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Labor and Employment Lawyers Guiding Management

Labor and Employment Law Update

SEPTEMBER 2011

In This Issue

...it is nice to hear about an employer whose compliance was rewarded.

Effective Harassment Policies And Practices Can Be An Employer's Best Defense

By Sara Goldsmith Schwartz [1]

With all of the cautionary tales about what can happen when employers don't comply with employment laws, it is nice to hear about an employer whose compliance was rewarded. In *Wilson v. Moulison North Corp.*, a recent opinion by the United States Court of Appeals for the First Circuit, the Court affirmed summary judgment for an employer that took appropriate precautions to prevent harassment in the workplace. In *Wilson*, the Court found that the employer had an appropriate policy against harassment, followed its policy, and as such, could not be found liable for the harassment of an employee.

In *Wilson*, the plaintiff was a former employee of Moulison North Corp. ("Moulison"), an electrical-utility contractor owned by Ken Moulison ("Mr. Moulison"). Moulison had a policy against harassment that directed employees to report harassment to a supervisor or to Mr. Moulison. The policy also provided Mr. Moulison's telephone number.

After the plaintiff began working for Moulison, two co-workers began using racial slurs against him. The plaintiff called Mr. Moulison to complain. The next day, Mr. Moulison visited the work site and confronted the offending co-workers. Mr. Moulison "became irate and berated the men," warning that any further incident of harassment "would result in immediate termination." Mr. Moulison also told the plaintiff to report any further harassment directly to him.

Despite Mr. Moulison's stern warning, these co-workers continued to make racially derogatory comments. Additionally, other co-workers yelled at the plaintiff, contaminated his water bottle, and refused to help him with his work. The plaintiff had numerous opportunities to complain about this to Mr. Moulison and/or his supervisor but failed to do so. The plaintiff complained only to the lead worker on his crew, who did not, in turn, notify Mr. Moulison, the plaintiff's supervisor, or anyone else at the company.

Despite Mr. Moulison's stern warning, these co-workers continued to make racially derogatory comments.

The plaintiff eventually sued Moulison for discrimination under Title VII of the Civil Rights Act of 1964. The plaintiff alleged that Moulison should be liable to him in damages for the initial and subsequent harassment.

First, the plaintiff argued that Mr. Moulison did not mete out sufficient discipline for the initial harassment. The Court rejected this argument. The Court explained that Moulison took prompt and appropriate action by reprimanding the offending co-workers and warning that further misconduct would result in termination of their employment. According to the Court, "an employer must be accorded some flexibility" in selecting appropriate sanctions for employee misconduct. The fact that the discipline did not satisfy the plaintiff did not render it inadequate.

The plaintiff next argued that Moulison should be liable for the subsequent harassment because he had complained about it to a co-worker. The Court rejected this argument as well. In particular, the Court determined that the co-worker had no actual or apparent authority to serve as a company representative for such complaints, and accordingly, that the co-worker's failure to report the complaints to management, which never

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NLRB Expands Union Handbilling Rights

By Brian D. Carlson

A recent decision by the National Labor Relations Board ("NLRB" or "Board"), New York New York LLC d/b/a New York New York Hotel and Casino, *creates expansive new rights for workers to distribute pro-union literature in public areas of worksites where they are employed.*

In this decision, the Board held that the New York New York Hotel and Casino ("NYNY"), in Las Vegas, violated the National Labor Relations Act ("NLRA") by forbidding employees of a contractor providing food services within NYNY from distributing handbills in public areas of the casino. The Board's ruling is significant, because while employees have long enjoyed the right to distribute literature within their *own* employers' premises, this holding extends that principle to public areas of facilities that are owned and controlled by companies with no direct relation to such employees. The Board's decision thus seems likely to strengthen organizing efforts among employees who work within similar job settings.

Factual Background

Ark Las Vegas Restaurant Corporation ("Ark") provides various types of food services to customers of NYNY. In 1997, Ark employees attempted on three occasions to distribute flyers to NYNY patrons, asking them to support the Ark employees' unionization efforts. The handbilling took place near the casino's main entrance and outside of two restaurants within the facility operated by Ark. On each of these occasions, NYNY responded to the handbilling by contacting the Las Vegas police, who issued trespassing citations to the employees distributing the literature and escorted them off the property.

