Is Your School Subject To The GDPR?

By Sarah H. Fay

On May 25, 2018, the European Union's[1] General Data Protection Regulation ("GDPR") went into effect, providing significantly greater data privacy and protection to all EU citizens. The GDPR replaces the 1995 Data Protection Directive. While many of the previous principles of data privacy remain the same as under the 1995 Data Protection Directive, the GDPR is designed to be consistent with the way technology is used in modern society.

In addition, and quite notably, the GDPR drastically increases the territorial scope of the 1995 Data Protection Directive, as the GDPR applies to organizations beyond EU territory. Specifically, the GDPR covers all organizations, located both in and outside of the EU states, that offer goods or services to, or monitor the behavior of, individuals within the EU.

As such, businesses and non-profit organizations located in the United States, including independent schools, need to carefully consider whether they fall within the ambit of the GDPR. Independent schools that are covered should quickly take action to ensure that they are in compliance with the GDPR rules. Indeed, any organization that is not in

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1. *The European Union ("EU"), a political and economic union of 28 member states located primarily in Europe, includes the following member states: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. While the United Kingdom is leaving the EU, the GDPR will take effect before the legal consequences of the Brexit vote.*

Matthew D. Batastini Named **Partner** At Schwartz Hannum PC

Schwartz Hannum PC is thrilled to announce that Matthew D. Batastini has been named a partner of the Firm. Matt's practice focuses on representing employers and educational institutions on all aspects of the employment relationship. Matt graduated from Middlebury College with a B.A. in Economics in 2003 and received his J.D., *magna cum laude,* from Seton Hall University School of Law in 2006.

Congratulations, Matt!

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SHPC Legal Update | THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

JUNE 2018

IN THIS ISSUE

Massachusetts Attorney General Provides Guidance On New Pay Equity Law

By Jaimeson E. Porter

The Massachusetts Attorney General's Office ("AGO") recently released a formal guidance document ("Guidance") intended to assist employers in understanding and complying with their obligations under the new Massachusetts pay equity law, which goes into effect on July 1, 2018.

Although the Guidance is not binding on courts, it provides important insight into how the AGO plans to interpret and enforce the new pay equity law. Thus, Massachusetts employers should carefully review the Guidance and consider how their current compensation practices may need to be amended.

Summary Of The New Pay Equity Law

The new pay equity law amends the existing Massachusetts equal pay statute in a manner that significantly expands equal pay requirements in the Commonwealth. In particular, the law dramatically broadens the definition of "comparable" work for which men and women must be paid equally.

Under the new law, jobs are considered comparable if they require substantially similar skill, effort, and responsibility and are performed under similar working conditions. A disparity in compensation paid to male and female employees for comparable work will be deemed unlawful

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Prospective 2018 Ballot Questions Could Prove Costly For Massachusetts Employers

By Gary D. Finley[1]

This coming November, Massachusetts voters may have an opportunity to decide two ballot questions with significant – and potentially expensive – implications for employers within the Commonwealth.

These proposals would (i) increase the Massachusetts minimum wage, in stages, to $15.00 per hour, and (ii) create a statewide program that would provide paid, job-protected family and medical leave for Massachusetts employees.

Though it is not yet clear whether these proposals will be placed on the ballot this fall, Massachusetts employers should keep a close eye on this process and consider how their operations might be impacted if these proposals become law.

Minimum Wage Ballot Question

The first proposed ballot question would gradually increase the minimum wage for employees in Massachusetts, which is currently $11.00 per hour. Specifically, the proposed measure would raise the minimum wage to $12.00 per hour on January 1, 2019; to $13.00 per hour on January 1, 2020; to $14.00 per hour on January 1, 2021; and, finally, to $15.00 per hour on January 1, 2022.

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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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Massachusetts Attorney General Provides Guidance On New Pay Equity Law

unless the employer can show that the disparity stems from one of six specified factors, namely (i) a compensation system based on seniority, (ii) a merit-based compensation system, (iii) a compensation system based on productivity, (iv) differences in job-related education, experience, or training, (v) geographic location, or (vi) travel requirements.

Additionally, the statute prohibits employers from asking job applicants about their salary history before a job offer has been extended.

Under the new law, an employee claiming to have been paid less than a member of the opposite sex for comparable work can sue his or her employer for twice the amount of the difference in compensation, in addition to attorneys' fees and costs. Importantly, however, the new law enables employers to protect themselves proactively from potential equal pay claims, by conducting self-audits of their pay practices and working to remedy any unlawful disparities.

Highlights Of AGO's Guidance

While this article does not cover every aspect of the AGO's Guidance, some of its most significant provisions are summarized below:

Coverage.

