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Labor and Employment Lawyers Guiding Management

Labor and Employment Law Update

JUNE 2013

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Schwartz Hannum PC is proud to volunteer with the Boston Bar Association to assist those businesses affected by the Boston Marathon bombings.

Massachusetts High Court Rules That Employees May Release Wage Claims

By Lori Rittman Clark

The Massachusetts Supreme Judicial Court ("SJC") has ruled that an employee may release claims arising under the Massachusetts Payment of Wages Law (the "Wage Act"), provided that the release (1) is "voluntary and knowing," and (2) includes "express language that Wage Act claims are being released."

The decision, *Crocker v. Townsend Oil Company, Inc.*, gives employers a "road map" for preparing valid releases of Wage Act claims. Previously, it was unclear if Wage Act claims survived despite an employee's execution of a general release upon separation from employment.

Factual Background

Townsend Oil Company, Inc. ("Townsend") delivers home heating oil to customers in northeastern Massachusetts. Townsend uses regular employees and independent contractors to operate its delivery trucks. While Townsend pays its employees an hourly wage and overtime where appropriate, the company pays its independent contractors based solely on the amount of oil they deliver. Townsend uses written agreements with its independent contractors, including the plaintiffs in this case, Joseph Barrasso ("Barrasso") and Charles Edward Crocker ("Crocker").

Eventually, Townsend ended its independent-contractor agreement with Barrasso. The parties signed a termination agreement that included mutual general releases of claims. Soon afterward, Townsend entered into a similar termination agreement with Crocker. Nonetheless, Barrasso and Crocker proceeded to file a lawsuit against Townsend under the Wage Act. They argued that they should have been classified as employees, not independent contractors, and that Townsend violated the Wage Act by failing to pay them the minimum wage and required overtime.

Townsend moved for summary judgment, arguing, in part, that the plaintiffs' claims were barred by their general releases. (Townsend also argued that the plaintiffs' claims were untimely under the applicable statute of limitations, a topic beyond the scope of this article.)

A Superior Court judge awarded summary judgment to Townsend, but a second judge vacated the award, concluding that the general releases did not encompass the plaintiffs' Wage Act claims. The second judge relied on a provision of the Wage Act that bars employers from entering into "special contracts" to exempt themselves from the statute's requirements. The SJC decided to review the case.

They argued that they should have been classified as employees, not independent contractors, and that Townsend violated the Wage Act…

SJC's Decision

The SJC found that the general releases in the plaintiffs' termination agreements did not encompass their Wage Act claims. However, the SJC also held that, in general, claims under the Wage Act *can* be released retrospectively through a settlement agreement, provided that the release (1) is "voluntary and knowing," and (2) includes "express language that Wage Act claims are being released." In explaining this new standard, the SJC clarified that the release must "be plainly

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Student Handbooks – Getting It "Write"

By Sara Goldsmith Schwartz and Susan E. Schorr

Summer is the perfect time to assess whether your school's student handbook is up to date with best practices and applicable laws. Recently, a federal court in Massachusetts highlighted the importance of the language included in student handbooks by permitting a lawsuit against an independent school to proceed to trial on the question of whether the school had breached an implied contract with a student by failing to follow its student handbook.

In the lawsuit, the student alleged that the student handbook created a binding contract that the school breached when it expelled the student without holding a meeting of the disciplinary committee, at which the student could have brought an advocate, as specified in the student handbook. The school, on the other hand, argued that the handbook did not create a binding contract because the handbook was simply "guidance" and included language providing that the school had "the right to alter, amend, or modify the policies and procedures … at any time."

The court disagreed with the school, concluding that the "policies, regulations and procedures contained in the Handbook are contractual in nature and binding" on the school and its students. Furthermore, the court found that the handbook was ambiguous as to the procedure the school had to follow when expelling a student. Accordingly, the court allowed the case to proceed to trial on the breach of contract claim.

