SCHWARTZ HANNUM PC
Guiding Employers & Educators

SHPC Legal Update

THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

SEPTEMBER 2018

IN THIS ISSUE

Mental Health Concerns Lead To New Responsibilities For Schools

By Sarah H. Fay

This past summer, Americans were shocked by a series of high-profile suicides, including those of Kate Spade and Anthony Bourdain. The sad reality is that these deaths are part of an alarming rise in suicide rates across the country.[1] Unfortunately, this public health crisis[2] has tragically impacted school campuses as well.

As a result, states are passing new laws requiring mental health education for students, and courts are beginning to consider the circumstances under which educational institutions – from colleges and universities to independent schools and everything in between – may be held responsible for students' mental health. Schools are scrambling to catch up with these rapid developments. Within this changing milieu, educators might well wonder what they can be held responsible for in connection with students' mental health, and what their schools can do to support and protect students with mental health issues.

As one might expect, the answers vary from state to state, but it is important for independent school educators and administrators across the nation to stay abreast of these changes so that they can begin to implement proactive measures on their own campuses.

Recent Legislation On Mental Health Education

As of July 1, 2018, New York and Virginia became the first states to have laws requiring schools to provide mental health education to students. The New York law requires all elementary, middle, and high schools – both public and private – to incorporate mental health and the relation-

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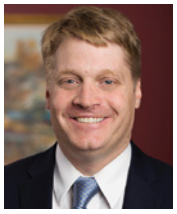
Massachusetts Employers Face New Minimum Wage And Paid Leave Mandates

By Gary D. Finley



On June 28, 2018, Massachusetts Governor Charlie Baker signed a bill that will have significant implications for Massachusetts employers. Most notably, the new legislation will increase the state minimum wage to $15.00 per hour by 2023 and require employers throughout the Commonwealth to offer paid family and medical leave to their employees beginning in 2021.

As detailed in a previous article, which appeared in our June 2018 Update ("Prospective 2018 Ballot Questions Could Prove Costly For Massachusetts Employers"), Massachusetts voters were set to vote on these same general proposals as part of separate ballot initiatives in the upcoming November election. In exchange for the passage of the new legislation, however, the sponsors of the ballot initiatives agreed to withdraw the initiatives from the 2018 ballot. As part of this deal, the Commonwealth was able to negotiate some minor concessions that make these laws slightly more palatable to employers.

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Mental Health Concerns Lead To New Responsibilities For Schools

ship between physical and mental health in their curricula. The goal of this new requirement is "to enhance student understanding, attitudes and behaviors that promote health, well-being and human dignity."

The Virginia law, which covers only public schools, requires that mental health be added to the 9th and 10th grade curricula. Interestingly, the Virginia law was proposed by three students, which suggests that student activism may have an impact on efforts to enact protections for student mental health.

Other states have sought to address the issue by requiring mental health screening before students begin the first day of school. Oregon, for example, requires "residential schools" to conduct a suicide risk analysis before a student attends school. Consequently, some schools in Oregon have added questions to their student health forms about suicide risks.

Similarly, in the wake of the Parkland school shooting, Florida recently passed legislation increasing public funding for mental health screening, as well as requiring school districts to ask students to report whether they have received mental health services.

We anticipate that states will continue to enact legislation that will heighten schools' obligation to provide education and resources to students regarding mental health.

Noteworthy Cases

This past May, the Massachusetts Supreme Judicial Court ("SJC") held, in *Nguyen v. Massachusetts Inst. of Tech.*, that universities may have a legal obligation to seek to prevent student suicides. In this landmark decision, the SJC held that while MIT could not be held liable for the suicide of the plaintiff (a graduate student), there could be limited circumstances in which educational institutions are responsible for protecting their students from suicide.

