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SHPC Legal Update

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IN THIS ISSUE

The NLRB Says My Employee Can Call Me *What?*

By Gary D. Finley

Employers are often surprised by the extent to which the National Labor Relations Act ("NLRA") protects intemperate, even abusive, outbursts by employees in connection with union matters or other workplace issues. While, in some instances, statements made by an employee may be deemed so obnoxious or disruptive as to forfeit the protections of the NLRA, employees generally enjoy a fair degree of latitude in criticizing their employer or its supervisors in connection with work-related issues of mutual concern to employees.

A recent decision by the U.S. Court of Appeals for the Second Circuit, *NLRB v. Pier Sixty, LLC*, affirming a ruling by the National Labor Relations Board ("NLRB"), illustrates this point. Both the NLRB and the Second Circuit concluded that an employee's angry social media rant – which included obscenities directed toward his manager and the manager's family – was protected under the NLRA, in large part because the employer had never previously fired or otherwise disciplined employees for using similar vulgarities.

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Tips For Negotiating Pre-Litigation Severance Agreements

By Matthew D. Batastini

Many employers are hesitant to terminate underperforming or redundant employees because they fear becoming embroiled in litigation. This reluctance may be justified in the case of separations involving employees who have recently been on a medical leave, have previously complained about harassment, discrimination or another workplace condition, or are generally known to be litigious.

To mitigate this risk, savvy employers will consider extending severance pay (or other benefits) to departing employees. Faced with unemployment, the promise of continued compensation, even for a relatively short period, is often too valuable for a departing employee to refuse. When drafted carefully and correctly, a pre-litigation severance agreement is enforceable and will bar the employee from asserting most claims against the employer. However, without appropriate care, a separation agreement may not be enforceable to the extent anticipated, or may not be enforceable at all.

This article discusses some practical considerations and tips for employers in negotiating pre-litigation severance agreements.

The Release Must Be Supported By Valid Consideration

A separation agreement is a contract and, as such, must be supported by consideration. Where a severance payment and/or other benefits will be provided in exchange for a release of claims,

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The NLRB Says My Employee Can Call Me *What?*

As this decision underscores, employers should act with caution in terminating or otherwise disciplining employees for even seemingly outrageous statements that implicate union issues or other matters covered by the NLRA.

Background

In general, the NLRA gives both unionized and non-unionized employees a right to engage in "protected concerted activities" – that is, actions aimed at employees' mutual aid and protection, and relating to the terms and conditions of their employment. An employer that discharges an employee for actions falling within this rubric can be ordered to reinstate the employee with back pay.

In recent years, the NLRB has shown a particular interest in safeguarding social media expression by employees related to their terms and conditions of employment. Many NLRB and court decisions, including the *Pier Sixty* case, have involved efforts to balance this principle against employers' interests in maintaining respect and civility in the workplace.

A Problematic Facebook Post

Pier Sixty operates a catering company in New York City. In early 2011, many of the company's service employees began seeking union representation. The organizing campaign, which ultimately resulted in the workers' voting to unionize, was tense, with managers allegedly threatening to discharge or otherwise penalize employees for union-related activities.

Two days before the union representation election, Herman Perez ("Perez"), a longtime Pier Sixty employee, was working at a catering event when he and two other servers received directions from their supervisor, Robert McSweeney ("McSweeney"). Speaking in what the NLRB described as "harsh tones," McSweeney ordered Perez and his co-workers to "turn [their] heads [towards the guests] and stop chitchatting," and to "spread out, move, move!"

About 45 minutes later, during an authorized break from work, Perez posted the following message about McSweeney on Perez's Facebook page:

> *Bob is such a NASTY [expletive] don't know how to talk to people!!!!!! [Expletive] his mother and his entire [expletive] family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!*

Perez's Facebook "friends," ten of whom were co-workers, were able to view the post. The post was also publicly accessible, though Perez claimed not to have been aware of that fact. By the time Perez took down the post – three days later – management had become aware of what Perez had posted. Subsequently, the company conducted an investigation, which culminated in Perez's termination.

In response to his termination, Perez filed a charge with the NLRB, alleging that he had been unlawfully fired for engaging in protected concerted activities. After a hearing, an NLRB administrative law judge concluded that Perez's Facebook post had constituted protected activity, for which Perez was unlawfully terminated. A three-member NLRB panel affirmed the administrative law judge's decision.

Subsequently, the NLRB asked the Second Circuit to enforce its decision, and Pier Sixty filed a cross-petition seeking to vacate the holding.

The Second Circuit's Holding

In its decision, the Second Circuit noted that while the NLRA generally prohibits employers from taking adverse employment actions based on concerted activity – including social media communications among employees relating to terms and conditions of employment – otherwise protected activity may be so outrageous or extreme that it loses the protection of the NLRA. (The NLRB and the federal circuit courts have applied varying legal standards in determining when this line has been crossed.)