- The new pay equity law does not specify which employers are covered. According to the Guidance, however, the statute covers virtually all employers in Massachusetts, irrespective of size, including state and municipal employers. Likewise, in the AGO's view, the statute applies to employers located outside of the Commonwealth if they have employees with a primary place of work in Massachusetts. (However, the statute does *not* apply to employees of the federal government.)
- The statute applies to employees who work primarily in Massachusetts, regardless of their status (*e.g.*, full-time, part-time, seasonal, per diem, or temporary) or where they live. An employee whose home base of operations is inside the Commonwealth is covered under the law, even if the employee regularly travels outside Massachusetts for work. Similarly, if an employee telecommutes to a Massachusetts worksite, Massachusetts is the employee's primary place of work, even if the employee does not physically spend those working hours in Massachusetts.
- Generally, employees within the same geographic area in Massachusetts should be compared to each other in determining whether compensation disparities exist. However, the AGO takes the position that in some situations, an employer may need to consider out-of-state employees - *e.g.*, when the only employees performing work comparable to that of a Massachusetts employee are located out of state.

Criteria For Comparing Jobs.

The Guidance adds some detail to the new law's references to the skill, effort, responsibility, and working conditions entailed by different jobs. In particular:

- "Skill" looks to *the job's* inherent performance requirements, irrespective of employees' individual skills. Skill is measured by factors such as the experience, training, education, and ability required to perform a particular job. For example, in a school setting, both janitor and food service positions generally require little or no previous experience or specialized training. Thus, even though the two positions are substantively different, they may require comparable skill.
- "Effort" takes into consideration the physical or mental exertion required by a particular position. For example, a job that requires standing or other physical exertion all day long is probably not comparable in this respect to a quiet desk job.
- "Responsibility" takes into account factors such as discretion, decision-making, accountability, supervision, and managerial responsibility.
- The "working conditions" involved in different jobs may include the days or times when the work is performed (*e.g.*, daytime versus overnight shifts).
- Differences in education, training, or experience can be a valid reason for paying employees differently for comparable work, so long as such factors are related to an employee's ability to perform a job more efficiently or effectively. For example, a bookkeeper with an accounting degree might be more valuable than a bookkeeper without such a degree, because accounting skills are relevant and useful in performing a bookkeeper's duties, even if an accounting degree is not required for the job.
- In calculating whether employees are receiving equivalent compensation, an employer may include the value of benefits that an employee chooses not to take advantage of, such as health or life insurance, retirement contributions, or tuition reimbursement.
- According to the Guidance, if an employer improperly pays men and women at differing wage rates for comparable work, the employer may not make up the difference by providing special bonuses or other benefits to the underpaid employees. (The AGO's position on this point, however, seems debatable and could be challenged in future litigation under the new law.)
- Part-time and full-time employees may be paid at different hourly rates, or offered different benefits, provided that employees within each category who perform comparable work are offered the same pay rate and benefits.

Compensation Inquiries.

- While inquiring about applicants' salary history at the pre-offer stage is prohibited under the new law, nothing prohibits an employer from asking a prospective employee about his or her *desired* compensation.
- Additionally, an employer may ask about an applicant's previous sales objectives and success in meeting those objectives,

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so long as the employer does not pose such questions in a manner intended to prompt disclosure of compensation history.

Self-Evaluations.

- Whether a self-evaluation is sufficient in detail and scope to provide an affirmative defense depends on various factors, such as whether the evaluation includes a reasonable number of jobs and employees, and whether the evaluation is "reasonably sophisticated" in its analysis of potentially comparable jobs, wages, and the permissible reasons for pay disparities.
- An employer can show "reasonable progress" toward eliminating unlawful pay disparities if it can demonstrate that it has taken meaningful steps to do so after a self-evaluation. "Reasonable progress" takes into consideration factors such as how much time has passed since the evaluation, the nature and degree of the progress in relation to the scope of the pay disparities, and the employer's size and resources. In addition, an employer must be able to show that pay disparities can be eliminated altogether within a reasonable amount of time.

Recommendations For Employers

Massachusetts employers should carefully review the AGO's Guidance and consider conducting a self-evaluation to identify and remediate any unlawful pay disparities. We recommend that any self-evaluation be carried out with the assistance of legal counsel, both to ensure compliance with the new law and to shield the evaluation under the attorney-client privilege to the greatest extent possible.

If you would like our assistance in conducting a self-evaluation for your organization, or if you have any other questions relating to the new pay equity law, please feel free to contact one of our experienced employment attorneys.

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Prospective 2018 Ballot Questions Could Prove Costly For Massachusetts Employers

Additionally, beginning in 2023, and each year after that, the Commissioner of the State Department of Labor Standards would be required to adjust the minimum wage, based on the twelve-month percentage increase, if any, of the Consumer Price Index, as published by the United States Department of Labor.

The proposed measure would also gradually increase the minimum guaranteed hourly wage in Massachusetts for tipped employees. That minimum wage would increase from its current level – $3.75 per hour – to $5.05 per hour on January 1, 2019; to $6.35 per hour on January 1, 2020; to $7.65 per hour on January 1, 2021; and, finally, to $9.00 per hour on January 1, 2022. Thereafter, the minimum wage rate for tipped employees would also be subject to adjustment annually based on the Consumer Price Index.