In light of this recent decision and similar cases around the country, we recommend that independent schools obtain legal review of their student handbooks before issuing them for the 2013-2014 school year. (In this regard, please note that some independent schools refer to student handbooks by other names, such as student-parent handbooks.) The following key provisions commonly included in student handbooks deserve close and careful scrutiny:

- Disclaimers: Depending on the case law in your state, carefully crafted disclaimer language may help your school avoid a claim that the handbook constitutes a contract between the school and its students. Including disclaimer language in a student handbook may help dissuade potential plaintiffs from pursuing a claim, even if a court would not find the disclaimer legally enforceable. Therefore, it is important to strategically consider and draft this potential provision for your student handbook.
- Accommodations: Due to Title III of the Americans with Disabilities Act, most independent schools are prohibited from discriminating against qualified students with disabilities, and may be required to make reasonable modifications in their policies, practices, and procedures to accommodate such students. Generally, accommodations policies should articulate the school's commitment to supporting students with disabilities, the process for requesting accommodations, and the guidelines for the interactive process that follows such requests. Depending on the school's available services and resources, it may also be helpful to articulate any limitations on the accommodations available to students.
- Anti-Bullying Policy: Due to the strong spotlight on the issue of bullying in schools, it is important to ensure that your school's anti-bullying policy is consistent with your state's laws and up to date with best practices. For example, does your school's anti-bullying policy cover cyber-bullying? Does it inform students that they may be disciplined if they retaliate against another student who reports bullying? Carefully crafting such language may help your school avoid difficult situations in the future.
- Child Abuse And Neglect Reporting: Due to high-profile sexual-abuse cases, more parents and insurers are interested in schools' abuse-prevention and response policies and protocols. As a result, schools often find it helpful to include a section in the student handbook that discusses the school's reporting policy in cases of suspected or known abuse and neglect. In such policies, schools may also find it helpful to encourage parents and students to voice any concerns they may have over interactions between adults and children at the school.
- Drugs, Alcohol And Amnesty: Depending on the age of the students attending the school, the handbook may need to address the consequences of the use of drugs and/or alcohol by students. If your school utilizes an amnesty protocol to encourage students to seek help with substance-abuse problems, it is important to be clear about the goals and limitations of the amnesty protocol. Similarly, if your school utilizes substance-abuse testing, the student handbook should outline the specifics of the testing protocol.
- Electronic Communications And Acceptable Use Policy: As technology continues to evolve and play an even greater role in independent schools, it has become more important than ever to regularly review electronic communications and acceptable use policies to ensure that they are up to date and reflect the changing environment. For example, if your school now provides iPads or other devices to students, it is important that your school's student handbook articulate the acceptable and unacceptable uses of such devices. Some schools' student handbooks also address the propriety of electronic communications between school employees and

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students. For instance, some schools permit their employees to text-message with their students, while other schools prohibit texting between employees and students. Whatever your school's philosophy is on electronic communications between school employees and students, it is important to communicate it to students (and employees, as well).

- Parental Comportment: While the majority of parents (and other adults connected to students) interact with independent schools in an appropriate manner, it can be helpful to have guidelines for parental conduct in the student handbook, and/or the enrollment agreement, in the event that such relationships become strained. Emotions may run high, for example, if the school is investigating a bullying incident or disciplining a student in a way with which a parent disagrees. A student handbook might be an ideal place to articulate the school's expectations for parental behavior. For example, the handbook may specify that all communications with school personnel should be respectful in tone and content, as children often learn through observing adults, and respectful communications may facilitate the type of partnership and cooperation many schools try to achieve with parents.
- Weapons Policy: Due to concerns over school shootings and violence on campus, independent schools should review their weapons policies and other safety-related policies to ensure that they adequately protect the students and the remainder of the school community. While updating the policies in the student handbook is important, enforcing such policies can be even more important, especially in the case of safety-related policies.

Concluding Recommendations

A school should be certain to build in some "wiggle room" in all of the policies included in its student handbook, avoiding the use of terms like "must" and "shall" where the school needs to retain discretion and flexibility. It is equally vital, however, to ensure that the handbook is consistent with all applicable legal requirements. In addition to ensuring that the student handbook is well-written and provides maximum flexibility to the school, we recommend ensuring that the student handbook is consistent with other documents issued by the school to its students and families (*e.g.*, enrollment agreements).

If you have any questions regarding student handbooks or need any assistance with updating your school's student handbook, please do not hesitate to contact us.

Massachusetts High Court Rules That Employees May Release Wage Claims

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worded and understandable to the average individual" and "specifically refer to the rights and claims under the Wage Act that the employee is waiving."

This decision struck a middle ground between two competing policies. On the one hand, the court observed that "the strong protections afforded by the Wage Age should not be able to be unknowingly frittered away under the cover of a general release in an employer-employee termination agreement." At the same time, the court noted that public policy favors the enforceability of releases, and that a sweeping prohibition on releases of Wage Act claims would undermine the ability of employers and employees to settle employment claims.