The Second Circuit concluded, however, that though Perez's Facebook post was vulgar and offensive, it did not go beyond the pale of NLRA protection. The court cited a number of factors in support of this conclusion:

- While Perez's post included vulgar attacks on McSweeney and his family, it also referred directly to the impending union election.
- Pier Sixty had consistently tolerated the use of obscenities by its employees, including the specific vulgarities used by Perez in his post. Since Pier Sixty had never disciplined – let alone discharged – any other employee solely for using obscenities, the NLRB had reasonable grounds for concluding that Perez would not have been terminated had his Facebook post occurred outside the context of the union election.
- The forum Perez used for his comments – Facebook – has become a key medium of communication among coworkers and an important tool for union organizing.
- Finally, while Perez's Facebook post was visible to the public – including actual and potential Pier Sixty customers – his online comments were, nonetheless, distinguishable from an outburst occurring in front of customers attending a catering event.

The Second Circuit cautioned, however, that Perez's activity fell on the "outer-bounds of protected, union-related comments." Indeed, the court suggested in its decision that if Pier Sixty had had an established practice of disciplining employees for similarly obscene outbursts, its termination of Perez might have been upheld.

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The NLRB Says My Employee Can Call Me What?

Implications For Employers

The *Pier Sixty* case provides some helpful reminders for employers. In particular, an employer should approach with caution any potential firing stemming from a social media posting by an employee pertaining to union or other workplace issues. The risk of any such firing increases when the post is viewable, commented on, "retweeted," or "liked" by fellow employees, as this makes the concerted nature of the activity even more apparent.

Similarly, if an employer intends to discipline an employee for obscene or otherwise extreme statements related to workplace issues, the employer should consider whether it has previously disciplined employees for similar conduct unconnected to issues implicating the NLRA. Again, the fact that Pier Sixty had consistently tolerated similar vulgarities by employees in other contexts was a pivotal factor in the Second Circuit's conclusion that Perez's termination was unlawful.

If you have questions regarding the Pier Sixty *decision or would like assistance in evaluating the risks of potential discipline for employee conduct involving protected concerted activity, please feel free to contact one of our experienced labor attorneys.*

Employers Must Begin Using New Version Of Form I-9

By Julie A. Galvin

United States Citizenship and Immigration Services ("USCIS") recently released a new version of Form I-9, Employment Eligibility Verification. This action comes less than a year after USCIS's previous release, in November 2016, of a new, "smart" version of Form I-9, including drop-down menus.

Use of the latest Form I-9, which includes a revision date of July 17, 2017, will be mandatory for employers as of September 18, 2017.

Background

Under the Immigration and Nationality Act ("INA"), employers are permitted to hire only employees who have authorization to work in the U.S. Form I-9 must be used to verify the employment authorization of all employees hired after November 6, 1986.

Section 1 of Form I-9 must be completed by the employee on or before the date of hire. The employer must then examine the employee's employment authorization documents and complete Section 2 of the Form I-9 within three business days following the date of hire.

Revisions To Form I-9

The revisions incorporated in the newest version of Form I-9 are fairly minor. For example, the instructions have been changed to reflect the new name of the former Office of Special Counsel for Immigration-Related Unfair Employment Practices. That office, which enforces the anti-discrimination provisions of the INA, is now known as the Immigrant and Employee Rights Section.

In addition, the words "the end of" have been removed from the phrase "the first day of employment."

The revised Form I-9 also includes some revisions to "List C," which delineates the specific identification documents that employees may provide to prove their employment eligibility:

- The Consular Report of Birth Abroad (Form FS-240) has been added;
- All certifications of reports of birth issued by the Department of State (Form FS-545, Form DS-1350, and Form FS-240) have been combined into a single section in List C; and
- All of the documents included in List C, except for the Social Security card, have been renumbered.

Finally, USCIS has released an updated version of its "Handbook for Employers: Guidance for Completing Form I-9 (M-274)."

Recommendations For Employers

As the new Form I-9 becomes mandatory on September 18, 2017, we recommend that employers begin using the new form as soon as possible for all new hires, rehires and reverifications. Even paperwork violations in connection with the I-9 process can result in substantial fines – ranging from $216 up to $2,156 per Form – so simply using the wrong version of Form I-9 could prove costly for an employer in the event of an I-9 audit.

Further, in light of the Trump Administration's focus on immigration enforcement, it is imperative that employers be diligent throughout the employment verification process. The administration is expected to continue to increase the number of Form I-9 audits and workplace raids carried out by USCIS, and employers found to have employed unauthorized workers face severe sanctions.

Please feel free to contact us if you have any questions about the Form I-9 verification process, or if we can help with any other business immigration matter.

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Tips For Negotiating Pre-Litigation Severance Agreements

the severance benefits must be above and beyond compensation to which the employee is already entitled under his or her employment agreement (if applicable), or under the employer's handbook or other policies.