Finding that universities have a special relationship with their students, the SJC concluded that a university has a duty to take reasonable measures to prevent suicide if it has actual knowledge of (1) a student's suicide attempt that occurred while the student was enrolled at the university or recently before his or her matriculation, or (2) a student's stated plan or intention to commit suicide. Reasonable measures include implementing a suicide prevention protocol, if the institution has one, or, if it does not, contacting appropriate officials empowered to assist the student in seeking proper care. If the student refuses such care, the duty extends to notifying the student's emergency contact.

While the *Nguyen* decision is limited to institutions of higher education, the principles it sets forth may equally apply to secondary schools, particularly boarding schools, where the relationship between the school and students is more consistent with *in loco parentis*. As such, independent schools should take heed of this decision and its potential implications for their responsibility to attempt to prevent student self-harm.

In fact, there are too many examples of similar cases moving forward at the secondary level. This past June, for example, parents in Rockaway, New Jersey filed suit against the local public school district after their sixth-grade daughter committed suicide. The family alleges that their daughter's suicide was caused by the school district's failure to respond to months of unaddressed bullying by her peers. Courts have thus far seemed resistant to such claims, but with changes in legislation meant to specifically address issues like bullying and mental health, that could change.

As such, independent schools should regard this moment as an opportunity to proactively address their policies and practices linked to student mental health and, particularly, suicide.

Recommendations

Given this alarming public health concern, coupled with emerging expectations, we recommend that independent schools consider the following steps:

- Review applicable school policies, such as those governing medical leaves, counseling services, and privacy issues.
- Update health forms to include appropriately tailored questions about suicide risk.
- Implement an authorization form that provides the school counselor with flexibility to share information with other school administrators and the student's parents on a need-to-know basis.
- Ensure that enrollment contracts include provisions that put responsibility on families to share relevant information about their children, including about medical conditions and behavioral issues.
- Review and update suicide prevention and response protocols.
- Review health and wellness curricula.
- Determine what mental health resources are available on (and off) campus and make sure students and their families are aware of these resources.
- Train school employees on how to talk about mental health issues, including suicide.
- Educate the entire community about the school's resources, policies, practices, and other relevant information.

Schools must be vigilant on these issues to protect not only their students but also the institution. Suicide is a complex and serious public health problem – but it is also one that may be preventable. As such, regardless of whether schools are *legally* required to, now is the time to act.

Please contact one of the attorneys in our education practice group if you have questions about any of these issues, or if you would like our assistance in implementing these recommendations.

1 Vital Signs: Trends in State Suicide Rates — United States, 1999–2016 and Circumstances Contributing to Suicide - 27 States, 2015, Centers for Disease Control and Prevention, June 8, 2018 at *https://www.cdc.gov/mmwr/volumes/67/wr/mm6722a1.htm?s_cid=mm6722a1_w*

2 How Suicide Quietly Morphed Into a Public Health Crisis, NY Times, June 8, 2018 at *https://www.nytimes.com/2018/06/08/health/suicide-spade-bordain-cdc.html*

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Massachusetts Employers Face New Minimum Wage And Paid Leave Mandates

Increases In Minimum Wage

Under the new law, the state minimum wage in Massachusetts - which currently sits at $11.00/hour - will increase to $15.00/hour by 2023. The first increase, slated for January 1, 2019, will raise the minimum wage to $12.00/hour. The state minimum wage will then increase by an additional 75 cents each year until it reaches $15.00/hour on January 1, 2023.

This rate of increase is a bit slower than what was proposed in the ballot initiative, under which the minimum wage would have reached $15.00/hour by January 1, 2022. Additionally, the new law omitted a provision of the ballot initiative that would have implemented further minimum wage increases automatically based on the inflation rate.

The new statute will also increase the minimum wage for tipped employees - currently $3.75/hour - to $6.75/hour by 2023, through incremental increases of 60 cents each year. (The ballot initiative would have raised this rate to $9.00/hour by 2022.)

Certain retail employers actually stand to benefit from one provision of the new law, which will gradually eliminate the requirement that these establishments pay non-exempt employees time-and-a-half for all hours worked on Sundays and certain legal holidays. This premium-pay obligation will gradually be reduced, until it is eliminated altogether as of January 1, 2023. However, covered employees will still have a right to refuse to work on Sundays or the enumerated legal holidays, without fear of adverse employment consequence.