The SJC emphasized that its decision encompassed only *retroactive* releases of Wage Act claims, noting that prospective releases would be "far more problematic under the special contracts provisions of the Wage Act." Thus, *Crocker* does not permit an employer to exempt itself from future liability under the Wage Act at the outset of an ongoing employment relationship.

Recommendations For Employers

In light of *Crocker*, we encourage Massachusetts employers to take the following steps:

- Carefully review all separation agreements and other documents that include releases of employment claims;
- Confer with counsel to revise all such agreements to ensure that the release provisions (i) are set forth in plain, readily understandable language, and (ii) specifically state that claims under the Wage Act are being released; and
- Review, in consultation with counsel, current employment policies and practices to confirm that all overtime, minimum-wage, and similar requirements are being met, and that no employees are misclassified as independent contractors.

If you have any questions about Crocker *or would like guidance on these issues or other employment matters, please do not hesitate to contact us.*

NLRB Asks Supreme Court To Review Ruling That Could Invalidate Hundreds Of NLRB Decisions

By Lori Rittman Clark

The National Labor Relations Board ("NLRB" or "Board") has asked the U.S. Supreme Court to review a federal appeals court decision suggesting that hundreds of recent Board rulings may be invalid because the Board lacked the necessary quorum of members to issue them.

In this decision, *Noel Canning v. NLRB,* the U.S. Court of Appeals for the D.C. Circuit held that President Obama's three recess appointments to the NLRB in January 2012 were constitutionally invalid. Without these recess appointments, the Board would have lacked the three-member quorum required for it to act.

Citing *Noel Canning,* many employers have asked the Board to rescind decisions issued since the recess appointments were made. The Board, however, has rejected those challenges, maintaining that the D.C. Circuit's decision is both incorrect and not binding on the Board.

Background

The NLRB is a five-member body that needs a three-member quorum to issue decisions and take other official actions. The expiration of Member Craig Becker's term on January 3, 2012, left the Board with only two members, Mark Gaston Pearce and Brian Hayes.

On January 4, 2012, President Obama invoked the Recess Appointments Clause of the U.S. Constitution and appointed Sharon Block, Terence Flynn, and Richard Griffin as new Board members. This clause allows the President to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." At the time, the Senate had not formally recessed but was not in active session.

In February 2012, a three-member panel of the Board (consisting of Members Block, Flynn, and Hayes) held that Noel Canning, a Pepsi bottler in Washington state, had violated the National Labor Relations Act ("NLRA") by refusing to reduce to writing and execute a collective bargaining agreement containing terms to which the parties had agreed. Noel Canning appealed this decision to the D.C. Circuit.

Noel Canning argued that the recess appointments were constitutionally invalid and, in turn, that the Board lacked a valid quorum when it decided the case. This, says Noel Canning, renders the decision invalid and unenforceable.

D.C. Circuit's Decision

The D.C. Circuit rejected the Board's argument that the term "Recess," as used in the Recess Appointments Clause, includes breaks in the Senate's business during a continuing session. Rather, the court agreed with Noel Canning's position that a "Recess" occurs only when the Senate formally recesses.

Since the Senate was not formally recessed when the appointments to the NLRB were made, the D.C. Circuit concluded that the appointments were constitutionally invalid. The D.C. Circuit also opined that a recess appointment can be made only if the vacancy arises during a formal Senate recess, which was not the case here.

Implications Of Decision

In the wake of *Noel Canning,* many employers have sought to invalidate Board action on the ground that it was taken without the required quorum. The Board has defended its activity, asserting that the D.C. Circuit's holding is incorrect and will be reversed by the Supreme Court, although, as of this writing, the Supreme Court has not ruled on the Board's petition for review of the case.

If the Court were to uphold *Noel Canning,* then this could invalidate the hundreds of Board decisions issued since January 4, 2012, when the recess appointments were made. In that event, the NLRB would likely commence the arduous process of reviewing and reissuing these decisions once further appointments have given it a valid quorum.

Recommendations

Until *Noel Canning* is resolved, employers are encouraged to:

- Consider directing any appeals from adverse Board decisions to the D.C. Circuit, as the other federal courts of appeal are not bound to follow *Noel Canning;*
- Confer with counsel relative to labor matters, as the Board is likely to remain on a pro-labor course for the foreseeable future, regardless of how *Noel Canning* is resolved; and
- Closely monitor further developments in this area of the law. In this regard, President Obama recently nominated three new candidates to the Board. If and when at least two of them are confirmed by the Senate, the Board will once again have an undisputedly valid quorum.