Subsequently, the labor unions assisting the Ark employees filed unfair labor practice ("ULP") charges with the Board, alleging that NYNY had violated the NLRA by refusing to permit the handbilling. After years of litigation, the U.S. Court of Appeals for the District of Columbia Circuit eventually remanded the case to the NLRB. The Court of Appeals directed the Board to rule on the dispute in light of Supreme Court precedents holding that an employer must permit its employees to distribute handbills in non-working areas of the jobsite during non-working time, but may prohibit such activity by non-employees, such as outside union organizers.

In remanding the case to the Board, the Court of Appeals noted that the Supreme Court has not clearly delineated employees' handbilling rights in the particular factual context involved – where employees regularly work within a job facility but seek to distribute literature in a different area of the facility that is open to the public.

NLRB's Decision

In a 3-1 decision, the Board concluded that the Ark employees were entitled to distribute handbills within the public areas of NYNY's premises. In its decision, the NLRB formulated a new legal standard for determining employees' handbilling rights in such situations. Specifically, the Board held that NYNY had violated the NLRA because it had failed to demonstrate *"that the handbilling significantly interfered with its use of the property or that exclusion was justified by some other legitimate business reason, such as the need to maintain operations or discipline."* (Emphasis added.)

In reaching this conclusion, the Board took the view that because Ark employees regularly worked within the casino's premises – even though for a separate employer – they were more comparable in status to employees of NYNY itself than to "pure" outsiders such as union organizers. Thus, the Board opined, because employees of NYNY would have been entitled to distribute handbills within public areas of the casino, employees of Ark should enjoy that same right.

In dissent, Member Brian Hayes argued that the Board had failed to consider whether the Ark employees had reasonable alternative means of conveying their message to NYNY patrons. Member Hayes also charged that the new legal standard established by the Board was so one-sided that "[t]he contractor employees' rights to engage in organizational activity will trump the property owner's rights every time."

Implications Of Decision And Recommendations For Employers

The NLRB's decision substantially broadens employees' rights to carry out handbilling in public areas of facilities such as office buildings, hotels and shopping malls, in which their employers lease space. Although the ruling purports to leave open the possibility that a property owner could show that handbilling by non-employees would unduly interfere with significant operational interests, in practice it will likely be difficult for a property owner to meet this standard, particularly with the current Board's strong pro-union bent.

Also, while the *New York New York* decision dealt specifically with employees' distribution of handbills, it seems quite possible that future Board rulings may expand the holding to other, more confrontational forms of expression, such as bannering and picketing. (Indeed, in another, somewhat analogous decision, the Board recently held that a union did not violate the NLRA by posting members holding banners near the premises of employers with which the union had no direct dispute, urging passers-by not to patronize those employers.)

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Don't Forget To Submit Your EEO-1 Report By September 30, 2011!

By Michelle-Kim Lee

The deadline for employers to submit their Employer Information Report EEO-1 (the "EEO-1 Report") is September 30, 2011. Many employers are required to submit an EEO-1 Report, which identifies employees by job category, race/ethnicity and gender. Generally, three categories of employers are required to submit an EEO-1 Report: (1) private employers with 100 or more employees; (2) private employers with fewer than 100 employees, if the company is owned by or corporately affiliated with another company and the entire enterprise employs a total of 100 or more employees; and (3) employers with a federal government contract or first-tier subcontract of $50,000 or more and 50 or more employees. The EEO-1 Report must be submitted to the Joint Reporting Committee of the U.S. Equal Employment Opportunity Commission ("EEOC") and the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFFCP").

The EEO-1 Report filing process is an annual reminder to each employer to evaluate whether the employer is, or could be, a federal contractor or sub-contractor. OFFCP uses EEO-1 Report data to determine which employer facilities to select for compliance evaluations. For more information on determining federal contractor or sub-contractor status, please contact us, or see the Firm's August 2005 Update article on this topic.

Covered employers that have submitted EEO-1 Reports in previous years should have recently received instructions from the EEOC regarding how to prepare and submit their EEO-1 Report for this year. If you believe that your organization is required to submit an EEO-1 Report and you have not received instructions, or if you have lost or cannot locate your organization's electronic log-in identification and/or password, you may contact the EEOC/OFCCP Joint Reporting Committee at 1-866-286-6440 (toll-free telephone), 202-663-7185 (fax), or e1.techassistance@eeoc.gov (email).