Finally, this ballot question would create a process that could potentially increase wages for family childcare providers who contract with the Commonwealth to provide services to low-income or at-risk families. Up until now, such workers have generally been excluded from minimum wage requirements. Under the proposed measure, however, the state Attorney General would determine pay rates for

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Independent Schools Seminar & Webinar Schedule

September 20, 2018
Talking Heads In Massachusetts:
Hot Topics And Best Practices In
Employee And Student Risk Management
8:30 a.m. to 12:00 p.m.

October 11, 2018
Risk Management For Off-Campus
Trips And Activities
3:00 p.m. to 4:30 p.m.

October 25, 2018
Drawing The Lines: Exploring Student
Disciplinary Policies And Protocols
12:00 p.m. to 1:30 p.m.

November 8, 2018
Drafting And Enforcing An Ideal
Enrollment Agreement
12:00 p.m. to 1:30 p.m.

November 15, 2018
Contracts And Compensation
For The Head Of School:
Tips, Traps And Best Practices
12:00 p.m. to 1:30 p.m.

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.

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

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

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Prospective 2018 Ballot Questions Could Prove Costly For Massachusetts Employers

such childcare providers that are "substantially equivalent to the minimum wage."

Paid Family And Medical Leave Ballot Question

The second proposed ballot question would provide for employee leaves of absence similar to those protected under the federal Family and Medical Leave Act ("FMLA"), but on a *paid* basis and for differing durations than under the FMLA. The measure would apply to both private and public sector employees, though municipal employees would be covered only if the proposed law were adopted by a vote of the city or town.

Significantly – and unlike many similar leave statutes – a private employer would not have to have a minimum number of employees in order for its employees to be covered.

Under the proposed measure, covered employees would be permitted to take up to 16 weeks per year of paid leave to: (1) care for a child after the child's birth, adoption, or placement in foster care; (2) care for a seriously ill family member; or (3) address needs arising from a family member's active duty military service.

Even more liberally, covered employees would have a right to take up to 26 weeks per year of paid leave to address their own serious medical conditions. Employees would be permitted to use medical leave for inpatient hospital, hospice, or residential medical care, or continuing treatment by a healthcare provider.

In either case, an employee's leave would run concurrently with any leave to which he or she might be entitled under the FMLA or the Massachusetts Parental Leave Act. Further, an employee's total annual leave entitlement under the new law would be capped at 26 weeks, even if the employee were to take separate leaves for family and for medical reasons.

While on leave, an employee would be eligible to receive up to 90% of his or her average weekly earnings, up to a maximum of $1,000 per week.

The proposed law would also create a new Massachusetts Department of Family and Medical Leave, which would issue regulations implementing the law, process applications for benefits, and, when necessary, conduct hearings.

This new benefit would be funded through a trust fund into which employers would initially pay an amount corresponding to .63% of each employee's annual wages, up to the Social Security contribution and benefit base limit. Up to one half of the .63% could be funded through deductions from employees' wages. Self-employed individuals who elect coverage and businesses that contract with self-employed individuals would each be required to pay one-half of the required .63%. This contribution rate would be reviewed and adjusted annually to ensure adequate funding.

Contributions to the trust fund would begin six months after the effective date of the proposed law, and covered workers could begin taking paid leave beginning 18 months after the effective date.

The proposed law would include an anti-retaliation provision, prohibiting employers from taking adverse action against employees for exercising their rights under the law. At the same time, the measure would offer some protections for employers, including requiring employees to give reasonable notice of their intention to take leave and provide documentation establishing that the requested leave is covered by the law.

The Ballot Question Process

The process for enacting these measures passed an important milestone last December, when Massachusetts Secretary of State William Galvin certified that supporters had obtained the necessary numbers of voter signatures for the proposals to be sent to the Massachusetts Legislature.

Since the Legislature did not act on the proposed measures by the applicable deadline – the first Wednesday in May – proponents of each bill must gather 10,792 additional signatures by early July. If enough signatures are gathered, the proposed law will be submitted to Massachusetts voters in the November 2018 election.

Finally, if the proposed measures are successfully placed on the November ballot, enacting each of them into law will require that (i) a majority of the voters weighing in on the measure vote "yes," and (ii) at least 30% of all voters casting ballots in the election vote in favor of the measure.

What Massachusetts Employers Should Do

Both the proposed minimum wage increase and the proposed paid family and medical leave measure are likely to prove popular with voters if they make it onto the November ballot. As employers will recall, it has been only four years since a similar measure, providing for mandatory paid sick leave, was easily approved by Massachusetts voters.

Accordingly, Massachusetts employers would be wise to begin considering now the financial and operational impacts that these measures would bring for them. In addition, employers are encouraged to consult experienced employment counsel to assist them in understanding the details of the proposed laws, particularly the paid family and medical leave statute.

Finally, employers with concerns about the proposed measures might consider joining advocacy groups in order to more effectively articulate their opposition and perhaps lobby for compromise legislation. In particular, the Associated Industries of Massachusetts, which represents approximately 4,000 member employers, has expressed opposition to both proposals, based on the substantial costs they would pose for employers.