Paid Family And Medical Leave

Starting in 2021, most Massachusetts employees will be eligible annually for up to 12 weeks of paid, job-protected family leave, and up to 20 weeks of paid, job-protected medical leave.

Some notable aspects of these new leave entitlements include the following:

- Covered employees will be permitted to take up to 12 weeks of paid leave annually to: (1) care for a child after the child's birth, adoption, or placement for foster care; (2) care for a seriously ill family member; or (3) address needs arising from a family member's active duty military service.
- Even more liberally, covered employees will have a right to take up to 20 weeks of paid leave annually to address their own serious medical conditions, through inpatient, hospice, or at-home care, or continuing treatment by a health-care provider.
- An employer may cap an employee's combined use of family and medical leave at 26 weeks within any year.
- An employee will be required to give at least 30 days' notice before commencing and returning from leave, or to provide notice as soon as practicable if the need for leave is not foreseeable.
- Benefit payments during family or medical leave will be calculated as a percentage of the employee's weekly wage, subject to a cap of $850 per week (with future adjustments to that cap indexed to the state's average weekly wage).
- Employers will not be responsible for directly paying employees their family and medical leave benefits. Instead, benefits will be financed through an increase in the state payroll tax, in an amount corresponding to 0.63% of the employee's annual wages. This payroll tax increase will be borne equally by employers and employees, except that employers with fewer than 25 employees may pass the full cost on to their employees. The payroll tax increase will go into effect July 1, 2019.
- In order to receive benefits, an employee will be required to file a claim with the to-be-created Department of Family and Medical Leave.
- Employers will be subject to certain posting and notification requirements.

What Employers Should Do

We recommend that Massachusetts employers review the new law and, in consultation with employment counsel, consider how their operations will be affected. In particular, employers with hourly employees may want to begin planning for the annual increases in the state minimum wage that will begin as of January 1, 2019.

Employers should also watch for official guidance from the Commonwealth as to how the new law will be implemented, including the collection of the additional payroll taxes beginning on July 1, 2019.

If you have questions about the new Massachusetts statute or any other employee compensation or leave issues, please feel free to contact one of our experienced employment lawyers.

Employment Law Seminar Schedule

October 9, 2018
"Getting It Write: Employee Handbooks"
8:30 a.m. to 10:30 a.m.
(at SHPC)

November 1-2, 2018
Employment Law Boot Camp: *Two-Day Seminar*

Thursday, Nov. 1, 2018
8:30 a.m. to 4:00 p.m.
(at SHPC)

Friday, Nov. 2, 2018
8:30 a.m. to 4:30 p.m.
(at SHPC)

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.

NLRB General Counsel Guidance Clarifies Work Rule Landscape Following *Boeing*

By Kirsten B. White And Brian B. Garrett

The National Labor Relations Board's ("NLRB" or the "Board") General Counsel, Peter Robb, recently released Office of the General Counsel Memorandum GC 18-04 ("GC 18-04" or the "Guidance"), setting forth written guidance to NLRB Regional Offices regarding the Board's more flexible approach to interpreting work rules in the wake of its decision in The Boeing Company, *365 NLRB No. 154 (Dec. 14, 2017). The Guidance signifies another step towards the Board's adoption of an employer-friendly approach under its new Republican majority.*

In particular, the Guidance instructs that Regions should "now note that ambiguities in rules are no longer interpreted against the drafter," and that generalized employment policies and provisions "should not be interpreted as banning all" conceivable worker activity protected by law. Essentially, GC 18-04 shifts the presumption about ambiguous or broadly written rules in favor of employers.