Accordingly, an employer whose policies provide for severance benefits to be extended unconditionally to departing employees *must* provide some additional benefit to the employee in order to support the release of claims. Absent such consideration, the severance agreement (and the release) is likely unenforceable against the employee.

Be Cautious With Promises Not To Contest Unemployment Benefits

During severance negotiations, employers commonly offer to not dispute an employee's application for unemployment benefits. While this seems like a harmless concession, an employer should be careful about how such a provision is phrased, particularly if the facts of the separation may not support an award of unemployment benefits.

Both federal and state law require employers to provide truthful responses to inquiries from state unemployment agencies, and failing to answer all or a portion of an agency's questionnaire may also be unlawful. Thus, rather than simply providing that the employer will not oppose an employee's application for unemployment benefits, a severance agreement might state that the employer will not take *affirmative* steps to contest the employee's eligibility for benefits, but that the employer will provide accurate, truthful information in response to any queries from the agency.

However, where the facts of a separation clearly do support an award of unemployment benefits – such as a reduction in force or a termination for unsatisfactory work performance, as opposed to misconduct – the severance agreement can simply specify what the employer will tell the state agency as to the reason for the termination.

Specify The Employment Reference Process

During severance negotiations, employees sometimes request that the employer provide a positive employment reference. Except where a favorable reference would be truthful – such as where a high performing employee is laid off because of redundancy or a lack of work – we generally recommend that employers adopt and not deviate from a neutral reference policy stating only the dates of employment, job title and salary.

The severance agreement should also state whom the departing employee will identify to a subsequent employer as the contact for an employment reference, in order to avoid an unintentional breach of the employer's agreement to provide a neutral reference.

Use Health Care Benefits As An Incentive

When dollars become a sticking point during separation negotiations, the employer may want to consider offering to continue paying a portion of the departing employee's health insurance premiums for a period after the separation. Payments for health coverage can be more palatable to frustrated managers in such negotiations, and are also likely to provide departing employees, especially those with dependent spouses or children, with the security of continued healthcare coverage.

Any agreement providing for continued payment of a departing employee's health insurance contributions should also stipulate that such payments will cease upon the employee's becoming eligible for insurance coverage through another employer.

Evaluate Restrictive Covenants

When separating an employee who has entered into restrictive covenants – such as non-compete or non-solicit agreements – there may be opportunities to sweeten the consideration provided to the employee with no detriment to the employer. In some states, non-compete restrictions are unenforceable when the employer involuntarily separates the employee, and in nearly all states, they are more difficult to enforce in that circumstance. Employers should consider whether to waive, or significantly reduce, non-compete obligations as part of a severance package.

By contrast, confidentiality (or non-disclosure) agreements are generally enforceable post-employment, regardless of the nature of the separation. Employers should take appropriate steps during any separation to ensure that their confidential information will be protected.

Beware Of Mutual Obligations

In separation negotiations, a common demand from employees is a mutual release or mutual non-disparagement provision. Employers should be wary of agreeing to such mutual obligations without careful consideration, as they can have unforeseen and sometimes far-reaching consequences.

Any mutual release should carve out intentional or willful misconduct, such as embezzlement or fraud, as the employer may learn of such misconduct only after the employee has departed. Any mutual non-disparagement provision should be limited to a handful of specifically designated employees to which the restriction applies, to avoid having the entire organization unwittingly bound by the provision. Indeed, an employer may want to consider whether a non-disparagement provision should be included at all, as such covenants are often costly and difficult to enforce.

Have The Employee Sign The Agreement On Or After The Termination Date

The release in a severance agreement waives only claims which precede the execution of the agreement. Accordingly, if the employee continues to work after signing the severance agreement, and a dispute over wages, benefits or any other employment

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issues arises thereafter, those claims will not be released. Retaliation claims can arise in this context as well.

To avoid such potential claims, an employee generally should not be permitted to sign a severance agreement until after his or her employment has ended. Presenting the agreement to the employee during the exit interview can be a convenient way of ensuring this.

Nonetheless, in some cases, an employer may have good reasons for wanting an employee to sign a release before his or her employment has ended. For instance, if an employee has raised problematic legal claims that the employer is eager to extinguish, it may make sense to allow the employee to sign a release before his or her final day of employment. In that event, however, the severance agreement should include a separate "affirmation" for the employee to sign after his or her termination, reaffirming the release and extending its reach through the employee's departure date.

Be Aware Of Important Technical Requirements

Finally, employers need to be sure to comply with any technical requirements applicable to a severance agreement. For instance, under the federal Older Workers' Benefit Protection Act ("OWBPA"), an employee who is 40 or older needs to be given at least 21 days to review the agreement before signing it (though the employee may choose to sign earlier) and seven days to revoke the agreement after signing it, and the agreement should specify that the employee has been advised to consult an attorney.

In the case of a "group" termination – typically, though not always, a formal reduction in force (or "RIF") – the OWBPA review period is extended to 45 days, and certain information about the decisional process must also be provided to the employee in writing.