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Amendments To Federal Rule 23: Get Ahead Of The Coming Changes To Class Actions

By Brian B. Garrett

The U.S. Supreme Court recently approved significant amendments to Rule 23 of the Federal Rules of Civil Procedure, which governs federal class actions. These amendments focus primarily on notice, settlement, and objection requirements and procedures, providing parties and courts with much needed guidance.

Unless Congress rejects any of these changes, the amendments will take effect on December 1, 2018. Employers facing federal class actions, however, would be well-served to understand and prepare for these changes in advance of the effective date.

Modernizing Class Notice

The pending amendments to Rule 23 expressly recognize contemporary communication methods of providing notice to individual class members. Under the current rule, courts must direct to class members "the best notice that is practicable under the circumstances." The amendment clarifies that such notice "may be by United States mail, electronic means, or other appropriate means." The amended rule does not specify any particular means as preferred.

Traditionally, courts read Rule 23 to require notice by first class mail. Over time, however, courts have authorized notice by other forms of communication, such as electronic mail, for the sake of efficiency and reducing costs. The amendment acknowledges this development and normalizes the use of modern technology as a likely conduit of class notice. Indeed, the addition of "electronic" or "other appropriate means" should prompt parties to think more broadly about potential avenues of communicating notice, such as through text messages or social media.

Notwithstanding this proposed change, the comments to the amendments note that it is important to remember that in some cases, class members may have limited or no access to email or the internet. The comments therefore caution that electronic means should not become a default mode to match modern times; rather, parties and courts should think critically about what means would be most appropriate on a case-by-case basis. Factors to consider include, but are not limited to, the age, socioeconomic status, and geographic locations of the potential class members.

In addition, the comments note that parties should think critically about the proper *form* of notice to class members. The goal is to sufficiently enable potential class members to make an informed decision as to whether they should opt out. Courts and parties are therefore encouraged to consider using class notice experts or professional claims administrators in devising the proper form of notice.

The goal is to sufficiently enable potential class members to make an informed decision as to whether they should opt out.

Standardizing The Settlement Approval Process

The Rule 23 amendments also set forth certain procedures for proposed class settlements. Importantly, the new rule formalizes the process for presenting a settlement offer to the court, requiring that it be based on grounds sufficient to enable the court to determine that the proposed settlement will earn final approval after notice is made to the class. The amended rule expressly sets the standard a court should use in determining whether to send notice: that the court likely will be able to both approve the settlement proposal and certify the class for purposes of judgment on the proposal, if it has not yet done so already.

The amendments also outline factors that courts must consider when approving a settlement and, in particular, determining whether a proposed settlement is "fair, reasonable, and adequate." Specifically, courts must consider the following:

- Whether "the class representatives and class counsel have adequately represented the class";
- Whether the settlement proposal was "negotiated at arm's length";
- Whether the relief provided for the class is adequate, taking into account several factors, such as costs, risks, the effectiveness of the proposed method of distributing relief to the class, and the terms of any proposed award of attorneys' fees; and
- Whether "class members are treated equitably relative to each other."

This updated language attempts to both standardize and condense the sometimes lengthy list of factors for assessing proposed settlements that various courts have developed over the past several decades. The amendments therefore focus on the core concerns of procedure and substance that should guide courts in considering proposed class-action settlements.

Class Members' Objections

The amended Rule 23 also establishes new procedures with respect to objections to proposed settlements. Under the new rule, any objection must indicate whether the

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Massachusetts Employers Should Act Now To Ensure Compliance With Pregnant Workers Fairness Act

By Jacqueline M. Robarge

Following its signature last summer by Governor Charlie Baker, the Massachusetts Pregnant Workers Fairness Act ("PWFA") went into effect on April 1, 2018. This new law amends the Massachusetts employment discrimination statute, Chapter 151B, to provide that employees who are pregnant or have pregnancy-related conditions are entitled to reasonable workplace accommodations, as well as protection from discrimination and retaliation.

In enacting the PWFA, Massachusetts joined 21 other states (as well as Washington, D.C.) that have statutes protecting pregnant employees from discrimination. Most recently, Connecticut, Nevada, Vermont, and Washington passed similar laws in 2017.

Pregnancy Discrimination And Accommodation Law Before The PWFA

Federal law protects workers who are pregnant or who have given birth from discrimination, specifically under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act ("ADA"). In particular, employers must provide reasonable accommodations for medical conditions related to pregnancy or childbirth that constitute covered disabilities under the ADA. However, pregnancy in and of itself is not considered a disability for purposes of the ADA.

Additionally, the Affordable Care Act of 2010 amended the Fair Labor Standards Act to require employers to provide employees with reasonable work breaks for expressing breast milk for up to one year after giving birth. An employee must be given access to a private location other than a bathroom. However, this amendment applies only to non-exempt employees in workplaces with 50 or more employees.

Many states have adopted laws to address concerns not covered by these existing federal laws. Thus, the Massachusetts Legislature enacted the PWFA specifically to address accommodations for pregnancy-related conditions that do not rise to the level of a disability, as well as breastfeeding employees' need to express breast milk at work.