*The **deadline** for employers to submit their Employer Information Report* EEO-1*... is **September 30, 2011***

Information Required To Be Included In The EEO-1 Report

Covered employers are required to identify the race/ethnicity and gender of each employee, using employment data from any payroll period during the third quarter (July, August or September) of 2011. Self-identification is the preferred method for identifying race/ethnicity. Therefore, employees should be given an opportunity to self-identify for purposes of the EEO-1 Report. If an employee denies self-identification, then employment records and/or observer identification may be substituted.

The race/ethnicity categories are as follows:

- Hispanic or Latino;
- White (Not Hispanic or Latino);
- Black or African American (Not Hispanic or Latino);
- Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino);
- Asian (Not Hispanic or Latino);
- American Indian or Alaska Native (Not Hispanic or Latino); and
- Two or More Races (Not Hispanic or Latino).

Employers must also categorize each employee by job type.

Major EEO-1 job categories include:

- Executive/Senior Level Officials and Managers;
- First/Mid Level Officials and Managers;
- Professionals;
- Technicians;
- Sales Workers;
- Administrative Support Workers;
- Craft Workers;
- Operatives;
- Laborers and Helpers; and
- Service Workers.

EEO-1 job categories are based primarily on the average skill level, knowledge, and responsibility involved in each occupation within the job category. A complete listing of job categories, including examples of the occupations within each, can be found in the EEOC's Job Classification Guide, located online at:

http://www.eeoc.gov/employers/eeo1survey/jobclassguide.cfm.

EEOC's Preferred Filing Methods

The EEOC/OFCCP Joint Reporting Committee prefers that EEO-1 data be submitted through the *EEO-1 Online Filing System* or as an electronically transmitted data file. Paper EEO-1 forms will be provided to employers upon request only if Internet access is not readily available.

We urge covered employers to take the steps necessary to meet the September 30, 2011 compliance deadline. Please let us know if you need assistance with this important reporting obligation.

Supreme Court Sharply Limits Employment Class Actions

By William E. Hannum III [1]

In a significant decision for employers, the U.S. Supreme Court recently rejected an attempted nationwide class-action sex-discrimination lawsuit against Wal-Mart Stores, Inc. By a 5-4 margin, in Wal-Mart Stores, Inc. v. Dukes, *the Court ruled that the three named plaintiffs had failed to cite any Wal-Mart policy or practice that would justify certifying their lawsuit as a class action.*

The plaintiffs were challenging Wal-Mart's "policy" of giving local managers (at approximately 3,400 stores nationwide) "broad discretion, which is exercised 'in a largely subjective manner'" to make their own employment decisions. Ultimately, the Court concluded that the plaintiffs were inappropriately seeking to aggregate a multitude of employment decisions with no real connection to each other, beyond the mere fact that they involved female employees of Wal-Mart.

Had the Court permitted the case to proceed as a class action, it would have constituted the largest employment class action in the nation's history, encompassing claims by as many as 1.5 million current and former Wal-Mart employees. The Court's decision was a relief for employers, as it otherwise could have opened the doors to unmanageably large class action lawsuits.

Facts

The three named plaintiffs, who worked in California (one had also worked in Missouri), claimed that Wal-Mart discriminated against them on the basis of their sex in making certain promotion and compensation decisions. Rather than pursuing their claims individually, the plaintiffs sought to bring them as part of a class action on behalf of all women employed by Wal-Mart anywhere in the United States at any time since December 1998, claiming that the company had an overall practice of discriminating against female employees.

Under the Federal Rules of Civil Procedure, a plaintiff who seeks to bring a class action must demonstrate, as a threshold matter, that there are "questions of law or fact common to the class." In an attempt to satisfy this requirement, the plaintiffs cited the fact that, under company policy, individual Wal-Mart store managers were given significant discretion to make day-to-day personnel decisions. According to the plaintiffs, this policy resulted in store managers making such decisions on the basis of gender stereotypes and other discriminatory criteria.

As evidence for their claim of a nationwide pattern of sex discrimination by Wal-Mart, the plaintiffs cited: (1) statistical studies allegedly indicating that Wal-Mart had a smaller proportion of female employees in management positions than other, comparable retailers; (2) testimony by a purported expert witness (a sociologist) that Wal-Mart's policy of delegating decision-making authority to individual store managers opened the door to sex stereotyping and discrimination; and (3) affidavits by approximately 120 current and former female employees, from varying locations, recounting their allegedly discriminatory treatment by Wal-Mart.