Interpreting Work Rules Under *Boeing*

In its 2004 decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board held that employers may violate Section 7 of the National Labor Relations Act ("NLRA" or the "Act") simply by maintaining handbook policies and work rules that might "reasonably be construed" by employees to restrict their ability to engage in protected concerted activity under the Act. During the eight years of the Obama Administration, the Board applied this standard extremely broadly, often seeming to strain to find possible interpretations of work rules that would render them unlawful.

In December 2017, the Board overturned the *Lutheran Heritage* standard in its *Boeing* decision, establishing a less burdensome standard for reviewing whether employer rules are lawful under the Act. In *Boeing*, the Board established a two-factor balancing test for rules cases, under which the Board will weigh: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." The *Boeing* test takes into account the type of NLRA-protected activity potentially being implicated, different industries and work settings, and the circumstances giving rise to the specific rule at issue.

The Board in *Boeing* additionally instructed that, moving forward, facially neutral work rules (*i.e.*, those that do not specifically ban protected concerted activity, or that are not promulgated directly in response to organizing or other protected concerted activity) will generally be placed into one of three categories:

- Category 1: Rules the Board designates as lawful, either because (i) a rule, when reasonably interpreted, does not prohibit or interfere with NLRA-protected rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- Category 2: Rules warranting individual scrutiny to determine whether they interfere with NLRA rights and, if so, whether any adverse impact on protected conduct is outweighed by legitimate justifications.
- Category 3: Rules that are unlawful to maintain because they would limit protected conduct, and the adverse impact on protected conduct is not outweighed by justifications associated with them.

Boeing is an abrupt departure from *Lutheran Heritage* and subsequent Obama-era precedents under which work rules could be struck down as unlawful if they could "reasonably be construed" by employees to restrict their ability to engage in protected activity under the Act. *Boeing* therefore signals the new, Republican-majority Board's intention to be far more circumspect in striking down employer rules and handbook policies.

Guidance's Treatment Of *Boeing's* Three Categories

GC 18-04 instructs the Board's Regions with respect to placing work rules into each of the three *Boeing* categories.

As an initial matter, the Guidance states that the following types of rules – many of which were often struck down by the Obama-era Board – are generally lawful, and should be classified under Category 1:

- Civility rules that generally prohibit rude or otherwise socially unacceptable behavior, including disparaging other employees;
- No-camera/no-recording rules, such as those found in *Boeing* and the more recent decision in *Nicholson Terminal & Dock Co.*, 07-CA-187907, that forbid employees from using cameras, video recorders, or any audio or visual recording equipment, including the camera or recorder function on a personal cell phone;
- Rules against insubordination, non-cooperation, or similar on-the-job conduct that adversely affects operations;
- Disruptive behavior rules, such as prohibitions on creating a disturbance on

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NLRB General Counsel Guidance Clarifies Work Rule Landscape Following *Boeing*

company premises or creating discord with clients or fellow employees;

- Rules targeted at protecting confidential, proprietary, and customer information or documents;
- Rules against defamation or misrepresentation, such as misrepresenting a company's products or services or its employees;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak on behalf of an employer; and
- Rules banning disloyalty, nepotism, or self-enrichment.

The Guidance provides some examples of possible Category 2 work rules, which will warrant case-by-case analysis or even a submission to the Division of Advice for further guidance. Such rules include:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union;
- Confidentiality rules broadly encompassing "employer business" or "employee information" (as opposed to confidentiality rules specifically applicable to customer or proprietary information);
- Rules regarding disparagement or criticism of the employer (as opposed to other employees);
- Rules regulating use of the employer's name (as opposed to the employer's logo/trademark);
- Rules generally restricting speaking to the media or third parties;
- Rules banning off-duty conduct that might harm the employer (as opposed to banning specific participation in outside organizations); and
- Rules against making false or inaccurate statements.

Finally, GC 18-04 provides two broad classes of work rules that generally are unlawful, and should be treated as Category 3 rules:

- Confidentiality rules specifically regarding wages, benefits, or working conditions; and
- Rules against joining outside organizations or voting on matters concerning employer, such as the general moonlighting rule addressed by *Nicholson* that prohibited employees from having another job that "could be inconsistent with the [employer's] interests" or that "could have a detrimental impact on the [employer's] image with customers or the public."