The PWFA

As stated above, the PWFA amends Chapter 151B, which is applicable to Massachusetts employers with six or more employees. The PWFA adds employees who are pregnant or have pregnancy-related medical conditions (including breastfeeding) as a protected class, with the right to be free from discrimination and to request reasonable workplace accommodations related to pregnancy or childbirth, so long as such accommodations do not cause an undue hardship for the employer.

The specific language included in the PWFA - "an employee's pregnancy or any condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk" - is very broad. Employers should be mindful of the wide range of potential conditions this language may encompass, such as shortness of breath, carpal tunnel syndrome, edema, depression, miscarriage, and pregnancy termination.

Reasonable Accommodations

Under the PWFA, unless an employer can demonstrate undue hardship, it must provide reasonable accommodations for employees who are pregnant or have pregnancy-related conditions. The statute delineates certain accommodations that are presumed to be reasonable, including: (1) more frequent or longer breaks; (2) time off to attend to a pregnancy complication or recover from childbirth; (3) acquisition or modification of seating or equipment; (4) temporary transfer to a less strenuous or hazardous position; (5) job restructuring; (6) light duty; (7) a private, non-bathroom space for expressing breast milk; (8) assistance with manual labor; or (9) a modified work schedule.

By contrast, reasonable accommodations under the PWFA do not include discharging or transferring an employee with more seniority, or promoting an employee who is not able to perform the essential functions of the job with or without a reasonable accommodation.

An "undue hardship" is defined under the PWFA as an action requiring significant difficulty or expense. Whether an accommodation would impose an undue hardship depends on the cost of the accommodation, the financial resources of the employer, the overall size of the employer's business, the nature of the employer's facilities, and the likely impact of the accommodation on the employer's operations. The employer has the burden of establishing an undue hardship, which may be challenging - particularly in the case of those accommodations that the PWFA states are presumed to be reasonable.

Interactive Process

After an employee makes a request for a reasonable accommodation under the PWFA, the employer must engage in a timely, good faith interactive process to try to identify an effective, reasonable accommodation to enable the employee to perform the essential functions of the job.

Generally, when an employee requests a pregnancy-related accommodation, the employee may be asked to provide supporting documentation from an appropriate

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health care or rehabilitation professional. However, an employer may not require an employee to provide documentation for any of the following accommodations: (1) more frequent restroom, food, or water breaks; (2) special seating; (3) limits on lifting more than 20 pounds; or (4) use of a private, non-bathroom space for expressing breast milk.

Prohibited Adverse Actions

In addition to requiring employers to grant reasonable accommodations for pregnancy or pregnancy-related conditions, the PWFA provides that an employer may not: (1) take adverse action against an employee in retaliation for her requesting or using a reasonable accommodation; (2) deny an employment opportunity based on the need to make a reasonable accommodation; (3) require an employee to accept an accommodation that the employee does not desire, if that accommodation is unnecessary to enable the employee to perform the essential functions of the job; (4) require an employee to take a leave of absence if another reasonable accommodation would be feasible; or (5) refuse to hire an applicant because of pregnancy or a pregnancy-related condition, if the applicant is capable of performing the essential functions of the job, with or without a reasonable accommodation.

Notice Obligations

The PWFA also requires Massachusetts employers to provide all employees - regardless of gender - with written notice of their right to be free from discrimination and enjoy reasonable accommodations in relation to pregnancy and pregnancy-related conditions. This notice may be provided in a handbook, pamphlet, or other means of notice to all employees.

Additionally, employers must provide notice of PWFA rights to all new employees upon or prior to commencement of their employment.

Finally, an employee who notifies her employer of a pregnancy or pregnancy-related condition must be given written notice of her rights under the statute within 10 days of such notification.

Recommendations For Employers

Given that the PWFA is now in effect, there are a number of steps we suggest Massachusetts employers take, with the assistance of employment counsel, to ensure compliance with this new law:

- Update employee handbooks, job applications, equal employment opportunity statements, and similar materials to include pregnancy and pregnancy-related conditions as categories protected from discrimination;
- Revise policies regarding reasonable accommodations, work breaks, and leaves of absence to incorporate pregnancy and pregnancy-related conditions;
- Ensure that all supervisors, managers, and human resources employees are trained on the requirements of the PWFA;
- Provide written notice to all employees of their right to be free from discrimination in relation to pregnancy and pregnancy-related conditions; and
- Implement a system under which an employee who gives notice of a pregnancy or pregnancy-related condition will receive written notice of her rights under the PWFA within 10 days.

If you have any questions about the steps your organization should take to comply with the Massachusetts PWFA, please feel free to contact us.

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Amendments To Federal Rule 23: Get Ahead Of The Coming Changes To Class Actions

objection asserts interests of only the objector, or of some subset of the class, or of all class members. Objections must otherwise be stated "with specificity." Recognizing the importance of good-faith objections to the settlement process, however, the comments state that courts should take care to avoid unduly burdening class members who wish to object.