If you have any questions about Noel Canning *or would like guidance on any other labor-law issue, please do not hesitate to contact us.*

New Massachusetts Law Gives "Right-To-Know" Protections To Temporary Workers

By William E. Hannum III [1]

Massachusetts recently enacted legislation imposing new obligations on staffing agencies and worksite employers that use temporary workers and granting those workers a right to notice of certain terms of their employment. The new statute, known as the "Temporary Worker Right to Know Act" (the "Act"), took effect earlier this year.

The Act creates additional protections for temporary employees in Massachusetts by: (i) requiring staffing agencies to provide certain information to temporary workers about their job assignments; (ii) limiting the fees that staffing agencies and worksite employers may charge temporary workers; (iii) prohibiting false advertising and certain other actions by staffing agencies; and (iv) providing for administration and interpretation of the Act by the Massachusetts Department of Labor Standards ("DLS"), and enforcement of the Act by the Massachusetts Office of the Attorney General ("AGO"), which is empowered to impose substantial criminal and civil penalties on violators.

Job Assignment Notice Requirements

As its name suggests, the new statute imposes a broad range of "job assignment" notice requirements upon staffing agencies in Massachusetts. As a result, staffing agencies must provide temporary employees with specific information in connection with *each* of their job assignments, as detailed below.

First, a staffing agency must provide employees with the name, address and telephone number of each of the following: (i) the staffing agency; (ii) the staffing agency's workers' compensation carrier; (iii) the worksite employer; and (iv) DLS.

The staffing agency must also provide a description of the position and any special requirements for it (such as clothing, equipment, training or licenses), as well as a specification of any costs to be charged to employees for supplies or training.

Employees must also be notified as to: (i) the designated pay day; (ii) the hourly rate of pay; (iii) the daily starting and anticipated end times; (iv) whether overtime work is anticipated; and (v) if known, the expected duration of the assignment.

In addition, the staffing agency must inform employees as to whether meals will be provided by the agency or the worksite employer, and the resulting cost, if any, to employees.

Finally, employees must be provided with details regarding the means of transportation to the worksite and any fees to be charged to employees for transportation services.

This information must be provided to employees when each new job assignment is made. The staffing agency may initially provide the information by telephone, but must then confirm the information in writing before the end of the first pay period for the assignment. Any changes to the initial terms of the assignment must immediately be communicated to employees, who must acknowledge the changes in the terms. Although the new law is not clear on this point, we recommend that any amended notice and each worker's acknowledgement be made *in writing*.

Staffing agencies are also obligated to post a notice in their offices setting forth information about employees' rights under the Act and contact information for DLS. The notice must be posted in a conspicuous place at each location where an agency does business. DLS has published a sample notice that employers can post.

There are significant exceptions to these notice obligations. In particular, professional employees, as defined under the National Labor Relations Act, are exempt from the statute's notice requirements. Also excluded are secretaries and administrative assistants whose main duties are described by the U.S. Department of Labor's Bureau of Labor Statistics as involving one or more of the following: (i) drafting or revising correspondence; (ii) scheduling appointments; (iii) creating, organizing and maintaining paper and electronic files; and (iv) providing information to callers.

Regulation Of Fees Charged To Temporary Workers

The new legislation also imposes a number of restrictions upon the fees that staffing agencies and worksite employers may charge temporary workers.

First, the Act prohibits staffing agencies and worksite employers from assessing a fee to an employee for registering with a staffing agency or securing a job assignment. Similarly, an employee may not be charged a fee for a criminal offender record information ("CORI") request.

The statute also provides that a staffing agency or worksite employer may not levy a fee for a bank card, debit card, payroll card, voucher, draft, money order or similar means of payment, or for any drug screen, in excess of the actual per-employee cost.

The Act further prohibits staffing agencies and worksite employers from imposing a fee for transportation in excess of either: (i) three percent of an employee's total daily wages; or (ii) the actual cost of transporting the employee to or from the designated work site.

