SCHWARTZ HANNUM PC
Labor and Employment Lawyers Guiding Management

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Federal Court Strikes Down NLRB's Election Rule Changes

By Sara Goldsmith Schwartz[1]

A U.S. District Court judge in the District of Columbia recently struck down the revised union election procedures of the National Labor Relations Board ("NLRB" or the "Board"), concluding that, in voting to approve these changes, the NLRB lacked the necessary quorum. The revised election procedures, which went into effect on April 30, 2012, contained significant changes sought by unions, including a substantial reduction in the time between the filing of a representation petition and the ensuing election, and a requirement for elections to proceed notwithstanding challenges to employees' voting eligibility. As a result of the court's ruling, the prior election procedures are now back in place. (For more information about the revised procedures affected by this court decision, please see "NLRB Adopts Significant Changes To Union Election Procedures To Take Effect On April 20, 2012" from our March 2012 Update, which appears on our website, *www.shpclaw.com*, under the Resources tab.)

While this is a victory for employers, it may be short-lived. In this regard, the court found fault with the *procedural basis* – but not the substance – of the election changes, noting that the Board is free to impose those changes again through the requisite quorum. Accordingly, employers should act now to ensure that all appropriate protections, including those recommended below, are in place.

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Factual Background

In December 2011, the NLRB published a final rule amending its procedures for determining whether employees wish to be represented by a labor union for purposes of collective bargaining. Prior to publication of the final rule, two of the Board's then three members voted in favor of it. The third member, Brian Hayes, neither cast a vote nor indicated that he was abstaining.

The U.S. Chamber of Commerce and the Coalition for a Democratic Workforce (the "plaintiffs") filed a lawsuit in federal court challenging the manner in which the final rule had been approved. They argued that because only two Board members had participated in the vote, the final rule had been adopted without the three-member quorum required by the National Labor Relations Act. In response, the NLRB contended that the quorum requirement was satisfied because Member Hayes had participated in earlier votes on the new election procedures and, as such, had "effectively indicated his opposition" to the final rule.

The Court's Decision

In response to cross-motions for summary judgment, Judge James E. Boasberg ruled in favor of the plaintiffs, holding that Member Hayes's participation in earlier votes concerning the election changes was not sufficient to satisfy the quorum requirement. Judge Boasberg emphasized that "while the court's decision may seem unduly technical, the quorum requirement…is no trifle."

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1 *Sara Goldsmith Schwartz is President and Managing Partner of Schwartz Hannum PC. Sara gratefully acknowledges the efforts of Todd A. Newman, a Partner at Schwartz Hannum PC, who assisted in drafting this article.*

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LABOR AND EMPLOYMENT LAW UPDATE SEPTEMBER 2012

The Importance Of Thorough Witness Preparation

By William E. Hannum III [1]

Developing effective witness testimony is a critical component of litigation strategy. Sometimes, however, a party to litigation overlooks the importance of careful and thorough witness preparation in readying for depositions or trial. The unusual settlement of a recent case in the U.S. District Court for the District of Massachusetts serves as a reminder that failing to adequately prepare a witness to testify can have devastating, even fatal, consequences for the litigant's case.

U.S. v. Stryker Biotech

In *U.S. v. Stryker Biotech*, the government was forced to settle a major felony fraud case due to its failure to interview any of the seven alleged victims before bringing the case to trial.

In this case, the prosecution alleged that Massachusetts-based Stryker Biotech and three of its sales representatives had marketed a mixture of products for promoting human bone growth even though the U.S. Food and Drug Administration had not approved the products for such use. In the indictment, the prosecution identified seven surgeons alleged to have been defrauded by the company's marketing of these products.

When the case went to trial, the prosecution announced in its opening statement that it would call dozens of witnesses and introduce hundreds of exhibits to prove the defendants' guilt. But the prosecution made a critical omission – it had neglected to interview any of the seven surgeons alleged to have been victimized by the defendants. Defense counsel, on the other hand, *had* interviewed these surgeons, who revealed that they had not, in fact, been victimized by any rogue marketing scheme. This enabled the defense to point out in its own opening statement that the prosecution had neglected to interview even one of the alleged victims—and that all of the surgeons would testify that the defendants had never deceived or defrauded them.

Shortly after opening statements concluded, the prosecution agreed to drop all of the charges against the individual defendants and to dismiss the felony charges against Stryker Biotech. As part of this agreement, Stryker Biotech pleaded guilty to a single misdemeanor count of misbranding a medical device and agreed to pay a relatively modest $15 million fine. With the plea, the company avoided the potential for permanent exclusion from government health programs crucial to its business and averted a potential $25 million fine.

The prosecution's failure to interview the surgeons who were allegedly defrauded by the defendants was a significant oversight that had major consequences for the case. In fact, the government recently announced that the head of its Health Care Fraud Division would be stepping down—an apparent additional consequence of the *Stryker Biotech* case.