On the basis of this evidence, a U.S. District Court judge granted the plaintiffs' request for certification of the proposed class. After the U.S. Court of Appeals for the Ninth Circuit affirmed the certification by a closely-divided vote, the Supreme Court eventually agreed to hear the case.

Supreme Court's Decision

In an opinion by Justice Antonin Scalia, the Court held that the plaintiffs failed to meet their burden of demonstrating that the proposed class members' claims were unified by a common discriminatory policy or practice at Wal-Mart. Thus, the Court concluded, the proposed class should not have been certified.

In reaching this conclusion, the Court rejected the plaintiffs' key evidence. For example, Justice Scalia concluded that the Court could "safely disregard" the sociologist's testimony that Wal-Mart's policy of giving local managers broad discretion left Wal-Mart "vulnerable to" stereotyping and discrimination, because, by the "expert" witness' own admission, he could not determine whether 0.5% or 95% of the company's employment decisions were actually infected by gender bias.

The Court's decision was a relief for employers, as it otherwise could have opened the doors to unmanageably large class action lawsuits.

Similarly, the Court opined that the plaintiffs' statistical studies were "insufficient" to show that discriminatory treatment is typical of Wal-Mart's employment practices. In part, these statistical studies were regional and national in scope, and thus failed to "establish the existence of disparities at individual stores." Also, the studies did not show that there is "commonality" in any alleged discriminatory practice at all 3,400 Wal-Mart stores.

Likewise, the Court rejected the employee affidavits submitted by the plaintiffs because they constituted too tiny a sample size, and were confined to too small a proportion of stores, to support any inference that Wal-Mart managers as a whole had engaged in a common

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Supreme Court Sharply Limits Employment Class Actions

pattern of sex discrimination, in defiance of the company's rigorous equal employment opportunity policies. In Justice Scalia's words, "In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."

Thus, the Court held that the plaintiffs could not establish the existence of common questions of fact or law that would justify aggregating all of the proposed class members' claims into a single, nationwide lawsuit. Rather, the Court concluded, the widely disparate nature of those claims dictated that they be adjudicated separately. As Justice Scalia stated, "[R]espondents wish to sue about literally millions of employment decisions all at once. Without some glue holding the alleged *reasons for* all those decisions together, it will be impossible to say that examination of all of the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."

Thus, the Court's decision does not foreclose the possibility that company-wide employment class actions will be found appropriate in some circumstances.

Writing for the four dissenting justices, Justice Ruth Bader Ginsburg opined that "[t]he practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects," and that the evidence submitted by the plaintiffs was sufficient to establish that "gender bias suffused Wal-Mart's corporate culture." Thus, Justice Ginsburg took the view that the plaintiffs had adequately demonstrated the existence of common questions of law or fact affecting the proposed class members.

Finally, the Supreme Court also held – on this point unanimously – that the district court had erred in certifying the proposed class members' claims for back pay. On this issue, the justices were in agreement that the requested back pay could not be considered merely "incidental" to the injunctive and declaratory relief sought by the plaintiffs, as required by the provision of the Federal Rules on which the plaintiffs sought to rely. (The dissenting justices would have remanded the case to the district court to allow the plaintiffs an opportunity to proceed under a different provision of the Federal Rules, but the majority's holding that the plaintiffs could not meet the threshold requirement of establishing common questions of law or fact rendered that issue moot.)

Implications And Recommendations For Employers

The *Dukes* decision comes as welcome news to employers, as it disappoints those plaintiffs' lawyers who hoped to use mega class action lawsuits to extract large settlements from employers by asserting garden-variety discrimination claims as class actions. The Supreme Court's decision makes clear that unless there are unique factors – such as a specific, company-wide policy, or a set of employment decisions made by a single manager – that unify claims by different employees, it is normally not appropriate for those claims to be brought as part of a class action.

It is also important, however, for employers to bear in mind that the *Dukes* decision has reaffirmed, but *not* changed, the basics of class action lawsuits. Thus, the Court's decision does not foreclose the possibility that company-wide employment class actions will be found appropriate in some circumstances. Likewise, the holding does not affect the manner in which any individual discrimination claim will be adjudicated.

Thus, employers should:

- Make certain that all supervisors are given regular, appropriate training as to the criteria on which hiring, promotion, compensation and other employment decisions should (and should not) be based;
- Ensure that managers' employment decisions are subject to appropriate oversight, to confirm that they are motivated by legitimate, non-discriminatory factors;
- Maintain appropriate, comprehensive equal employment opportunity policies, and regularly communicate those policies to employees; and
- Ensure that any company-wide employment policies or procedures – for instance, standardized tests or interview procedures – are legally compliant.