On top of these federal-law requirements, state laws may impose additional obligations upon employers in securing releases of claims.

Conclusion

When carefully considered, a pre-litigation separation agreement can provide both the employer and employee with certainty and closure. It should go without saying, however, that prior to presenting any such agreement to an employee, an employer should consult with experienced counsel to ensure the proposed agreement will provide the benefits and protections sought. Our attorneys have significant experience both guiding employers through separation negotiations and drafting and reviewing separation agreements.

Joseph E. Santucci, Jr. Is Recognized As "Lawyer of the Year" 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 the 2017 **"Lawyer of the Year"** in Labor Law – Management for the Boston, MA region. He was also named a **"Best Lawyer"** in the categories of Labor & Employment Law and Employment 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 on the Best Lawyers list 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!

DOJ/FTC Guidance Details Antitrust Pitfalls For Businesses In Employment Context

By Brian D. Carlson

Last year, the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") jointly issued an Antitrust Guidance for Human Resource Professionals (the "Guidance"). The Guidance details critical antitrust principles arising in the employment context, which corporate executives, HR professionals, and other managers responsible for recruitment and hiring would be wise to review.

In particular, the Guidance emphasizes that wage-fixing and no-poaching agreements among business competitors violate federal antitrust laws and can result in stiff sanctions, including criminal and civil penalties for businesses as well as the individual employees involved. Similarly, the Guidance cautions that the antitrust laws restrict employers' ability to share compensation information with competitors.

Background And Overview Of Guidance

In recent years, the DOJ and the FTC have brought major antitrust enforcement actions against businesses in connection with alleged no-poaching or wage-fixing agreements. For example, the DOJ has initiated civil enforcement actions against several technology companies for allegedly entering into agreements with one another not to "cold call," and in some cases not to hire, each other's employees. Similarly, the FTC has brought enforcement actions against various companies for allegedly agreeing not to compete for employees and conspiring to hold down compensation terms for employees.

In the wake of such enforcement actions, the Guidance outlines the fundamental antitrust principles governing the employment marketplace, focusing principally on no-poaching and wage-fixing agreements, as well as the exchange of compensation information with competitors. While this article does not cover every aspect of the Guidance, most of the key issues it addresses are summarized below:

Rules of a Competitive Employment Marketplace

From an antitrust perspective, companies that compete to hire or retain particular employees are competitors in the employment marketplace, regardless of whether the businesses make similar products or provide the same types of services. Under the antitrust laws, it is unlawful for businesses to agree, whether expressly or implicitly, not to compete with one another in recruiting employees or setting compensation terms. Therefore, corporate executives, human resources professionals and hiring managers must ensure that their interactions with other businesses are not aimed at, and do not result in, any such unlawful agreement.

Violations of the antitrust laws can have severe consequences. Depending on the facts of the case, the DOJ may bring a criminal prosecution against individual employees and/or the companies involved. Both the DOJ and the FTC are authorized to initiate civil enforcement actions for antitrust violations. In addition, an individual employee or other private party injured by an illegal agreement among competing employers may bring a civil lawsuit for treble damages and attorneys' fees. Particularly in the case of a class action, the potential costs of such a lawsuit may be enormous.

No-Poaching and Wage-Fixing Agreements

Agreements among employers not to solicit or hire each other's employees ("no-poaching") or not to compete with one another in salaries or other compensation terms offered to employees ("wage-fixing") likewise violate the antitrust laws. Again, it does not matter whether the agreement is informal or formal, written or unwritten, explicit or tacit. Evidence of exchanges of information among competitors relating to compensation, recruiting, or similar topics, followed by parallel behavior, may lead to an inference of an unlawful agreement.

As the Guidance notes, unless a no-poaching or wage-fixing agreement is "reasonably necessary to a larger legitimate collaboration" between employers, the agreement is considered "naked" and *per se* unlawful, regardless of its actual anti-competitive effects. (An example of a "legitimate collaboration" might be a bona fide joint venture, as part of which employers agree not to solicit one another's employees involved in the venture for a limited period of time.)

The Guidance emphasizes the DOJ's intention to proceed criminally against wage-fixing and no-poaching agreements. Indeed, the Guidance cautions that a finding of such an unlawful agreement may result in felony criminal charges against the employers and individuals involved.

Exchanges of Compensation Information Among Competitors

The Guidance also cautions employers about sharing information with competitors concerning employee compensation or other terms and conditions of employment. Even if the individuals involved do not explicitly agree to fix terms of employment, exchanging such information without a legitimate purpose can serve as evidence of an implicit illegal agreement. Additionally, even absent such an agreement, the exchange of compensation data or other sensitive information among competitors may result in civil antitrust liability if the exchange has, or is likely to have, an anticompetitive effect.

The Guidance notes that, in certain circumstances, business competitors may share compensation data or similar information with one another without violating the antitrust laws. For example, an exchange of compensation information may be lawful if

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it is carried out in connection with a legitimate merger or acquisition proposal and appropriate precautions are taken to minimize potential anti-competitive effects, such as limiting the information-sharing to a small number of key decision-makers.