Additionally, if a staffing agency or worksite employer *requires* employees to use its transportation services, the agency or employer is not permitted to charge employees for those services. Further, if a staffing agency sends an employee on a job assignment, and it turns out that work is not available that day, the staffing agency must

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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 in publishing this article.*

First Circuit Holds That Massachusetts Wage Act Precludes Shift Supervisors From Participating In Tip Pools

By Hillary J. Massey

The U.S. Court of Appeals for the First Circuit has ruled that under Massachusetts law, restaurant employees who hold *any* managerial responsibility may not share in wait-staff "tip pools" – *i.e.*, arrangements in which tips are combined and shared among employees who directly serve customers. In the same case, the First Circuit rejected a challenge by the employer to the constitutionality of the mandatory treble damages provision of the Massachusetts Wage Act, M.G.L. c. 149, §§ 148, 150 (the "Wage Act").

In *Matamoros v. Starbucks Corporation*, the First Circuit concluded that Starbucks Corporation ("Starbucks") had violated M.G.L. c. 149, § 152A (the "Tips Act") by permitting shift supervisors holding some managerial responsibilities to participate in tip pools with baristas. The court also affirmed an award of treble damages to the plaintiffs under the Wage Act, concluding that the Wage Act's mandatory trebling provision did not violate Starbucks's federal due-process rights.

Although *Matamoros* involved a restaurant employer, the Tips Act covers employees in any industry who directly serve patrons and customarily receive tips. Thus, *all* employers in Massachusetts should ensure that their tip practices comply with the statute. Further, employers should heed the First Circuit's upholding of mandatory treble damages under the Wage Act, which applies to all wage payments (not just to tips).

Factual Background

Matamoros involved a proposed class of more than 11,000 current and former Starbucks baristas. The complaint alleged that Starbucks violated the Tips Act by allowing shift supervisors to receive a share of tips. Because tips are a form of wages under Massachusetts law, the complaint further alleged that this violated the Wage Act, entitling the plaintiffs to an award of treble damages, attorneys' fees, and litigation costs.

The Tips Act provides that employers can create tip pools only for restaurant "wait staff employees," "service employees" (*i.e.*, non-restaurant employees who directly serve patrons and customarily receive tips), and "service bartenders." "Wait staff" and "service" employees are defined, in part, as employees who hold "*no* managerial responsibility." (Emphasis added.) By contrast, the Tips Act is silent as to whether a "service bartender" (defined as an employee who prepares beverages to be served by another employee) may hold managerial responsibility.

The issue in *Matamoros* was whether Starbucks shift supervisors have "no managerial responsibility" and therefore may be considered "wait staff employees" permitted to share tips with baristas. Shift supervisors are hourly employees typically promoted from within the ranks of baristas. They report to store managers and assistant managers and do not have authority to hire, fire, discipline, or promote other employees. However, shift supervisors open and close stores, handle and account for cash, and ensure that baristas take scheduled breaks.

The *Matamoros* plaintiffs moved for partial summary judgment on their Tips Act claim, arguing that shift supervisors were not permitted to share in tip pools because they had some managerial responsibility. The District Court allowed the motion and, after granting class certification, awarded the plaintiffs $14 million in damages. This reflected the tips that had been allocated to shift supervisors during a designated period, as well as a trebling of the tips allocated on or after July 11, 2008 (the date of an amendment to the Wage Act requiring such trebling). Starbucks appealed to the First Circuit.

First Circuit's Decision

The First Circuit affirmed the District Court's decision, noting that under the plain language of the Tips Act, a wait staff or service employee must hold "no managerial responsibility." Emphasizing this point, the First Circuit stated, "No means no."

In addition, the First Circuit cited an interpretive guidance of the Massachusetts Attorney General. This guidance, the First Circuit explained, "states with conspicuous clarity that '[w]orkers with limited managerial responsibility, such as shift supervisors ... do not qualify as wait staff employees.'" In response to Starbucks's contention that it was unfair to interpret the Tips Act so strictly, the First Circuit stated that this was a policy judgment legitimately made by the Massachusetts legislature.

Finally, the First Circuit rejected Starbucks's constitutional challenge to the District Court's damages award. In this regard, Starbucks argued that the Wage Act's mandatory treble damages provision violated its federal due-process rights by imposing punitive damages without requiring a finding of reprehensibility. The First Circuit was not persuaded, concluding that the provision does not pose the same risks as affording a jury untrammeled discretion to award punitive damages in a civil tort case.