Notably, in *Dukes*, the Court cited Wal-Mart's strong equal employment opportunity policy as one factor that made it highly improbable that store managers throughout the company would have followed a common practice of sex discrimination. Thus, employers should remain vigilant – have the right policies, and train managers and employees to follow them – in order to minimize the risk of all types of discrimination claims. Because the *Dukes* decision expressly leaves open the possibility that employment class actions may still be brought on the basis of such common policies or procedures, continued oversight is critical.

1 *Will gratefully acknowledges the assistance of Brian D. Carlson in the preparation of this article. This article previously appeared in the July 2011 edition of New England In-House (NEIH). Will gratefully acknowledges NEIH for its support in publishing this article.*

Parents With A Past: A Challenge For Private Schools

By Jessica L. Herbster

While many independent schools faithfully check the criminal histories of their employees, contractors and volunteers, as required by law or internal policy, little guidance exists when an independent school learns that a student's parent is a registered sex offender. Should the school notify other parents or restrict the sex offender's access to campus? Unless the school has adopted a policy, or is governed by a state or local law regarding these issues, schools may be venturing into uncharted waters. We recommend that schools anticipate this issue and implement a policy reflecting the school's desired practices and any applicable governing laws so that the interests of students, parents, and the community are appropriately addressed.

National Sex Offender Registry

Significantly, schools (and others) can readily determine who "has a past" with one click of the mouse. Sex offender registries have been developed over the past 20 years in an effort to protect children and facilitate public notification of dangerous individuals who are released into the community. There is now one national database compiling information from all participating registries.

By way of background, on May 17, 1996, President Clinton signed Megan's Law, which requires the states to register individuals convicted of sex crimes against children, maintain a public database, and establish criteria for community notification. On July 27, 2006, President Bush signed the Adam Walsh Child Protection and Safety Act, which requires the U.S. Department of Justice to establish a publicly accessible Internet-based national sex offender database. Pursuant to these laws, the Dru Sjodin National Sex Offender Public Website was created; this database allows a user to submit a single national query to obtain information about sex offenders. (It also includes a listing of public registry websites by state, and information on sexual abuse education and prevention.) Thus, if the name of a particular sex offender is known, anyone can search the online databases of all participating states and territories that contribute to the national database with one search, to access that individual's records.

Because this nationwide database is readily available, schools ignore it at their peril: if checking a parent's (or other person's) sex offender records could have prevented harm to a student, the school that failed to check (or act upon) those records could face significant legal liability.

Information On State Online Databases Varies

The national database is a compilation of each online database maintained by the participating states and territories. Accordingly, the information received through a national search will be limited by the information that any given state chooses to disclose on its online database. State laws vary greatly with respect to the amount of information that is revealed through their online databases. For example, in Massachusetts, the Sex Offender Registry Board ("SORB") only reveals detailed Sex Offender Registry Information ("SORI") (*e.g.*, a sex offender's work and home addresses) regarding sex offenders who are classified as "high risk" or "Level 3" offenders on its public website. However, additional SORI (including information regarding Level 2 offenders) is available by visiting local police departments or by submitting a written request to the SORB. Other state online databases may disclose more or less information based on the level or type of the crime. Therefore, it is important to carefully review the scope of the information available in any given state.

Your State May Be Silent On This Issue

Once a school has determined that it may need to address the presence of a sex offender within its vicinity, schools often look to their state or local government for guidance. However, there is significant variation in what (if any) legal restrictions are placed on sex offenders who are released back into the community.

For example, in Massachusetts, unless the courts place restrictions on a sex offender's whereabouts when he or she is released from custody, it is left to the discretion of the municipalities to dictate whether a registered sex offender is prohibited from residing near (or accessing) a school campus.

Because this nationwide database is readily available, schools ignore it at their peril: if checking a parent's (or other person's) sex offender records could have prevented harm to a student, the school that failed to check (or act upon) those records could face significant legal liability.