Both the DOJ and the FTC offer review processes under which employers may request advisory opinions as to how the agencies would view potential joint ventures or other collaborations among competitors involving the sharing of compensation data or similar information. Seeking such advance guidance may enable companies to avoid potential antitrust enforcement investigations and lawsuits.

Reporting Potential Violations

Finally, the Guidance encourages employees who have information about possible employment-related antitrust violations to report such conduct to the DOJ or the FTC. In order to incentivize such reporting, the DOJ offers a leniency program, under which companies and individuals can avoid criminal penalties by being the first to confess participation in a criminal antitrust violation, fully cooperating with the DOJ's investigation, and meeting other specified conditions.

Recommendations For Employers

In response to the Guidance, there are a number of steps we suggest employers take.

Foremost, employers would be wise to have their corporate executives, HR professionals and other hiring managers review the Guidance carefully, ideally as part of broader antitrust training regularly provided to all relevant personnel.

In consultation with legal counsel, employers should critically review and revise, as needed, their policies, practices and agreements relating to the sharing of employee compensation information with competitors and other third parties, in order to ensure compliance with the antitrust laws.

Finally, an employer should immediately notify counsel if it discovers evidence of an unlawful agreement or improper information-sharing mechanism involving a business competitor, in order to determine the appropriate steps to take.

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Unparalleled Client Relationships In BTI Industry Power Rankings 2017

BTI has recognized Schwartz Hannum PC in its ***Industry Power Rankings 2017: Law Firms with the Best Client Relationships in 18 Industries*** report. Ranked in the top 10% on both the Honor Roll of ***Core*** Firms and Honor Roll of ***Recommended*** Firms in the chemicals industry, Schwartz Hannum PC is thrilled to have received this honor.

The report stems from more than 950 in-depth telephone interviews with the highest-ranking legal decision makers at organizations with $1 billion or more in revenue. It is based solely on *direct, unprompted* feedback about the client/law firm relationship. Founded in 1989, BTI is the leading provider of strategic research to the legal community—performing more client and market research about law firms than virtually anyone.

Explore the ranking methodology on the BTI website *http://www.bticonsulting.com/power-rankings-for-law-firms/.*

Tips For Schools In Handling "Pass The Trash" Issues

By Brian B. Garrett

Independent schools increasingly face critical challenges in determining how best to protect their students and employees, and the institutions themselves, when employees or students violate sexual or other boundaries.

Over the past few years, a particular focus has fallen on situations in which faculty members or students have committed misconduct (typically, though not always, sexual) at one educational institution and, after moving on to another with positive or neutral references, have engaged in similar misbehavior. Such scenarios are often referred to as "passing the trash."

Recent controversies over such situations have created pressures on schools to ensure that they appropriately handle student and employee reference and reporting issues. It is critical for each school to develop and implement appropriate policies and practices that comply with its legal and moral obligations in this area.

Background

The landscape surrounding sexual misconduct at independent schools has evolved considerably over recent years. Whereas much of the national attention initially focused on colleges' and universities' handling of cases of sexual misconduct, independent schools have come under similar scrutiny in the past few years. As a result, students, families, and alumni, as well as the general public, have come to expect that schools will respond to allegations of misconduct in a swift, thorough, and transparent manner.

This heightened sense of awareness has not only changed how schools approach current cases of sexual misconduct, but has also prompted many schools to proactively investigate allegations of abuse stretching decades into the past. Indeed, dozens of institutions have initiated investigations into such issues in recent years, prompted, in part, by investigative reports by *The Boston Globe's* Spotlight Team and other media sources.

Handling And Disclosing Employee Misconduct

This recent focus has brought to light an alarming number of instances in which school employees have engaged in sexual misconduct with students, moved on to other schools, and later committed similar acts.

As these reports underscore, it is critical that a school act quickly and appropriately upon learning of alleged sexual misconduct by an employee. In particular, the school must determine whether the allegations must be reported to government agencies; how the allegations should be investigated; what should be done with the alleged perpetrator while an investigation is ongoing; and how best to care for the affected student or students.

Government Agencies.

While state laws on this subject vary, schools are often required, in their roles as caretakers, to immediately report any instances of alleged child abuse or neglect – including sexual abuse – to state law enforcement and/or licensing agencies. For instance, in Massachusetts, school employees who learn of possible abuse or neglect must immediately call the Massachusetts Department of Children & Families and then submit a standard, written report within 48 hours of the oral report.

Further, even if it is not legally *obligated* to do so, a school nonetheless may want to promptly report such alleged misconduct to appropriate government agencies. Doing so may help to emphasize to students, families, and the overall school community how seriously the school takes the matter. Schools should seek legal counsel as soon as possible upon learning of allegations of sexual misconduct, in order to determine how best to navigate their mandated reporting obligations.