Recommendations For Employers

In light of *Matamoros*, Massachusetts employers are advised to:

- Confer with employment counsel before implementing tip pools. Although the Tips Act is specific in many respects, it is not completely clear as to some issues, such as whether an employer with both restaurant and non-restaurant operations must maintain separate tip pools for wait-staff employees, service bartenders and service employees or, conversely, may include all such employees within a single tip pool;

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- Carefully review current tip policies and practices and revise them as necessary to ensure that employees who hold *any* managerial duties do not participate in wait-staff or service–employee tip pools;
- Ensure that if employees with managerial responsibilities need to be removed from existing tip pools, their regular compensation is adjusted, if necessary, to provide at least the minimum wage for all hours worked; and
- Regularly audit compensation practices to ensure compliance with all other wage-and-hour obligations. This is crucial in light of the First Circuit's upholding of the Wage Act's mandatory treble damages provision.

Please contact us if you have any questions regarding the First Circuit's Matamoros *decision or any other wage-and-hour issues. We regularly assist employers with such matters and would be happy to assist you.*

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reimburse the employee for his or her transportation costs.

The statute also provides that an agency or worksite employer may not impose a charge for any good or service that would cause the employee to earn less than the required minimum wage.

Finally, if a staffing agency or worksite employer imposes *any* charge upon an employee for a good or service, the charge must be levied pursuant to a written contract with the employee. The contract must state clearly, in a language that the employee understands, that the purchase is voluntary and that the agency will not profit from the cost or fee charged to the employee.

Prohibitions Against False Information And Improper Purposes

The Act imposes various other prohibitions upon staffing agencies aimed at further protecting temporary workers. In particular, a staffing agency may not: (i) engage in false advertising aimed at applicants or employees; (ii) advertise under a name other than the agency's registered name; (iii) place an employee in an assignment by force or fraud; (iv) place an employee in an assignment that is for an illegal purpose; (v) place an employee in an assignment that violates state or federal laws governing minimum wages, child labor, compulsory school attendance or a required licensure or certification; or (vi) place an employee in an assignment at a location where there is a strike or lockout without first notifying the employee.

Further, staffing agencies are required, upon request, to return employees' personal property to them, and to reimburse employees for any fees or costs charged to them in excess of what the Act permits.

Administration And Enforcement

The Act directs DLS to administer this statute by promulgating implementing regulations and carrying out inspections and investigations. As of this writing, proposed regulations have not yet been promulgated.

The AGO will enforce the Act and, in this regard, may impose on violators the full range of civil and criminal sanctions available under Mass. Gen. Laws ch. 149, § 27C. These sanctions include criminal penalties of up to two years in jail, fines of up to $50,000, and civil penalties of up to $25,000 per violation.

Recommendations For Agencies And Worksite Employers

Staffing agencies should review and revise, as necessary, their procedures for placing temporary employees, in order to ensure that employees are provided with all of the information required by the Act in a timely manner.

Specifically, staffing agencies should develop and make sure to provide temporary workers with the required "job assignment" notices and to display the required poster about the new Act.

Staffing agencies should also carefully review their advertising materials to be sure that they do not include any false or misleading statements.

Additionally, both staffing agencies and worksite employers should examine the fees, if any, that they charge to employees, in order to verify that the nature and amounts of those fees are permitted under the Act.

Staffing agencies and worksite employers should evaluate their policies and practices relating to any transportation services provided to temporary workers, in order to ensure that they are in compliance with the new legislation.

Finally, staffing agencies and worksite employers are strongly encouraged to train all managers with responsibilities touching on these issues, and to work with experienced counsel, to ensure compliance with these extensive new requirements.

Immigration Reform On The Horizon: What Employers Should Watch For

By Julie A. Galvin [1]

While there appears to be real momentum to pass a comprehensive bill to reform the nation's immigration system, employers should also be aware of some smaller-scale developments and proposed changes in immigration law. Headlines on immigration reform talk about the push for legislation strengthening border security, targeting employers who hire illegal immigrants, making it easier to sponsor foreign workers under special visas, and providing a path to citizenship for the millions who are undocumented. However, in addition to keeping an eye on these "larger" issues and how they may impact the workplace, employers should also be aware of the Deferred Action for Childhood Arrivals program, potential regulatory changes to current visa programs, the release of an updated Form I-9, and the pending automation of Form I-94, all of which require employers' attention, as discussed below.

Deferred Action For Childhood Arrivals

In June 2012, the Obama Administration announced that it would allow certain young immigrants who are in the country illegally but came to the U.S. as children to be given a reprieve from deportation. Known as "Deferred Action for Childhood Arrivals," or "DACA," this program allows those who qualify to stay in the U.S. without fear of deportation for two years, subject to renewal, and to apply for employment authorization. As of this writing, over 480,000 undocumented immigrants have applied to U.S. Citizenship and Immigration Services ("USCIS") under this program, and more than 260,000 applications have been approved.

