second, human resources and payroll personnel should identify any non-exempt employees requiring hourly (or similarly frequent) breaks due to medical conditions, and ensure that such breaks are unpaid.

Finally, employers should be mindful that the majority of lump-sum payments made to employees are subject to the CCPA's garnishment limitations.

Employers should pay close attention to these and future WHD Opinion Letters. In addition to clarifying the law, Opinion Letters offer an affirmative defense to monetary liability if an employer can plead and prove it acted "in good faith in conformity with and in reliance on" an Opinion Letter.

What To Expect When You're Facing A Deposition

By Jaimeson E. Porter

It's a harsh reality: sometimes employers and even individual employees get sued. And when workplace disputes turn into litigation, employees are often the first line of witnesses noticed for depositions.

Whether you are a high-ranking executive or manager or an entry-level worker, facing a deposition can be a nerve-wracking experience. A deposition puts the witness in the proverbial "hot seat," where he or she must answer questions asked by a lawyer on the spot and under oath.

Overview

Despite what the movies might suggest about witness interrogation, depositions are usually *not* about proving your case on the record, or exclaiming at just the right moment, "You can't handle the truth!" To the contrary, depositions are primarily about digging for facts, and a day of deposition testimony can often feel long and uneventful.

Nonetheless, depositions can be critically important to a case and should never be taken lightly. Imagine, for a moment, that an incident of alleged employee misconduct occurs while several co-workers are out for drinks after work. One of the employees files a lawsuit, and litigation commences. In a case like this, where there is often little or no documentary evidence, how do the parties investigate the facts to prove what happened that night? By talking to – and deposing – eyewitnesses.

Depositions not only offer a chance to uncover new facts about a case, but also present an important opportunity for a party to showcase to the other side the strength and credibility of its witnesses. A deposition can also present an opportunity for an opposing party to assess an unfriendly witness's demeanor and attack his or her credibility before trial. Finally, depositions can allow parties to ask questions about alleged damages to better understand how much a case is worth.

What To Expect And How To Prepare

While not every answer provided in a deposition might come out as perfectly-crafted as a witness might like, the key rule for anyone about to be deposed is to tell the truth. Beyond that basic principle, however, knowing what to expect from a deposition, and properly preparing for it, can turn even an inexperienced or apprehensive witness into a confident and skilled deponent.

If you find yourself facing a deposition, here are a number of points to keep in mind:

- When you are asked to give deposition testimony in a case, you're usually served with a legal document (a deposition notice or subpoena) telling you where and when to appear. Failing to appear for your deposition can have serious consequences. Thus, if you cannot attend your deposition for whatever reason, make sure you promptly contact the attorney who noticed you as a witness and let him or her know. (Alternatively, if you are being deposed in a case in which your employer is a party, the employer's attorney may be representing you for purposes of the deposition, in which case you can inform that attorney.)
- Typically, depositions are held at the offices of one of the attorneys in a case, or occasionally in another location such as a hotel conference room. Your deposition will be attended by you (the witness), the attorneys in the case, and a court reporter. Depending on the nature of the case, your employer's attorney may be representing you for purposes of the deposition. Alternatively, some witnesses choose to bring their own attorney to represent them at a deposition. Sometimes the parties in a case, or an insurance adjuster, will also attend the deposition.
- If you are being represented by a lawyer at the deposition, take the opportunity to meet with that lawyer in advance to talk about the case and what you know about it, and to go through some practice questions and answers. You will feel much more confident and comfortable in the deposition if you take time to prepare for it.
- Giving a deposition can turn into a long, sometimes tiresome day. You should expect to spend a full day giving your deposition, unless you are told otherwise. Thus, make sure you get a good night's sleep the night before, and have something to eat before you begin.
- To start the deposition, the court reporter will swear you in. After you are sworn in, the testimony you give throughout the day will be under oath.
- The lawyer who noticed your deposition will go first in questioning you. As the witness, you should be mindful that it is important to let the lawyer finish his or her question before you respond. This is important not only for making sure you understand the question, but also for ensuring that the court reporter can accurately transcribe both the question and your answer.
- The lawyers in the case may object and argue. Let them. If you have a lawyer with you who is representing you, your lawyer will tell you when you should not answer a question. Typically, this occurs when you have been asked a question that would require you to disclose attorney-client privileged communications in order to answer the question – in which case, you should decline to answer. Otherwise, you will be generally expected to answer all questions presented to you.
- You will likely be asked about documents in your deposition. If you are presented