Conclusion

Though the GC's Guidance provides more discretion to employers in drafting and interpreting work rules, it serves as a reminder to all employers to be precise when drafting employee work rules and policies. Indeed, rules that are deemed by the Board to be not narrowly tailored are still targets, even by the Trump-era Board.

To that end, employers should follow the examples set forth in the Guidance, and, where appropriate, expressly state the legitimate business rationale for maintaining work rules and policies. Employers should, additionally, ensure that such work rules are uniform and consistently enforced.

If you have any questions about this Guidance or other anticipated changes under the Act, please feel free to contact one of our experienced labor lawyers. We regularly assist employers with all types of union-related issues and would be pleased to help.

Kirsten B. White Honored As A Top Woman Of Law

Schwartz Hannum PC is thrilled to announce that ***Massachusetts Lawyers Weekly*** has recognized Kirsten B. White as one of its Top Women of Law for 2018.

Kirsten is one of 50 women lawyers from across Massachusetts who are being honored for their contributions and accomplishments in the legal community.

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

Kirsten will be recognized at the Top Women of Law Awards Event on Thursday, October 18, 2018, at the Marriott Copley Place Hotel in Boston, MA.

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

About Top Women of Law

The Top Women of Law event celebrates outstanding achievements made by exceptional women lawyers. Each year ***Lawyers Weekly*** honors women attorneys who have made tremendous professional strides and demonstrated great accomplishments in the legal field, which includes: pro bono, social justice, advocacy and business. The awards highlight women who are pioneers, educators, trailblazers, and role models.

Tips For Employers And Schools In Negotiating And Drafting Litigation Settlement Agreements

By Anthony L. DeProspo, Jr.

You have suffered through months, maybe years, of protracted litigation and discovery. Allegations of misconduct have flown back and forth between the parties. At last, the parties have resolved their differences and decided to move on. The only thing standing between you and the finish line is the settlement agreement. You can breathe easy. Or can you?

While litigation settlement agreements are often concluded quickly and smoothly, that is not always the case. The process of moving from a settlement in principle to a signed, legally enforceable settlement agreement can be slow and contentious. As part of that process, it is critical that employers and educators ensure that the terms of the settlement are carefully thought through and appropriately memorialized in the settlement agreement.

This article discusses some practical considerations and tips for employers and educators in drafting and negotiating settlement agreements.

The Basics

To back up for a moment, when reaching a settlement in principle – typically, agreement on the amount of a settlement payment – a litigant should explicitly note that the settlement is provisional and contingent on the parties' execution of a formal, written settlement agreement. Otherwise, if the parties are unable to conclude a formal settlement agreement, one of the parties may nonetheless ask the court to declare that a binding settlement has been reached and dismiss the litigation, thereby giving rise to avoidable expense and uncertainty.

Assuming that a formal settlement agreement *is* reached, then the basic terms that the agreement should identify include the parties, the claims at issue, the pending litigation, payment terms (if any), and the released parties. As set forth below, most settlement agreements operate to release multiple parties.

The settlement agreement also should incorporate customary representations and warranties, *e.g.*, that each side has had counsel review the agreement, that no assignment of claims has been made, and that no party is admitting liability. The agreement should identify which state's law will govern and the venue for any lawsuit seeking to enforce the agreement. In addition, the agreement should contain an integration clause reflecting that the agreement represents the parties' complete understanding of their respective rights and obligations.

The Details

In addition to those basic points, there are a number of other critical issues that employers and educators should keep in mind in negotiating and drafting settlement agreements:

Notify the insurer: If an insurer is involved, the insurer should be kept apprised of all settlement negotiations and be allowed to review the settlement agreement prior to execution. Failure to do so could cause the insurer to refuse to pay the settlement amount and related attorneys' fees. The settlement agreement should also specify that the insurer is being released from all claims.