Further, an objector is no longer required to obtain court approval to withdraw an objection, but rather may do so freely upon concluding that the objection is not justified. However, the amended rule states that a party is required to disclose and obtain court approval for any payment or "other consideration" in connection with either forgoing or withdrawing an objection, or forgoing, dismissing, or withdrawing an appeal from a judgment approving a settlement proposal. The comments state that the term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangement beneficial to the objecting party's counsel.

If you have any questions about the substance or implications of the pending amendments to Rule 23, or if you would like assistance with any other litigation matter, please do not hesitate to contact one of our experienced litigation attorneys.

Supreme Court Narrows Scope Of Federal Whistleblower Law

By Gary D. Finley

This past February, the U.S. Supreme Court issued a long-awaited decision under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). In *Digital Realty Trust Inc. v. Somers*, the Court unanimously held that in order to be protected from retaliation for reporting an alleged violation, an employee must make a report to the Securities and Exchange Commission ("SEC") and *not just to his or her employer.*

The *Somers* decision was not surprising, as the holding rests on a straightforward interpretation of the text of the Dodd-Frank law. Nonetheless, the decision is likely to have important implications for would-be whistleblowers and their employers.

Sarbanes-Oxley, Dodd-Frank, And Whistleblowers

The *Somers* decision arose against the backdrop of the two most important federal financial reform measures of the last 20 years.

First, the Sarbanes-Oxley Act of 2002 ("SOX") was passed in the wake of several high-profile corporate and accounting scandals, with the intention of "safeguard[ing] investors in public companies and restor[ing] trust in the financial markets following the collapse of Enron Corporation." Among other things, the legislation increased financial oversight and imposed stiffer penalties for corporate fraud. Importantly, SOX protects whistleblowers – defined as employees who report misconduct to the SEC, Congress, any federal agency, or an internal supervisor – from retaliation.

Dodd-Frank, enacted in 2010, had its origins, in large part, in the crash of the subprime mortgage market in 2007, the banking crisis in 2008, and the ensuing widespread financial downturn. As with SOX, Dodd-Frank's reforms were extensive, aimed at "promot[ing] the financial stability of the United States by improving accountability and transparency in the financial system."

Also like SOX, Dodd-Frank provides for whistleblowers to be protected from retaliation. However, Dodd-Frank defines a whistleblower more narrowly than SOX, as "any individual who voluntarily provides original information to the [SEC] that leads to the successful enforcement of a covered administrative action."

Through Dodd-Frank, Congress authorized the SEC "to issue such rules and regulations as may be necessary or appropriate to implement" the law's whistleblower provisions. However, in exercising this rulemaking authority, the SEC appears to have strayed from Dodd-Frank's text, creating two separate definitions of "whistleblower" – one for purposes of determining eligibility to receive a financial award, and the other for purposes of protection from retaliation. As to the latter of these, the SEC's Final Rule defined a whistleblower as encompassing some situations in which an employee makes a report to a company supervisor but not to the SEC.

Background Facts

By presenting a situation in which an "internal" whistleblower who had not reported his company to the SEC claimed retaliation under Dodd-Frank, *Somers* provided the proper set of facts for the Supreme Court to address the apparent conflict between the text of Dodd-Frank and the SEC's Final Rule.

From 2010 until 2014, Paul Somers worked as a Vice President of Digital Realty Trust, Inc. ("DRT"), a real estate investment trust. When Mr. Somers suspected DRT of securities fraud, he reported these suspicions to senior management. Soon after this report, and without Mr. Somers's having also reported the suspected fraud to the SEC, DRT terminated Mr. Somers's employment.

Because he did not file an administrative complaint within 180 days of his termination, Mr. Somers was not covered by the anti-retaliation provisions of SOX. Therefore, relying in part on the SEC's Dodd-Frank Final Rule, Mr. Somers filed suit against DRT in U.S. District Court, claiming, among other things, retaliation for whistleblowing under Dodd-Frank.

DRT moved to dismiss the lawsuit, arguing that Mr. Somers did not meet the statutory definition of a "whistleblower," since he had not complained to the SEC. Both the district court and the Ninth Circuit Court of Appeals found in favor of Mr. Somers, holding that the SEC's Final Rule should be accorded deference, and that, in order to be protected by Dodd-Frank's anti-retaliation provisions, an individual who has reported a violation internally need not also make a report to the SEC.

The Supreme Court granted certiorari to resolve the issue, noting that two other federal circuit courts had addressed this question, with differing results. Specifically, the Fifth Circuit had concluded that employees must provide information to the SEC to avail themselves of Dodd-Frank's anti-retaliation protections, while the Second Circuit had reached the opposite conclusion.

Supreme Court's Decision

In a unanimous ruling – with Justice Ginsburg writing on behalf of a majority of the Justices – the Supreme Court overturned the Ninth Circuit's holding and concluded that Mr. Somers's failure to make a report to the SEC was fatal to his case.