At the other end of the spectrum, Illinois law expressly prohibits child sex offenders from residing within 500 feet of a school, playground or any facility providing programs or services exclusively directed toward people under age 18. Further, in Illinois, sex offenders cannot be present in any school building or property, or loiter within 500 feet of school property, without the permission of the superintendent or school board, or in the case of a private school from the principal, unless the child sex offender is a parent of a child at that school and the parent is on school grounds for one of the following reasons:

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Seminars

Annual Seminar:
Hot Topics in Labor and Employment Law

Annual Labor and Employment Update: Overview of Significant Legal Decisions and Legislative Changes

Sara Goldsmith Schwartz

This presentation will survey the past year's most important court decisions and legislative changes in federal, Massachusetts and multi-state labor, employment and immigration laws, including: Genetic Information non-discrimination regulations and safe harbor language, dramatic expansion of the definition of retaliation, harassment policies as an employer's best defense, workers' compensation law amendments, same-sex union law expansion, distracted driving law updates, new reference release laws, data security law amendments, new OFCCP regulations, new OFCCP regulations, wage and hour updates on fluctuating work weeks and direct deposit, FMLA developments, and recent NLRB decisions on Facebook, blogging, back pay for undocumented aliens and more.

ADA/ADAAA: Teaching Old Dogs New Tricks

Suzanne W. King & Jessica L. Herbster

More than 20 years after the Americans with Disabilities Act was first enacted, many employers are still struggling with interpreting its impact in the workplace. The Americans with Disabilities Act Amendments Act of 2008 and its implementing regulations, finalized earlier this year, change the landscape entirely, causing even more confusion. EEOC enforcement activity of disability issues has increased dramatically and a number of headline-grabbing settlements remind us all of the high cost of getting disability issues wrong. But how exactly does an employer get it right? This presentation will provide practical solutions, including recommended policy language, step-by-step guidance on how to engage in the interactive process, and a discussion of various accommodations that courts have found to be reasonable. We are eagerly awaiting the EEOC's new guidance on leaves of absence as a reasonable accommodation, and hope to be able to discuss that as well.

Facebook Terminations and Other Social Media Issues in 2011

William E. Hannum III

As the varieties of social media expand, and as employees continue to astound employers by posting comments that likely should never have been put in writing, employers are asking, "When can I fire an employee for his online misconduct?" This presentation will review the recent Facebook firing cases and other social media disputes in the news. We will outline how to draft effective policies to protect your organization, facilitate corrective action, and reduce the risk that your employees will later claim you have violated their privacy rights or other legal rights. The law is changing almost as quickly as technology. Make sure you are up to date in this fast-paced world!

Ask the Experts

The conclusion of this seminar features an "Ask the Experts" session, during which attendees are encouraged to ask questions regarding any labor and employment law topic.

REGISTRATION NOW OPEN

LOCATION

The Westin Waltham-Boston
70 Third Avenue
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NOVEMBER 2, 2011

7:45 a.m. to 12:00 p.m.

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October 21, 2011

TUITION

Early Registration For Clients (before October 1, 2011)	$175
Early Registration For All Others (before October 1, 2011)	$225
Late Registration (on or after October 1, 2011)	$250

To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com

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Seminars

REGISTRATION

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LOCATION

The Westin Waltham-Boston
70 Third Avenue
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DATES

November 2, 2011
7:45 a.m. to 12:00 p.m.

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Early Registration For Clients.....$175	(before October 1st)
Early Registration For All Others.....$225	(before October 1st)
Late Registration.....$250	(on or after October 1st)

Note: Tuition is non-refundable

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Check: Please make payable to **Schwartz Hannum PC**

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Parents With A Past: A Challenge For Private Schools

- To attend a conference at the school with school personnel to discuss the progress of his or her child academically or socially;
- To participate in child review conferences in which evaluation and placement decisions may be made with respect to his or her child regarding special education services; or
- To attend conferences to discuss other student issues concerning his or her child, such as retention and promotion.

Other state laws may expressly prohibit sex offenders from accessing a school campus unless he or she has permission or lawful business there (*e.g.*, attending a public meeting or voting), but leave it up to the school or school district to determine whether a sex offender will have access to his or her child's school.

Policies In Absence Of Legal Guidance

In the absence of a specific law addressing whether any restrictions should be placed on sex offenders who are released into the community, some schools have developed policies to guide how they will respond to the news that a parent is a registered sex offender. Banning parent sex offenders from accessing schools appears to be the minority view. Rather, many schools have developed policies akin to the law in Illinois. Some of the more common elements of such a policy are as follows:

- Limiting access to the school without prior approval;
- Approving access only for limited purposes (*e.g.*, transportation, teacher conferences, or school-related activities);
- Requiring parent sex offenders to register at the school's office prior to visiting the campus; and
- Barring parent sex offenders from all electronic communication with a student other than his/her own child;
- Barring parent sex offenders from serving as volunteers (related to the school or school activities) in any capacity; and
- Directing requests from other parents regarding registry information to the public website or the State or local police department.