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What To Expect When You're Facing A Deposition

with a document, be sure to read it fully, and make sure you understand and are comfortable with what the document says, before agreeing that you have seen it before, making a statement about what the document is, or answering questions about it.

- *Anytime you need it, ask to take a break*. Depositions are not meant to be a race to the finish line. The day is often long, and without breaks, it is easy for a witness to become tired and worn down by questioning. Feel free to indicate that you need to stretch your legs, get a cup of coffee, or use the rest room.
- You can also use a break to speak with your attorney, if you are being represented at the deposition. For instance, if you are unsure about the meaning or scope of any of the other lawyer's questions to you, it may be helpful to talk with your attorney about that.
- After the deposition, you will be given a transcript of your testimony. You should carefully read the transcript and correct anything that the court reporter may have spelled or transcribed incorrectly.

A Few "Dos And Don'ts" For Answering Deposition Questions

- Do tell the truth. This is the number one rule for any deponent. Making a knowingly false or misleading statement can bring severe consequences.
- Do pause and think before answering each question. Consider exactly what is being asked of you, and then provide that information, and *only* that information.
- Don't volunteer information or ramble on unnecessarily. Sometimes, silence makes a witness uncomfortable and prompts him or her to continue talking after answering the question. Don't fall into this trap. State your answer, and then wait patiently for the next question.
- Don't answer questions that you don't understand or know the answer to. If you don't understand the question, ask the attorney to rephrase it. If you don't know the answer, simply say "I don't know."
- Do speak to your personal knowledge – that is, things you saw and heard firsthand. Do not state as fact things you learned of or overheard from others, but did not witness or experience personally.
- Do be confident in your answers, but don't say "always" or "never" unless the answer truly is "always" or "never." Don't exaggerate.
- Don't let the lawyer rattle you. Stay calm.
- If your lawyer interjects "Objection" in response to a question, pause and do not say anything unless and until he or she instructs you to answer the question.
- If you realize that you made a mistake in answering a question and need to correct your answer, don't hesitate to say that. This is very common and nothing to be concerned about.

Giving deposition testimony is rarely a pleasant experience. With careful preparation beforehand and close attention during the proceeding, however, it can be as comfortable and stress-free as possible.

If you need assistance in preparing for a deposition, or with any other aspect of litigation to which you or your employer are a party, please feel free to contact one of our experienced litigators.

Kirsten B. White Honored As A Top Woman Of Law

Schwartz Hannum PC is thrilled to announce that Massachusetts Lawyers Weekly has recognized Kirsten B. White as one of its Top Women of Law for 2018. Kirsten is one of 50 women lawyers from across Massachusetts who were honored on October 18, 2018 for their contributions and accomplishments in the legal community.

Kirsten counsels clients on all aspects of the employment relationship including labor-management relations and collective bargaining agreement administration, crafting and implementing workplace policies, and conducting internal investigations. She has significant depth and breadth in advising employers with respect to the Uniformed Services Employment and Reemployment Rights Act (USERRA), and in the design and implementation of effective and compliant veteran hiring programs.

Congratulations Kirsten, on this exceptional and well-deserved recognition!