The Court found little room for debate, citing the principle that "when a statute includes an explicit definition [the Court] must follow that definition." The only apparent disagreement between the Justices was the extent to which the Court should rely on legislative history in rendering its ruling. On that point, the majority found it persuasive that one of Congress's stated purposes

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Supreme Court Narrows Scope Of Federal Whistleblower Law

in enacting Dodd-Frank was "to motivate people who know of securities law violations to tell the SEC." Conversely, in a concurring opinion, Justices Thomas, Alito, and Gorsuch argued that the text of the law alone should be used to interpret the term "whistleblower," and that ancillary materials such as legislative history should not be considered.

In explaining the reasons for the differences between the definitions of "whistleblower" in SOX and Dodd-Frank, the Court indicated that SOX had the broad purpose of "disturb[ing] the 'corporate code of silence,'" and thus incentivized employees to make either internal or external reports. By contrast, the fundamental purpose of Dodd-Frank was more narrow – to encourage employees to "tell the SEC," specifically, of illegal activity.

As the Court also noted, Dodd-Frank sought to incentivize reports to the SEC by offering enhanced remedies for whistleblowers, including a six-year statute of limitations (as opposed to 180 days under SOX), direct access to courts (versus SOX's requirement that administrative remedies first be exhausted), and the opportunity to recover double back pay (as opposed to actual damages under SOX). In exchange for these enhanced incentives, Dodd-Frank considers only employees who report violations to the SEC to be protected whistleblowers.

Determining Which Way The Wind (Or The Whistle) Blows

At first glance, *Somers* may appear to be a victory for employers, given the Court's rejection of Mr. Somers's claim against DRT. However, the Court's ruling clearly incentivizes would-be whistleblowers to make *external* reports of corporate impropriety, to the SEC – thereby increasing the risks of costly and invasive SEC investigations.

Along similar lines, employees who suspect that their company may have violated federal securities laws and who wish to take advantage of the enhanced protections offered by Dodd-Frank are left with no "middle course" – *i.e.*, making an initial internal report without providing a nearly contemporaneous report to the SEC. This could potentially lead to either under-reporting – if employees do not want to take the big step of making an SEC report – or over-reporting, if anxious employees find it necessary to report minor suspected violations to the SEC.

Overall, though, the *Somers* ruling plainly resolves an issue that had been in question. Both employers and employees now have greater clarity as to their respective rights and responsibilities under the Dodd-Frank law.

Recommendations For Employers

Our basic recommendations in the wake of the *Somers* ruling remain consistent. Employers should review their whistleblower policies frequently, in conjunction with legal counsel, to ensure that employees have multiple avenues to report suspected illegal and/or unethical conduct. Likewise, whistleblower polices should assure employees that such reports will not be met with retaliation.

Additionally, upon learning that an employee has made such a complaint, an employer should promptly consult counsel to determine how best to respond.

Chambers And Partners USA 2018 Recognizes Sara Goldsmith Schwartz And William E. Hannum III As Leading Lawyers

Schwartz Hannum PC is thrilled to announce that **Sara Goldsmith Schwartz** and **William E. Hannum III** have been recognized by Chambers and Partners USA as leading attorneys in labor and employment law in Massachusetts. This is the thirteenth consecutive year that Sara has been honored, and Will's sixth year being acknowledged by Chambers.

The Firm is also thrilled that Chambers USA has listed Schwartz Hannum PC as a "Noted Firm" in the Labor & Employment – Massachusetts practice area.

In 2018 commentators describe Sara as *"a very good counselor and a gifted presenter." "She listens well,"* says a client.

The rankings, which are determined by a rigorous process that includes a detailed written submission by the Firm and in-depth, objective research and interviews, were published in the recent Chambers USA 2018 guide. Chambers and Partners publishes guides world-wide, and has been a recognized leader in its field since 1990.

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Is Your School Subject To The GDPR?

GDPR compliance may be subject to hefty penalties.

Below is an overview of the applicability of the GDPR to non-EU organizations, and the key regulatory changes imposed by the GDPR of which independent schools should take heed.

Scope Of Jurisdiction

Of relevance to independent schools, the GDPR applies to "controllers" and "processors" who are not established in the EU where the "processing" of data is related to "the offering of goods or services" to individuals residing in the EU.

The GDPR distinguishes a data controller – which states how and why personal data is processed – from a processor – which is the party doing the actual processing of the data. The GDPR significantly expands the definition of personal data – which now includes *any information* related to a person that can be used to directly or indirectly identify that individual. This definition would likely cover an individual's name, photograph, email address, bank details, posts on social media, medical information, and IP address.

Thus, schools collecting personal information online from an EU resident – for instance, identifiable information during the admissions or enrollment process – likely trigger coverage under the GDPR.

Consent

Another significant change to the regulatory landscape is the requirement to obtain consent and the conditions required to do so. Under the GDPR, consent means "any freely given, specific, informed and unambiguous indication" of a clear, active, affirmative action by the individual to allow processing of personal data. Long, complex terms and conditions will no longer pass muster. The request for consent must be provided in an intelligible and easily accessible format. There is also a corollary to adequate consent – the right of the individual to withdraw consent at any time. And withdrawing consent must be as easy to do as giving it. Finally, organizations must maintain a record of how and when the consent is given.