In addition, these policies often address how to handle student sex offenders and non-parent sex offenders as well, and clearly define the school's commitment to the safety of its students.

A common message communicated by these laws and policies is that a parent sex offender should still be able to participate in his or her child's school experience, as long as the safety of other children is not put at substantial risk. In addition, notifying the community regarding the whereabouts of a registered sex offender should be the responsibility of law enforcement rather than the school itself. In sum, we recommend that each school consider the rights of the parent sex offender and his or her child in balance with those of the rest of the community.

Recommendations For School Principals And Heads Of School

It might not occur to a school to develop a sex offender policy until an issue arises. We recommend that schools be proactive and anticipate these issues so there is clear guidance if and when a sex offender is on campus. The following is a brief list of best practices a school may want to consider:

- Review the scope of the school's background check policies and procedures. Inquire whether the school checks the criminal histories of volunteers and contractors and whether the background checks are national or limited to state records;
- Understand that the results of criminal background checks may not be enough. For example, in Massachusetts, a state-run Criminal Offender Record Information ("CORI") check includes offenses committed in Massachusetts only. That means that crimes committed in other states (including sex offenses) will not be included in a state CORI check;
- Ensure that the school is complying with state and federal laws with respect to obtaining the required authorization prior to conducting criminal background checks. These laws vary dramatically from one state to the next;
- If the school is already checking the national and state sex offender registries, make sure the school understands the scope of that search. For example, only certain level offenders may be listed online. If the school has not done so already, consider establishing a relationship with the local police department to ensure that the school is receiving the most information possible;
- Check with counsel to determine whether any state and/or local laws are in place that restrict the activities of a sex offender on campus; and
- Consider developing a policy that addresses the school's commitment to student safety, how the school will communicate safety issues to parents, and how the school will handle parent, student, and non-affiliated registered sex offenders on campus.

Please feel free to contact any of the attorneys in the Firm's Education Practice for assistance in developing a sex offender policy or if you have any questions related to criminal background checks or sex offender registry information checks.

Red Flags Identity Theft: Are Independent Schools Covered Or Not?

By Paul Dubois

After nearly two years of delays, the Federal Trade Commission ("FTC") began enforcing the Red Flags Rule on January 1, 2011. As the implementing regulations indicate, any public or private entity that meets the definition of a "financial institution" or "creditor" with "covered accounts" will likely be covered by the Red Flags Rule. Although the regulations are generally directed at banks and other financial institutions that provide credit to consumers, the regulations also apply to entities that obtain consumer reports from third-party agencies – in the case of employers, for the purpose of making hiring, promotion and other employment-related decisions – and employers that defer payments for goods or services, such as a school offering a deferred tuition payment plan.

Applicable regulations require, among other things, that covered employers implement a written program that describes the employer's policies and procedures for detecting and preventing identity theft in connection with the employer's covered accounts. Significantly, failure to comply with the Red Flags Rule can result in substantial liability, including actual and punitive damages, costs and attorneys' fees. In addition, the FTC can impose civil penalties of up to $3,500 per violation. To the extent that a school is a covered employer, it is essential to have an up-to-date and compliant program to detect and prevent identity theft.

In addition to offering deferred tuition plans, there are a number of other practices that can cause an independent school to be covered under the Red Flags Rule. The following examples may cause an independent school to be subject to the Red Flags Rule and related regulations:

- Performing credit history checks on any of its employees, parents, volunteers or contractors;
- Offering deferred tuition payment plans, either directly through the school or through a third-party provider;
- Offering deferred payment plans for items such as books, school supplies or food; and
- Regularly providing loans (not grants) to employees, such as through a computer purchase loan program.

We recommend that each school analyze whether it is required to comply with the Red Flags Rule and related regulations. The Firm is available to assist with this analysis, as well as to provide the required Identity Theft Program, Board Resolution and employee training.