Request broad releases: Employers and schools should push for broad releases, extending to the institution itself as well as all current and former employees, directors, trustees, and other agents. For a settlement agreement involving a school, it may also be appropriate for the release to encompass students and their parents. If the claimant is a minor, the school or employer should generally require that the minor ***and*** his or her parents/legal guardians execute releases.

Provide for prompt dismissal: The settlement agreement should provide a specific mechanism and timeframe for dismissing the litigation at issue. In general, the claimant should agree to file a stipulation of dismissal, with prejudice, with the court within a certain number of days (generally, no longer than a week) after receipt of the settlement proceeds. The claimant's failure to do so should be specifically identified as a breach of the agreement. Finally, a form stipulation of dismissal should be attached to the settlement agreement.

If necessary, obtain court approval: Certain settlement agreements may require court approval. For example, in many states, a settlement agreement involving a release by a minor requires court approval. In most cases, court approval is required to resolve wage claims brought under the Fair Labor Standards Act. Failure to obtain court approval can jeopardize an otherwise proper settlement agreement.

Consider how to allocate the settlement proceeds: For a settlement payment made in the employment context, the organization should confer with its counsel to ensure that any allocation of the settlement amount requested by the plaintiff – for instance, among taxable wages, non-taxable tort damages, and attorneys' fees – is appropriate. The settlement agreement should also include a representation that the recipient of the settlement proceeds has consulted a tax advisor.

Be mindful of statutory prerequisites: Settlements of employment claims can have statutory prerequisites. For example, a release of claims under the Age Discrimination in Employment Act ("ADEA") must (i) specifically reference the ADEA; (ii) state that the employee has been advised, in writing, to consult with an attorney prior to executing the release; (iii) not extend to claims arising after the date the release is signed; (iv) permit the employee to take at least 21 days (or,

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Tips For Employers And Schools In Negotiating And Drafting Litigation Settlement Agreements

in the case of a reduction in force or other "group termination," 45 days) to review the agreement before signing it; and (v) allow the employee to revoke the agreement within seven days after signing it. An ADEA release that does not meet these requirements may be voidable.

Non-disparagement covenants should be narrowly tailored: Settlement agreements often contain mutual non-disparagement provisions. In the case of a school or employer, it is important that such a covenant apply only to those individuals whom the organization can closely control – such as top-level managers or administrators, as well as trustees/directors. A blanket non-disparagement covenant could lead to allegations that the settlement agreement has been breached by a low-level employee who may not even know that the agreement and non-disparagement covenant are in place.

Provide a mechanism to address potential breaches: Settlement agreements often contain provisions calling for penalties in the event one side breaches the agreement. This can take many forms, including liquidated (*i.e.*, pre-specified) damages. At the very least, the settlement agreement should provide that the breaching party will be responsible for paying the other party's reasonable attorney's fees in the event it is forced to file suit to compel the breaching party's compliance with the agreement.

The Bottom Line

It is vital that settlement agreements be carefully negotiated and drafted, to ensure that they accurately reflect the parties' intent and that any statutory requirements are met.

If you have any questions about these issues, or settlement agreements generally, please feel free to contact one of our experienced litigators.

Sara Goldsmith Schwartz Sworn Into Supreme Court

Sara Goldsmith Schwartz recently joined fellow members of the Harvard Law School Alumni Association in a special group admission to the Bar of the Supreme Court of the United States in Washington, D.C.

Sara participated in a swearing-in ceremony and a lecture about the Court, the history of the building, and the architecture of the courtroom. The group also visited with Associate Justice Ruth Bader Ginsburg.

Congratulations, Sara!

Massachusetts Attorney General Launches New Data Security Breach Reporting Portal

By Jaimeson E. Porter

The Massachusetts Attorney General's Office ("AGO") recently launched an online portal making it easier for organizations to report data security breaches. This new portal provides employers and other organizations with an avenue for notifying the AGO electronically of a data security breach. Use of the portal is voluntary, and organizations are free to provide hard copy notice of a breach if they prefer.