Potential Employers.

Schools also must determine whether and how they will disclose an incident of sexual misconduct to current or future employers of an offender.

Certain states, including Pennsylvania and Oregon, have enacted "pass the trash" legislation. In other states (such as Massachusetts), similar legislation has been proposed. These laws impose affirmative duties on schools to disclose instances of sexual misconduct to prospective employers. (In certain states, only *public* schools are subject to such obligations.)

Currently, in most states, schools are not legally required to report sexual misconduct by employees to future employers. Instead, schools must decide, as a matter of policy, whether to do so. Many schools (and other employers) have policies under which they provide only neutral references (name, dates of employment, and position(s) held) to prospective employers, as a means of limiting potential liability.

> "This recent focus has brought to light an alarming number of instances in which school employees have engaged in sexual misconduct with students…"

However, in the case of a former employee with a history of sexual abuse or similar

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Tips For Schools In Handling "Pass The Trash" Issues

boundary crossing with students, a school might consider whether to make an exception to a neutral reference policy and disclose information relating to the incident to prospective employers. Given the recent spotlight on sexual abuse of students, a school's withholding such information could create a backlash of negative publicity if a former employee were to reoffend after going to work for a new school.

In addition, some states have reference immunity laws that may protect schools against liability arising from the disclosure of such information. Still, there is always the possibility that a school could face tort claims by a former employee as a consequence of disclosing negative information about the individual.

Legal counsel can assist schools in balancing these considerations and deciding whether to notify prospective employers about a former employee's sexual misconduct.

Handling And Disclosing Student Misconduct

Schools face similar challenges in determining whether to report student discipline for sexual misconduct to next schools or colleges. While reporting such discipline may impact students' ability to be successful at their next institutions, schools can open themselves up to potential legal exposure and reputational harm if they fail to do so.

Notably, several standardized applications, such as the Common App (for college applications) and the SSAT App (for secondary school applications), require that both applicants and schools disclose disciplinary violations, including probations, suspensions, and expulsions. The National Association for College Admission Counseling's ("NACAC") "Statement of Principles of Good Practice" ("Statement") also focuses on this issue. The NACAC's Statement mandates that member schools "provide, as permissible by law, accurate descriptions of the candidates' personal qualities relevant to the admission process," and states that member schools should, as a best practice, "establish a written policy on disclosure of disciplinary infractions in their communications to colleges," and "report any significant change in a candidate's academic status or qualifications, including personal school conduct record between the time of recommendation and graduation, where permitted by applicable law."

Further, in June, the American Association of Collegiate Registrars and Admissions Officers ("AACRAO") released guidance on disciplinary transcript notations. The purpose of the guidance is to "enhance transparency and standardize practices" in order to "promote consistency and fairness to all students involved in internal disciplinary procedures." AACRAO specifically advised its more than 2,500 public and private higher education member schools to notify receiving institutions of serious misconduct, including a resulting suspension or expulsion, through an academic transcript, student conduct transcript, dean's certification letter, or transcript insert.

Though the AACRAO's guidance applies specifically to higher education institutions, it highlights the growing trend of transparency and disclosure as a means of protecting school communities from recidive student conduct.

Recommendations For Schools

Every independent school – whether or not it has dealt with instances of sexual misconduct by employees or students – should give thoughtful consideration to how best to handle such occurrences. We suggest that schools take the following steps, with the guidance of counsel:

- Educate themselves as to their legal obligations to report or disclose sexual misconduct, including to state agencies, potential employers, and next schools or colleges.

> "Schools face similar challenges in determining whether to report student discipline for sexual misconduct to next schools or colleges."

- Provide comprehensive training for all faculty and other employees on recognizing and responding appropriately to potential instances of sexual misconduct or other boundary crossing.
- Carefully review and update relevant policies in student and employee handbooks, including those relating to interpersonal misconduct, discipline, employment references, and disclosure to next schools and colleges.
- Ensure that all employment forms and authorizations, such as employment application certifications, separation agreements, and reference releases, provide the school with appropriate discretion in determining whether to report or disclose such information.

Schwartz Hannum's team of education lawyers has a wealth of experience advising independent schools in issues relating to sexual misconduct and other boundary crossing. If you have any questions about these issues or need assistance with any other school safety-related matters, please feel free to contact us.

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Gender-Identity Discrimination: Guidance From Massachusetts Agencies

Nature and Evidence of Gender Identity

The MCAD and AG guidance documents describe gender identity as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." Importantly, individuals may be considered transgender – *i.e.,* as having a gender identity different from the sex assigned to them at birth – whether or not they have undergone surgery, intend to undergo surgery, or have received other medical or psychological treatment related to their gender identity.

Massachusetts law also protects persons whose gender identity is consistent with their assigned sex at birth, but who do not adopt or express traditional gender roles, stereotypes or cultural norms. For example, discrimination against a person who was designated as female at birth and now identifies as a woman, but who does not act, dress, or groom herself in a manner consistent with feminine stereotypes, is unlawful discrimination based on gender identity (as well as sex).