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NLRB Expands Union Handbilling Rights

In light of these issues, employers would be well-advised to:

- Seek legal advice if confronted with attempted handbilling or similar activity by non-employees on or near their premises. Because the precise parameters of the Board's *NYNY* holding remain to be worked out through future decisions, it is vital that an employer have the benefit of the most up-to-date legal advice in responding to such a situation.
- Make certain that they have valid, written personnel policies prohibiting non-employees from soliciting or distributing literature within their premises, and that those policies are enforced uniformly. Irrespective of the *NYNY* holding, if an employer regularly permits third parties with no relation to its business to solicit or distribute literature on its property, the employer will likely be found to have relinquished *any* right to bar such activity by labor unions. (Note: the legal standards governing solicitation and distribution policies are quite subtle and nuanced, so it is important that these policies be reviewed by counsel.)
- Consider adopting and enforcing "no access" and "union-free" policies within the workplace. While these policies are not universally favored and may be controversial, they are increasingly "in vogue" and merit serious consideration.
- Offer management training (such as union avoidance "tips and traps") to assist management in identifying issues within the workplace that may lead to union organizing and/or unfair labor practice charges.

If you have any questions about the NYNY *decision or would like guidance in connection with any of these issues, please don't hesitate to contact us.*

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For the sixth consecutive year, Sara Goldsmith Schwartz has been recognized by Chambers USA as a leading attorney in labor and employment law. Chambers listed Sara as a top management-side labor and employment lawyer in Massachusetts.

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Congratulations, Sara! And congratulations to the entire Schwartz Hannum team, for their excellent work supporting Sara and our clients!

CHAMBERS AND PARTNERS

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Effective Harassment Policies And Practices Can Be An Employer's Best Defense

learned of the continuing harassment, did not constitute inaction or neglect by the employer. In the Court's view, the plaintiff's failure to report the continuing harassment to management under Moulison's known and effective policy was "fatal to his claim of employer liability."

The moral of the story is that "doing it right" with employment policies and practices can be an effective shield against prolonged litigation and liability. Thus, *Wilson* serves as a reminder that employers should:

- establish and maintain a harassment policy that complies with all applicable state and federal laws;
- take measures to ensure that all employees are aware of the policy and its procedure for reporting harassment, including training for managers and employees; and
- take prompt action to investigate and remediate any harassment in the workplace.

Please feel free to contact us if you have any questions about Wilson *or would like assistance in developing, and training employees on, harassment policies and procedures.*

1 *Sara is the founder and co-managing partner of Schwartz Hannum PC, a management-side labor and employment law firm in Andover, Massachusetts. Sara gratefully acknowledges the assistance of Frances S. P. Barbieri in the preparation of this article.*

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Schwartz Hannum PC's Fall 2011 Seminars

SEPTEMBER

Facebook, MySpace, YouTube And Other Social Media
September 15th

Conducting An I-9 Audit: Tips, Traps And Best Practices
September 26th

OCTOBER

Employment Law Boot Camp (Two-Day Seminar)
October 5th and 6th

Employment Law Boot Camp (Two-Day Seminar)
October 17th and 18th

NOVEMBER

Eleventh Annual Hot Topics In Labor And Employment Law
November 2nd
Location: *The Westin Waltham-Boston, 70 Third Avenue, Waltham, MA*

Advanced Employment Law Boot Camp
November 30th

DECEMBER

The High Price Of Misclassification: Are You Properly Classifying Independent Contractors, Temps, Interns And Volunteers?
December 6th

Fall 2011 Seminars For Independent Schools:

Annual Independent School Hot Topics Seminar
October 13th
Location: *Belmont Hill School, 350 Prospect Street, Belmont, MA*

Bullying: Are You Truly Prepared For The Next Incident On Your Campus? Will You Know Exactly What To Do?
October 25th

Criminal And Sex Offender Records: Best Practices For Minimizing School Liability
November 10th

All programs take place at Schwartz Hannum PC, 11 Chestnut Street, Andover, MA, except as otherwise noted. Please see the Firm's website at **www.shpclaw.com** or contact the Firm's Seminar Coordinator, Kathie Duffy, at **kduffy@shpclaw.com** or **(978) 623-0900**, for more detailed information on these seminars and/or to register for one or more of these programs.

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Schwartz Hannum PC is an experienced labor and employment law firm guiding businesses and non-profit organizations throughout New England and nationally. Located outside of Boston, the Firm represents hundreds of clients, from small New England-based businesses to Fortune 100 and 500 companies.

11 CHESTNUT STREET, ANDOVER, MA 01810
E-MAIL: shpc@shpclaw.com **TEL:** 978.623.0900
www.shpclaw.com