While DACA is beneficial for eligible undocumented immigrants, it creates some thorny issues for employers. For example, to qualify for this program, applicants must show that they have been physically present in the U.S. Many employers worry that if an employee applying for DACA provides earnings statements or other employment documentation to establish his or her presence in the U.S., the employer will be exposed as having hired an unauthorized foreign worker, even if unwittingly. Although DACA provides confidentiality protections, they are somewhat ambiguous and do not necessarily prohibit USCIS from sharing information with other government agencies. Thus, it is conceivable that an employer could face an I-9 audit by Immigration and Customs Enforcement ("ICE") as a result of an employee's submitting such documentation.

Further, if an employer learns that one of its employees is applying for DACA, the employer will then have knowledge that the employee may not have current authorization to work in the U.S. In such instances, unless the individual is able to provide documentation of current work authorization, the employer will likely be required to terminate the individual's employment, at least until he or she has obtained employment authorization under DACA.

In other cases, an employer may become aware of an employee's prior lack of employment authorization when the employee presents a new employment authorization document obtained through DACA. In such instances, the employer generally may continue to employ the individual, as he or she will have obtained valid employment authorization. However, if the employer has an "honesty" policy providing that employees may be terminated for misrepresentations made during the application process, then the employer may need to consider whether to terminate this individual's employment. Of course, it is critical that such policies be applied consistently to avoid any potential discrimination claims. (For example, before taking any action, it is important to review past practices with respect to taking action against employees who were not honest during the application process.)

…regulatory changes may be on the way that could ease an employer's burden when petitioning for authorization to hire foreign workers…

Possible Expansion Of Visas For High-Tech Workers

Another potential change that could benefit employers involves proposed additional visas for certain highly skilled workers. Although Congress failed to pass legislation introduced last year by Republican Senator Lamar Smith that would have created new visa categories for foreign nationals earning graduate degrees in the sciences, technology, education, or mathematics from American universities, this general concept still has momentum.

In particular, comprehensive immigration reform legislation may well include a provision that would make it easier for employers to hire highly skilled foreign workers by increasing the number of H-1B visas that could potentially be granted to employers. An H-1B visa allows a foreign worker in a "specialty occupation" – generally, a pro-

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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 in publishing this article.*

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fessional job requiring at least a bachelor's degree – to work in the U.S. for a petitioning employer. For example, the immigration reform bill recently proposed in the Senate includes a provision that would initially raise the H-1B cap to 110,000 and would consider market demand in determining future increases or decreases to the allotted number of H-1B's.

Critics of the H-1B program contend that expanding the program could perpetuate illegal practices such as "benching," which occurs when an employer hires an employee on an H-1B visa but fails to provide work or to pay the employee the required amount. A 2008 study by USCIS concluded that a significant number of H-1B petitions have involved such fraud. While USCIS has sought to crack down on benching and related practices, critics assert that the current system should be cleaned up before any expansion to the H-1B program is enacted.

Nonetheless, if a measure expanding the H-1B program passes, it may become easier for employers in high technology fields to hire and retain foreign workers.

Proposed Regulatory Changes For Certain Nonimmigrant Visas

In addition, regulatory changes may be on the way that could ease an employer's burden when petitioning for authorization to hire foreign workers on certain temporary work visas. The Department of Homeland Security has issued a proposed rule that would implement some potentially significant changes.

In particular, the proposed rule would allow foreign nationals on E-3 and H-1B1 visas to continue working for up to 240 days while a petition for an extension of their visa status, and the employment authorization that accompanies that status, is pending. (E-3 and H-1B1 visas are temporary visas, created by free-trade agreements, that allow certain professional workers from Australia, Singapore, or Chile to work in the United States in specialty occupations.) Currently, foreign nationals on H-1B visas are permitted to continue working for up to 240 days while a petition for an extension of their employment authorization and visa status is pending, so this proposed rule would align holders of E-3 and H-1B1 visas with holders of H-1B visas.

Additionally, the proposed rule would expand the range of evidence that may be submitted in support of researchers and professors who are applying for permanent residence under the "Outstanding Researcher" category.

While the proposed rule is still in its initial stages and pertains only to limited sections of the immigration regulations, it nonetheless may be a glimmer of larger changes that are to come if comprehensive immigration reform passes.