The MCAD Guidance indicates that, in most cases, it is not appropriate for an employer to request documentation of an individual's gender identity. However, when such evidence is legitimately needed, the MCAD Guidance states that an individual's gender identity may be demonstrated by any evidence showing that the gender identity is "sincerely held as a part of the individual's core identity." According to the MCAD, the precise meaning of this phrase will be developed as the case law evolves. The MCAD takes the general position, however, that evidence of consistent conduct over a period of time should be sufficient to demonstrate the sincerity of one's belief regarding his or her gender identity.

Similarly, the AG Guidance notes that, in the vast majority of cases, it is not appropriate for a place of public accommodation to request documentation of an individual's stated gender identity. However, such a request may be permissible for an organization that regularly and legitimately requires documentation of its members' genders, such as a health or sports club. In that circumstance, an individual's gender identity may be demonstrated by (1) a driver's license or other government-issued identification; (2) a letter from a doctor, therapist, or other healthcare provider; (3) a letter from a friend, clergy, or family member regarding the person's routine conduct, such as dress, grooming, and use of corresponding pronouns; or (4) any other evidence that the gender identity is sincerely held as part of the person's core identity.

Employment Practices

M.G.L. Chapter 151B, which is enforced by the MCAD, prohibits discrimination in employment based on an individual's gender identity. In its Guidance, the MCAD provides examples of workplace actions that may constitute gender-identity discrimination:

- Demoting an employee, or assigning him or her a smaller office or less desirable work schedule, when the employee returns from a leave of absence to undergo gender-affirming surgery;
- Rejecting a job applicant who identifies as a man after a check of his employment references reveals that the applicant identified as a woman in previous employment;
- Refusing to respect an employee's request for use of preferred gender pronouns;
- Excluding an employee from meetings, office parties, or other work-related events on the basis of his or her transgender status;
- Failing to take prompt remedial action to stop harassment of an employee based on transgender status, if the employer is aware of the harassment;
- Denying an employee access to the restroom that corresponds to the employee's gender identity.

The MCAD Guidance also describes various types of employer actions that may help demonstrate an *absence* of discrimination based on gender identity:

- Communicating to employees that harassment of transgender employees will not be tolerated;
- Promptly and appropriately disciplining employees who violate this prohibition;
- Revising company records to reflect an employee's name change;
- Assisting a transgender employee in obtaining insurance coverage for surgery.

Public-Accommodation Issues

Since 2016, Massachusetts law has prohibited places of accommodation from discriminating against persons or otherwise denying services based on gender identity. The term "place of public accommodation" is broadly defined to encompass a wide variety of facilities that are open to the general public, including retail stores, hotels, restaurants, theaters, malls, sports stadiums, museums, libraries, public parks, beaches, and public roads. Businesses that provide services to the general public are also covered, including health and sports clubs, hospitals, loan companies, taxi companies, and insurance companies.

Both the AG and the MCAD Guidance provide examples of actions that may violate the prohibition against gender-identity discrimination in places of public accommodation. These include, for instance, refusing or denying services, or offering an inferior class or quality of service, because of a customer's gender identity; lying to or misleading someone about the availability of goods, services or facilities because of his or her gender identity; and harassing or

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intimidating someone on the basis of gender identity.

The AG Guidance also addresses the use by transgender persons of "sex-segregated" facilities in places of public accommodation, such as restrooms, changing rooms and locker rooms. In essence, transgender individuals must be permitted to use whichever facility is most consistent with their gender identity, as opposed to their assigned birth sex. Significantly, a place of public accommodation may *not* require a patron to use a unisex facility because of his or her gender identity.

The AG Guidance cautions that attempted misuse of sex-segregated facilities is exceedingly rare, and that individuals should be presumed to be using the facilities consistent with their gender, regardless of their appearance. However, the AG Guidance states that inquiry into a patron's gender identity may be appropriate if the person's behavior creates "reasonable worry" that the person is engaged in "improper or unlawful conduct," such as loitering for the purpose of observing others, harassing or threatening violence against an employee or patron, or photographing others without permission. In such situations, the AG Guidance suggests that the place of public accommodation ask the patron to leave, or call security or law enforcement if necessary.

Best Practices

Finally, the MCAD Guidance details various "best practices" for employers and places of public accommodation to comply with their legal obligations and foster an inclusive and welcoming environment:

- Revising non-discrimination, equal opportunity, anti-harassment, and other policies as necessary to specify that discrimination and harassment on the basis of gender identity are prohibited;
- Incorporating information about transgender individuals into diversity, anti-discrimination, and anti-harassment trainings;
- Updating e-mail systems, personnel records, payroll records, and other documents to reflect each employee's stated name and gender identity;
- Using names, preferred pronouns, and other gender-related terms appropriate to each person's stated gender identity;
- Avoiding gender-specific dress codes and permitting employees to dress in a manner consistent with their gender identity;
- Permitting access to sex-segregated facilities (*e.g.*, bathrooms, locker rooms) based on each person's stated gender identity;
- Promptly investigating and addressing any complaints of harassment or other discrimination based on transgender status.