Organizations should bear in mind that use of the new portal satisfies only the AGO's notice requirement. A data security breach will still need to be reported separately to the Director of the Office of Consumer Affairs and Business Regulation ("OCABR") and the affected Massachusetts resident.

Overview Of Massachusetts Data Security Law

Massachusetts data security law, enacted in 2007 after a series of high-profile data breaches, imposes significant obligations on entities possessing "personal information" about residents of the Commonwealth, including notice requirements in the event of a data security breach. The law applies to any person or organization that owns, licenses, stores, or maintains personal information about a Massachusetts resident. Public and private Massachusetts employers in possession of personal information are covered, regardless of size.

The statute requires organizations to protect against data security breaches, and governs what they must do if a breach occurs. Under the law, a covered entity must provide written notice of a data security breach "as soon as practicable and without reasonable delay" to: (1) the AGO; (2) OCABR; and (3) the affected Massachusetts resident. This reporting obligation is triggered as soon as the entity knows or has reason to know that a breach has occurred, or that personal information was acquired without authorization.

"Personal information" is defined as "a Massachusetts resident's first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such resident: (a) Social Security number; (b) driver's license number or state-issued identification card number; or (c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password that would permit access to a resident's financial account." For most employers, personal information is maintained by the Human Resources Departments.

Under the data security law, a "breach" includes a breach of security or the unauthorized acquisition or use of data (or the confidential process or key for accessing data), which is "capable of compromising the security, confidentiality, or integrity of personal information, maintained by a person or agency that creates a substantial risk of identity theft or fraud against a resident of the [C]ommonwealth..."

The data security law protects Massachusetts residents' personal information both in and out of state. Thus, entities operating in other states are covered by the law if they possess personal information of Massachusetts citizens.

Other Employer Obligations Under The Law

All Massachusetts employers are required to have a comprehensive Written Information Security Program (or "WISP") establishing written safeguards for the protection of personal information within the organization. A WISP must include basic standards for how employees are expected to safeguard personal information, as well as information on how the employer will respond to a data breach. Employers must also designate one or more employees to be in charge of maintaining the organization's security program.

Other obligations for employers include regularly assessing internal and external risks; developing security policies relating to storage, access, and transportation of records containing personal information; regularly conducting employee trainings; imposing disciplinary measures for WISP violations; taking steps to prevent terminated employees from accessing or retaining records containing personal information; and overseeing third-party vendors and service providers to ensure that appropriate security measures for personal information are in place.

Steps For Organizations To Ensure Legal Compliance

We suggest that employers and other organizations that are uncertain whether they are in full compliance with the Massachusetts data security law take the following steps:

- Review your organization's WISP and employee handbook. Are all necessary policies in place? Has your organization appointed a data security coordinator?
- Evaluate the types of personal information your organization possesses, who has access to it, and all the different places where personal information may be stored. Are employees being trained on data security on an ongoing basis? Are appropriate storage protections in place?
- Assess your organization's risk factors, and consider the ways you can help to minimize potential breaches within your organization.

If you have questions about the Massachusetts data security law or any related issues, please feel free to contact one of our experienced employment lawyers.

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Massachusetts Amends "Ban-The-Box" Law

Changes To The Law

As of October 13, 2018, the following changes to the "ban-the-box" law will take effect:

- The time period over which Massachusetts employers may ask applicants about past misdemeanor convictions will be reduced from five years to three years. (As before, however, this time period may be lengthened where an applicant had a subsequent, intervening conviction.)
- Any form used by an employer that seeks information concerning an applicant's criminal history must include the following statement: "An applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer 'no record' to an inquiry herein relative to prior arrests, criminal court appearances, juvenile court appearances, adjudications or convictions."
- Massachusetts employers will be prohibited from asking applicants, whether in writing or orally, about criminal conviction records that have been sealed or expunged. (The amendments also reduce the time period an individual must wait before seeking to have his or her criminal record sealed or expunged.)
- Finally, Massachusetts employers will enjoy enhanced legal protection against potential negligent-hiring or negligent-retention claims based on criminal history to which they did not have access. An employer will be presumed not to have access to criminal records (i) that have been sealed or expunged, (ii) about which the employer is legally prohibited from inquiring, or (iii) that the Massachusetts Department of Criminal Justice Information Services cannot lawfully disclose to an employer.