Lessons Learned

Thorough witness preparation is essential even in cases that are unlikely to have dramatic moments such as the defense's opening statement in *Stryker Biotech*. Attorneys who prepare their witnesses thoroughly help them feel comfortable and confident in their testimony.

Additionally, thorough preparation enables a witness to gain an overall understanding of the case and to appreciate the purpose of his or her testimony in this broader context.

Detailed witness preparation also can help witnesses and their attorneys determine how best to deal with problematic facts. In preparation sessions, counsel can candidly discuss challenging issues and make certain that the witness anticipates—and has a strategy for addressing—difficult questions from opposing counsel. This not only helps to develop the factual record advantageously but also enables the witness to ward off attacks on his or her credibility. Thus, through such "witness prep" sessions, a party can exert some control over how unfavorable information is disclosed and limit the damage that the information may cause to its case.

"Witness prep" sessions also play an important educational role, as even the most intelligent witness needs to learn how to answer questions effectively in a deposition or at trial. Preparation can help a witness remember to answer each question candidly and not to be afraid to respond with "I don't know" or "I don't recall" when appropriate. Additionally, through effective preparation, a witness can learn *not* to answer a question that he or she does not understand, and *not* to volunteer information beyond the scope of the question.

Recommendations

In light of the benefits of thorough witness preparation – and *Stryker Biotech's* illustration of how quickly and drastically a case can turn when shortcuts are taken – litigants and their attorneys should be sure to take the following measures.

First, talk with *all* potential witnesses in the course of trial preparation whenever possible. Accordingly, the witness list for purposes of preparing the case should include not only the party's own witnesses (such as the employees of a party-employer) but also third-party witnesses and individuals expected to testify for the opposing side. In

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1 *Will gratefully acknowledges the efforts of Michelle-Kim Lee and Todd A. Newman of Schwartz Hannum PC for their help in preparing this article. This article previously appeared in the April 2012 edition of* New England In-House (NEIH). *The Firm is also grateful to* NEIH *for its support in publishing this article.*

Laws Regulating Guns In The Workplace Are Coming To New England

By Todd A. Newman [1]

While laws regulating guns in the workplace are common elsewhere in the United States, they are also becoming a challenge for New England employers, particularly those with multi-state operations. The new workplace gun laws in Maine and Wisconsin are illustrative of the challenges these laws can pose—and may be a harbinger of workplace gun bills to come. And some other New England states may not be far behind. For example, New Hampshire is considering adopting a new law on this issue. Thus, employers should monitor these laws and develop compliant policies and procedures pertaining to guns in their workplaces.

Maine's Workplace Gun Law

Under Maine's new gun law, an employer "may not prohibit an employee who has a valid permit to carry a concealed firearm … from keeping a firearm in the employee's vehicle as long as the vehicle is locked and the firearm is not visible." If this results in injury or death, such as by the theft of a gun from a vehicle in the parking lot and its subsequent use, then the employer will be immune from civil liability "unless the employer or an agent of the employer intentionally solicited or procured the other person's injurious actions."

Unfortunately, the Maine law does not specify whether employers have a duty to ensure that their employees' guns are, in fact, covered by a valid permit, kept in a locked vehicle, and stored out of sight. This raises the possibility that the statute's immunity provision may not apply if the employer failed to exercise some reasonable (although unspecified) level of care. Accordingly, Maine employers might consider requiring employees who wish to keep guns in their cars to notify the employer, to provide a copy of the valid gun permit, and to park in a designated, monitored area of the parking lot. Restrictions on access to vehicles in this area also might be appropriate.

The statute states that it does not affect any of the provisions of the Maine Workers' Compensation Act. Thus, injury resulting from use of a gun brought to work pursuant to this law may be treated as a workplace injury under the Act. This provides Maine employers with yet another incentive to develop appropriate safeguards in connection with the new gun law.

Significantly, the Maine law does not restrict an employer's right to ban weapons in the workplace itself, nor does it contain a penalty for employees who store unlicensed guns in their vehicles, fail to lock their vehicles, and/or leave their guns in plain view. Employers must develop policies concerning discipline and discharge for such offenses, and the lawful extent of these policies will ultimately be determined by the courts as disputes over them arise.

New Hampshire's HB 334

New Hampshire's proposed law, House Bill 334 ("HB 334"), would prevent all public and private entities in New Hampshire from banning the possession of firearms (or knives) on any property owned in whole or in part by the state, unless the ban were expressly allowed by statute. As such, HB 334 would prevent New Hampshire's public colleges and universities, as well as facilities such as Verizon Wireless Arena, Northeast Delta Dental Stadium (formerly Fisher Cats Ballpark), and New Hampshire Hospital, from banning employees, patrons, and visitors from carrying guns on the premises.

New Hampshire's House of Representatives approved HB 334 and sent it to the state Senate. However, on January 26, 2012, after a lengthy and heated debate, the Senate Judiciary Committee voted to send the bill to "interim study," where it is expected to eventually be removed from consideration. Until such time, though, passage of HB 334 will remain a possibility for which covered employers should be prepared.