Recommendations For Employers

We recommend that employers and other organizations carefully review the MCAD and AG Guidance with managers, supervisors, human resources representatives, and any other relevant personnel. In conjunction with that review, organizations should closely consider the MCAD's suggested best practices, as detailed above.

If you have any questions about the MCAD and AG Guidance or need assistance with any other gender-identity-related issues, please feel free to contact us.

Attorney **Jaimeson E. Porter** Joins Schwartz Hannum PC

Schwartz Hannum PC is thrilled to announce that Jaimeson E. Porter has joined the Firm's Labor and Employment group.

Jaimeson provides counsel and representation to businesses and independent schools in litigation and other aspects of the employer-employee relationship. Jaimeson routinely handles wage and hour issues, claims of discrimination, accommodation requests, complex internal investigations, handbook issues, employee discipline issues, severance agreements, employment agreements including non-competes, and FMLA and other leave matters. She counsels clients to identify and mitigate future risks of litigation, and she represents employers before state and federal courts, the MCAD and EEOC, and at mediation and arbitration proceedings.

Jaimeson received her undergraduate degree from the University of Massachusetts, Amherst and her J.D. from Suffolk University School of Law. She is a member of the Women's Bar Association, Massachusetts Bar Association, and the Boston Bar Association.

Before joining Schwartz Hannum PC, Jaimeson was an associate at Kenney & Sams, P.C. in Boston, MA.

Gender-Identity Discrimination: Guidance From Massachusetts Agencies

By Brian D. Carlson

Within recent years, gender identity has been added as a protected category under various Massachusetts laws, including the state employment-discrimination and public-accommodations statutes. Employers and other organizations should be aware that the Massachusetts Commission Against Discrimination ("MCAD") and the Massachusetts Office of the Attorney General ("AG") have each issued formal guidance documents addressing issues arising under these laws.

Although the guidance documents are not formally binding, courts often give significant weight to the views of the MCAD and AG in deciding discrimination cases. Further, MCAD and AG investigators will almost certainly consider the guidance documents in evaluating allegations of discrimination and deciding whether to initiate litigation. Accordingly, Massachusetts employers and other organizations should carefully review the guidance documents and consider whether their policies and practices regarding gender identity need to be modified.

Overview Of MCAD And AG Guidance

The MCAD and AG guidance documents ("MCAD Guidance" and "AG Guidance") include detailed examples of conduct that may constitute unlawful gender-identity discrimination, as well as question-and-answer guides. While this article does not cover every aspect of the guidance documents, most of the key issues they address are outlined below.

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Independent Schools Webinar/Seminar Schedule

September 28, 2017
Risk Management Strategies For Off-Campus Trips And Activities
3:00 p.m. to 4:30 p.m. (EST)

October 12, 2017
Legal Adventures And Hot Topics In Independent Schools: An Annual Review
8:30 a.m. to 10:30 a.m. at SHPC or as On-line Webinar

October 27, 2017
Drawing The Lines: Exploring Student Disciplinary Policies And Protocols
12:00 p.m. to 1:30 p.m. (EST)

November 2, 2017
Tips And Traps For Welcoming International Students
12:00 p.m. to 1:30 p.m. at SHPC or as On-line Webinar

November 15, 2017
Drafting And Enforcing An Ideal Enrollment Agreement
12:00 p.m. to 1:30 p.m. (EST)

December 6, 2017
Accommodating Applicants And Students With Disabilities
3:00 p.m. to 4:30 p.m. (EST)

January 24, 2018
Contracts And Compensation For The Head Of School: Tips, Traps And Best Practices
12:00 p.m. to 1:30 p.m. (EST)

January 26, 2018
Easing The Administrative Burden: Best Practices For Implementing Electronic Signatures On School Forms
3:00 p.m. to 4:30 p.m. (EST)

February 16, 2018
Getting It Write: Student Handbooks
3:00 p.m. to 4:30 p.m. (EST)

Labor And Employment Webinar/Seminar Schedule

October 5, 2017
But Can You Enforce It? Restrictive Covenants And Your Business
8:30 a.m. to 10:30 a.m. at SHPC

October 25 & 26, 2017
(Two Day Seminar)
Employment Law Boot Camp
Oct. 25: 8:30 a.m. to 4:00 p.m.
Oct. 26: 8:30 a.m. to 4:30 p.m.
at SHPC

November 9, 2017
Annual Seminar: Hot Topics In Labor And Employment Law
8:00 a.m. to 12:00 p.m. at The Andover Inn

February 8, 2018
Conducting An I-9 Audit: Tips, Traps And Best Practices
12:00 p.m. to 1:30 p.m. (EST)

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

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

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