Kirsten White Receives Her Award From Susan A. Bocamazo, Esq., Publisher, *Massachusetts Lawyers Weekly*

Sara Goldsmith Schwartz, William E. Hannum III, And **Anthony L. DeProspo, Jr.** Named To **2018 Super Lawyers® List**

Kirsten B. White And **Sarah H. Fay** Named To **2018 Rising Stars®**

Schwartz Hannum PC is thrilled to announce that three attorneys have been named to the **2018 Massachusetts Super Lawyers®** list, and two have been named to the **2018 Massachusetts Rising Stars®** list.



Sara and **Will** have been selected for inclusion in the **2018 Massachusetts Super Lawyers®** list in the area of Employment & Labor Law. They were first acknowledged by Super Lawyers® in 2004. **Tony** has been selected for inclusion in the area of Business Litigation. He was first acknowledged by Super Lawyers® in 2012.


Kirsten and **Sarah** have been selected for inclusion in the **2018 Massachusetts Rising Stars®** list. This is Kirsten's first year on the Rising Stars® list. Sarah was first acknowledged by Rising Stars® in 2017.

Schwartz Hannum PC is proud of its **Super Lawyers®** and congratulates each of them on this achievement. We also extend our congratulations and gratitude to the entire Schwartz Hannum team for their part in this achievement through their continued hard work and excellent client service!

WEBINAR:

Hot Topics In Student Mental Health Issues

January 17, 2019
12:00 p.m. – 1:30 p.m. EST

What is the scope of a school's obligation to protect students from self-harm? Are students with anxiety entitled to accommodations? How should a school respond to a student's threats of violence?

In this webinar, Sara Schwartz will explore the various ways that student mental health issues are manifesting in schools, and will discuss recent, significant case law clarifying the scope of a school's legal duty to protect students from self-harm, how schools should respond when students have expressed suicidal ideation or other mental health issues, and practical solutions for risk management in this complex and quickly-evolving area.

Topics will include:

- A School's Legal Duties Regarding Student Self-Harm In The Wake Of *Nguyen v. MIT*
- Creating A Suicide Prevention Protocol
- Establishing A Process For Student Mental Health Assessment
- Crafting Policies Regarding Medical Leaves

Who should attend?

- Head Of School
- Dean Of Students
- Chief Financial Officer
- School Nurse
- Medical Director
- Counselors

To register for this or any other SHPC program, please contact **Kathie Duffy** at (978) 623-0900 or *kduffy@shpclaw.com*, or visit the "Seminars" page at www.shpclaw.com.

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What Employers Should Know About ICE's Recent I-9 Crackdown

verify that all U.S.-based workers are legally authorized to work in the country. Employers found to have violated their paperwork obligations under IRCA face civil penalties of up to $2,191 per violation.

The penalties under IRCA for knowingly hiring or continuing to employ unauthorized workers are much more severe – up to $21,916 per violation. Further, an individual employer can face criminal fines – and even jail time – if convicted of engaging in a pattern or practice of knowingly hiring unauthorized workers.

The penalties under IRCA for knowingly hiring or continuing to employ unauthorized workers are much more severe – up to $21,916 per violation.

What Employers Can Do Now

In order to be prepared for a potential audit by ICE, employers would be wise to conduct internal audits of their I-9 practices. An I-9 audit is aimed at ensuring that the employer has procedures in place that meet the legal requirements regarding collecting, verifying, and storing I-9 forms, and that the employees responsible for these functions are consistently following those procedures.

Additionally, employers should audit their existing I-9 forms to make certain that a properly completed I-9 form is on file for each current employee and for each former employee still within the retention period.

Employers should also consider whether to involve outside counsel in their I-9 audits. A number of factors may come into play in this determination, including risk tolerance, the size of the organization, and the familiarity of internal personnel with the technicalities of I-9 compliance. Some potential advantages of using outside counsel include having a fresh set of eyes review policies and documents and protecting the confidentiality of the internal audit process via the attorney-client privilege.

Of course, during an internal audit, an employer might discover that one or more I-9s are incomplete or otherwise defective. Some examples of common errors or omissions are missing forms, the lack of a full name on a form, failure to provide a proper title for the document(s) used to establish proof of legal work status, using the wrong version of the I-9, failure to sign the attestation, and failure to provide the date of hire.