Related Developments

Revised Form I-9: On March 8, 2013, USCIS released a revised version of the Employment Eligibility Verification Form I-9, which is used to verify individuals' eligibility to work in the U.S. *As of May 6, 2013, employers must use the revised Form I-9 for all new hires and reverifications.*

The changes to Form I-9 are relatively minor, including improved instructions, a revised layout, and new data fields for the employee's email address, phone number, and foreign passport information. Nonetheless, employers that fail to use the proper version of the form could face penalties in the event of an audit by ICE, including fines ranging from $110 to $1,100 per incorrect Form I-9. Thus, employers should ensure that they are using the new version of the form.

Automation Of Form I-94: Finally, on March 21, 2013, U.S. Customs and Border Protection ("CBP") announced its submission to the Federal Register of a rule to automate the Form I-94 Arrival/Departure Record. On April 30, 2013, CBP began implementing the automated version of Form I-94 at air and sea ports of entry. Traditionally, Form I-94 has been a paper form, given upon entry to the U.S., which provides foreign visitors with proof that they have been lawfully admitted to the U.S. Once the process has been fully automated, a paper Form I-94 will no longer be provided at entry. Travelers wishing to obtain a hard copy of their Form I-94, which may be necessary to obtain certain immigration or other benefits, will be directed to the CBP website (www.cbp.gov/I94) to print a copy of the form. Automating the Form I-94 is expected to save an estimated $15.5 million per year.

Recommendations For Employers

In light of these developments, there are a number of steps that employers who hire foreign nationals should take.

First, employers should promptly contact experienced counsel if they learn that an employee is not currently authorized to work in the U.S.

Second, employers should revisit their nondiscrimination and honesty policies to ensure that they are not treating foreign nationals with employment authorization differently than U.S. workers.

Third, employers should continue to use Form I-9 when hiring new employees, including both foreign nationals and U.S. workers. In this regard, employers should use the *new* Form I-9 for all new hires and reverifications occurring after May 6, 2013.

Finally, employers are advised to continue monitoring the news for further developments in immigration law.

Independent School Seminars And Webinars

June 20, 2013
Safety On And Off Campus: A Four-Part Series For Independent Schools
9:00 a.m. - 3:00 p.m.
The Williston Northampton School
19 Payson Avenue
Easthampton, MA

June 27, 2013
Criminal Records Risk Management: Best Practices For Minimizing School Liability With Fingerprinting, SORI, FCRA And More
9:00 a.m. - 11:30 a.m.

August 1, 2013
Risk Management Strategies For Off-Campus Trips And Activities (Webinar)
12:00 p.m. – 1:30 p.m.

August 8, 2013
Accommodating Applicants And Students With Disabilities (Webinar)
12:00 p.m. – 1:30 p.m.

Upcoming Seminars

July 16, 2013
Solutions To Legal Challenges Presented By The Digital Era: Tips And Traps For Surviving And Thriving In The BYOD (Bring Your Own Device) Revolution
11:30 a.m. - 1:30 p.m. (lunch provided)

September 12, 2013
Trustee Boot Camp
8:30 a.m. - 4:30 p.m.

September 16 & 17, 2013
Employment Law Boot Camp (Two-Day Seminar)
Sept. 16: 8:30 a.m. – 4:00 p.m.
Sept. 17: 8:30 a.m. – 4:30 p.m.

October 17, 2013
Advanced Employment Law Boot Camp
8:30 a.m. – 4:30 p.m.

November 7, 2013
Annual Seminar: Hot Topics In Labor And Employment Law
8:30 a.m. – 10:00 a.m.

Please see the Firm's website at **www.shpclaw.com** or contact the Firm's Seminar Coordinator, **Kathie Duffy**, at **kduffy@shpclaw.com** or **(978) 623-0900** for more detailed information on these seminars and/or to register for one or more of these programs.

Schwartz Hannum focuses exclusively on labor and employment counsel and litigation, together with business immigration and education law. The Firm develops innovative strategies that help prevent and resolve workplace issues skillfully and sensibly. As a management-side firm with a national presence, Schwartz Hannum represents hundreds of clients in industries that include financial services, healthcare, hospitality, manufacturing, non-profit, and technology, as well as handling the full spectrum of issues facing educational institutions. Small organizations and Fortune 100 companies alike rely on Schwartz Hannum for thoughtful legal solutions that help achieve their broader goals and objectives.

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