Recommendations For Employers

Before these changes take effect on October 13, 2018, Massachusetts employers should work with employment counsel to update all pre-hire forms that ask about criminal history to incorporate the reduced misdemeanor time period, and to include the mandatory statement regarding expunged and sealed records.

Further, employers should ensure that all supervisors, managers, and human resources employees are trained on these new requirements.

If you would like our assistance with bringing your organization into compliance with these new requirements, or if you have any other questions about addressing criminal conviction records for job applicants, please feel free to contact us.

Schwartz Hannum PC Welcomes Attorney **Anthony L. DeProspo, Jr.**

Schwartz Hannum PC is thrilled to announce that Anthony L. DeProspo, Jr. has joined the Firm's Labor and Employment and Education practice groups representing employers and educational institutions in litigation matters.

Tony manages employment, education, and other business litigation cases from inception to resolution. He has successfully tried, appealed, mediated, and arbitrated cases before the Massachusetts state and federal courts, the First Circuit Court of Appeals, the Massachusetts Appeals Court, Land Court, Probate Court, and in dispute resolution venues.

Tony represents employers in cases involving claims of discrimination and wrongful termination, as well as disputes concerning wage and hour issues, restrictive covenants, contracts, and other employment and business claims. He also represents educational institutions in litigation involving employment, business, and student issues.

Before joining Schwartz Hannum PC, Tony was a Director at Kenney & Sams, P.C. in Boston, MA, and a Partner at Sherin & Lodgen LLP in Boston, MA. He served 12 years in the United States Air Force Reserve, and is a Lifetime Member of the National Eagle Scout Association. Tony has been named a Massachusetts Super Lawyer® each year since 2012.

Tony is a 1986 graduate of Assumption College, and earned his J.D. from Northeastern University School of Law in 1999. He is admitted to practice in the Commonwealth of Massachusetts and the District of Columbia, as well as the United States District Court for the District of Massachusetts, and the United States Court of Appeals for the Federal Circuit and the First Circuit. He is a member of the American Bar Association, Litigation Section.

Contact Tony: *adeprospo@shpclaw.com*
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Massachusetts Amends "Ban-The-Box" Law

By Jacqueline M. Robarge

Massachusetts employers should be aware of recently enacted changes to the Commonwealth's "ban-the-box" law, which limits employers' ability to ask job applicants about their criminal conviction history. These changes will go into effect on October 13, 2018.

In particular, the amendments reduce the time period over which applicants may be asked to disclose past misdemeanor convictions. Additionally, employers that use pre-hire forms asking applicants about criminal convictions must include specific disclaimer language in those forms.

Current Law

Under the "ban-the-box" law, which was enacted in 2010, Massachusetts employers are generally prohibited from inquiring about criminal history on initial job application forms. (Employers are exempt from this restriction if they are specifically prohibited under state or federal law from employing individuals who have been convicted of certain crimes.)

Further, employers that inquire about criminal history after the initial application stage are restricted in the questions they can ask applicants. Under current law, an employer generally may not ask about misdemeanor convictions that occurred more than five years previously, unless the individual was convicted of another offense within that five-year period. In addition, employers may not ask about first convictions for certain minor misdemeanor offenses, or about arrests or other dispositions that did not result in a conviction.

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Independent Schools Webinar Schedule

October 10, 2018
Risk Management For Off-Campus Trips And Activities
3:00 p.m. to 4:30 p.m. (EST)

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

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

November 13, 2018
GDPR: What Independent Schools Need To Know
12:00 p.m. to 1:30 p.m. (EST)

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

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

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

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

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, 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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