There are heightened expectations for protecting the personal data of children. The GDPR imposes a 16-year-old age limit on an individual's ability to consent to the processing of personal data. (The GDPR does provide that member states may legislate for a lower age of consent, but that no state may permit consent without a parent for a child below the age of 13.) As such, organizations must obtain parental consent for the processing of personal data of children under the age of 16 residing in the EU. This rule explicitly provides that it "shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child." Thus, it is likely the case that schools can treat all international students equally – meaning that they can require parental consent for all these students rather than distinguishing between those who are above and below the age of 16 years old. But the GDPR is ambiguous on this topic.

In the admissions and enrollment context, this likely means that schools subject to the GDPR will need to obtain parental consent both when applications for admission are submitted and during the enrollment process.

Right To Be Forgotten

The GDPR provides individuals with the right to demand that an organization delete their personal data if such data is no longer necessary to the purpose for which it was collected. Individuals can also demand that their data be erased if they withdraw their consent to the data collection, or otherwise oppose the way the data is being processed. In these situations, the controller is responsible for deleting the information, as well as telling other organizations that may have this information to do so.

Penalties

Organizations that fail to comply with the GDPR may be subject to significant penalties. The maximum fine, imposed for the most serious infractions, is 4% of the organization's annual global turnover (*i.e.*, revenues) or €20 Million, whichever is greater. This penalty would likely apply if an organization does not obtain sufficient consent, which underscores the importance of this fundamental concept. For less egregious violations, there is a tiered scheme for fines, with the potential for significant financial costs for an organization.

Recommendations

Each independent school should conduct an audit to determine whether it processes personal data of individuals residing in the EU – including prospective and current students, alumni, employees, donors, and any other members of the school community. Schools should evaluate the type of personal data they collect, whether internally or through a third-party provider, and how such information is used.

Any school that falls within the scope of the GDPR's jurisdiction should work with counsel to ensure that the institution, as well as any outside processors it is using, is in compliance with all applicable rules, including the requirement to obtain consent. Compliance measures may be required for the website, the admissions process, and the enrollment process.

Please feel free to contact us if you have any questions regarding the GDPR or any other data security laws.

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Schwartz Hannum PC Welcomes **Attorney Kirsten B. White,** Former Policy Director To Second Lady Dr. Jill Biden

Schwartz Hannum PC is thrilled to announce that Kirsten B. White has joined the Firm's Labor and Employment and Education practice groups.

Kirsten served as the policy director to Second Lady Dr. Jill Biden from 2009 to 2013 in the Office of the Vice President of the United States, and as a clerk on the U.S. Senate Judiciary Committee staff of Senator Russell D. Feingold (D-WI). In these positions, she developed considerable domestic policy knowledge in the areas of veterans and military families, education, workforce training, and women's health.

Kirsten represents employers and educators in all aspects of labor and employment law and advises them with respect to collective bargaining and matters arising under the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA). Kirsten represents clients in collective bargaining negotiations, proceedings before the National Labor Relations Board (NLRB), and labor arbitration proceedings, and counsels clients in connection with all aspects of labor-management relations and collective bargaining agreement administration. She actively assists clients in the development of proactive policies and practices designed to foster labor-management relations and minimize the potential for labor disputes that could harm a client's operations.

Kirsten 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.

Before joining Schwartz Hannum PC, Kirsten was an associate at Morgan Lewis in its Boston, MA and Washington, DC offices. She is a 2000 graduate of Middlebury College, and earned her J.D. from the University of Pennsylvania Law School in 2007.

Joseph E. Santucci, Jr. Is Recognized By **Best Lawyers In New England**

Schwartz Hannum is pleased to announce that Senior Counsel Joseph E. Santucci, Jr. has been recognized by ***Best Lawyers in New England*** as a 2018 **"Best Lawyer"** in the categories of Employment Law – Management, Litigation - Labor & Employment, and Labor Law – Management.

A nationally-renowned labor law attorney, Joe has extensive experience advising clients with collective bargaining, labor counseling and litigation, and arbitration. Joe has been selected for inclusion in *Best Lawyers* for almost 20 years at local, regional and national levels.

Best Lawyers is the "oldest and most respected peer-review publication in the legal profession," and recognition is widely regarded as a significant honor conferred on a lawyer by his or her peers.

Congratulations, Joe!

Schwartz Hannum PC Welcomes **Vaughn Abraham, Director Of Finance**

Schwartz Hannum PC is thrilled to announce that Vaughn Abraham has assumed the role of Director of Finance.

As Director of Finance, Vaughn Abraham oversees all financial aspects of the Firm. Vaughn earned his Bachelor of Science degree with a concentration in Accounting & Finance, as well as his MBA, from Babson College, Wellesley, MA. He earned his J.D. from New England School of Law, Boston, MA.

Vaughn has over 20 years of financial, legal, technology and operations experience. Before joining Schwartz Hannum PC, he held positions at Harvard University in Cambridge, MA, and at Goodwin Procter in Boston, MA.