Employers that find these types of errors should not panic, as the government is likely to be more lenient when an employer takes proactive measures to correct I-9 errors and oversights. The key for an employer is to be transparent about any corrections it makes, and not to attempt to hide the fact that errors and oversights were made.

Practical tips for correcting I-9s include the following:

- Always cross out mistakes with a red pen, using a single line. Do not attempt to obscure errors by using a black marker or whiteout, or by disposing of incomplete or inaccurate forms.
- Always date and initial changes.
- Never backdate an I-9.
- Remember that only the employee can correct Section 1, and only the employer can correct Section 2.
- If there are multiple errors on a form, the corrections can be made on a new form, as long as the old form is preserved and kept with the new form.
- Include an audit note that explains and clarifies the "what, when and why" of the corrections.

What To Do When ICE Comes Knocking

To put it mildly, being audited by a government agency – particularly ICE – can be a stressful event for an employer. However, employers should be aware that though the government sometimes can demand immediate access to employment-related documents, ICE must give an employer three days' notice before conducting a Form I-9 audit. While an employer can waive this waiting period, we strongly recommend that the employer instead use the time to make sure that all of its paperwork and files are in order, in one place, and in a format that allows for easy review.

In addition, and as with any governmental audit, an employer should consult legal counsel as soon as possible to ensure that the employer understands its legal rights and responsibilities.

Next Steps

Given the current regulatory climate with regard to immigration issues, employers should prepare now for potential ICE audits.

As detailed above, an important step in this process is to conduct an I-9 self-audit and, based on the results of that self-audit, to correct any errors or omissions in current forms and train employees responsible for collecting and completing I-9 forms. An employer contemplating a self-audit should also consider involving legal counsel to assist with these issues and preserve the potential benefits of the attorney-client privilege.

What Employers Should Know About ICE's Recent I-9 Crackdown

By Gary D. Finley

The Trump Administration's "zero tolerance policy" on illegal immigration has not been limited to heightened enforcement of immigration laws along the borders. As recent activity on the part of U.S. Immigration and Customs Enforcement ("ICE") makes clear, employers are also starting to feel the heat.

Recently, ICE released statistics showing that it has made good on the promises made in late 2017 by ICE Deputy Director Tom Horman to increase the number of worksite inspections to deter employers from hiring people without valid work authorization. These efforts resulted in 3,510 worksite inspections (including 2,282 I-9 audits) between October 1, 2017, and May 4, 2018 – more than a threefold increase over the previous fiscal year.

This trend of dramatically increased workplace inspections shows no sign of slowing, with one senior ICE official saying that the agency would eventually like to conduct as many as 15,000 audits per year.

Given ICE's renewed focus on workplace inspections, every employer would be wise to act now to make sure that its I-9 house is in order.

What Is At Stake?

Once audited, employers can face steep penalties for non-compliance with the federal immigration laws. In particular, the Immigration Reform and Control Act of 1986 ("IRCA") requires all employers – regardless of size – to use the Form I-9 to

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Independent Schools Webinar Schedule

December 12, 2018
Employing Faculty: Tips, Traps And Best Practices For Faculty Contracts And Offer Letters
3:00 p.m. to 4:30 p.m. (EST)

January 17, 2019
Hot Topics In Student Mental Health Issues
12:00 p.m. to 1:30 p.m. (EST)

January 30, 2019
Accommodating Applicants And Students With Disabilities
3:00 p.m. to 4:30 p.m. (EST)

February 21, 2019
Getting It Write: Student Handbooks
3:00 p.m. to 4:30 p.m. (EST)

Independent Schools Seminar Schedule

December 14, 2018
Student Misconduct:
Mastering An Effective Investigation In An Independent School
8:30 a.m. to 12:00 p.m.
at Schwartz Hannum PC, Andover, MA

Schwartz Hannum PC focuses on labor and employment counsel and litigation, 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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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.

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