Wisconsin's Workplace Gun Law

Wisconsin's new gun law goes much further, and a bill modeled after it could present a worst-case scenario for New England employers. Under this new law, employees may carry licensed, concealed weapons in the workplace *unless* specifically prohibited by the employer—but the risks and burdens to the employer of imposing such a prohibition are significant.

If a Wisconsin employer prohibits employees, patrons, and visitors from carrying guns on the premises, then the employer *loses* immunity from any resulting injury or death, as the new law immunizes only those employers that *allow* guns on the premises. The reasoning for this counterintuitive immunity arrangement appears to be this: If the employer prevented the victim from carrying his own gun for personal protection, and the victim was shot by a perpetrator who succeeded in skirting the employer's prohibition on guns, then the employer should have potential liability for enabling this to happen. Unfortunately, the Wisconsin law is silent as to the employer's duty of care to the gunless victim in such a scenario, thereby compounding the risk of liability to the employer.

This immunity arrangement poses a difficult dilemma for Wisconsin employers. If the employer prohibits concealed weapons in the workplace, then this may reduce the possibility of workplace violence, but at the cost of the employer losing immunity from liability in the event of a gun-related injury or death. Conversely, if the employer allows concealed weapons on the premises, then this

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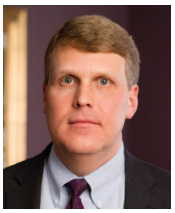
1 *Todd gratefully acknowledges the efforts of Brian D. Carlson and Michelle-Kim Lee of Schwartz Hannum PC for their help in preparing this article. This article previously appeared in the March 2012 edition of* New England In-House (NEIH). *The Firm is also grateful to* NEIH *for its support in publishing this article.*

New EEOC Guidance Underscores Importance Of "Individualized Assessment" In Employers' Review Of Criminal Records

By Brian D. Carlson [1]

The U.S. Equal Employment Opportunity Commission ("EEOC") recently issued a formal "Enforcement Guidance" addressing the applicability of the chief federal employment discrimination statute, Title VII of the Civil Rights Act of 1964, to the use of criminal conviction and arrest records in employment decisions. The Enforcement Guidance updates and supplements guidelines that the EEOC first issued on this subject more than 20 years ago.



In sum, the EEOC's new Enforcement Guidance cautions that while, in some circumstances, employers may be justified in basing employment decisions on criminal background information, employers should apply such policies in a flexible manner that allows for consideration of individual circumstances. In the EEOC's view, businesses that impose rigid prohibitions on employing persons with criminal records expose themselves to potential liability under Title VII.

While the Enforcement Guidance is not formally binding, courts often give serious consideration to the EEOC's views in deciding Title VII cases. Further, the Enforcement Guidance highlights the types of criminal background policies that the EEOC is likely to view as "red flags" in investigating charges and deciding whether to initiate litigation. Accordingly, employers ignore the new Guidance at their peril.

Conviction Records

The Enforcement Guidance notes that, under court precedents and previous EEOC pronouncements, an employer's use of criminal conviction records can potentially violate Title VII in two different ways. First, if an employer treats two individuals with similar conviction records differently – for instance, by offering employment to a white applicant with a larceny conviction, while declining to hire a Hispanic applicant with a similar conviction record – the employer may be found to have engaged in disparate treatment, in violation of Title VII.

Alternatively, a facially neutral criminal history policy – for example, a policy excluding all individuals who have been convicted of any crime within the past ten years – may result in an unlawful "disparate impact" upon members of protected groups. In this regard, the Enforcement Guidance notes that members of certain minority groups are arrested and convicted of crimes in numbers disproportionate to their representation in the general population. Where an employer's criminal background policy results in such a disparate impact, it may violate Title VII, unless the employer can demonstrate that the policy is job-related and consistent with business necessity.

The Enforcement Guidance explains that this "business necessity" standard generally requires a two-part showing. First, rather than simply excluding *all* applicants with criminal conviction records from consideration for a position, an employer should apply a "targeted screen" that is specifically tailored to (i) the nature of a conviction, (ii) the length of time that has passed since the conviction, and (iii) the nature of the job.

Second, if that targeted screen results in an applicant's presumptive exclusion from employment, the employer should then engage in an "individual assessment." As part of this process, the applicant should be given an opportunity to demonstrate that he or she was not correctly identified in the conviction records, or that the records are otherwise inaccurate. The employer should also consider any other relevant information provided by the individual, including:

- The specific circumstances surrounding the offense;
- The number of offenses for which the applicant was convicted;
- The individual's age at the time of the conviction (or his or her release from prison);
- Any evidence that, since the conviction, the applicant has held similar employment without engaging in further criminal conduct;
- The length and consistency of the individual's employment history before and after the criminal offense;
- The success of any rehabilitation efforts (such as education or training);
- Employment or character references provided by the applicant;
- Whether the individual is bonded under a federal, state or local bonding program; and
- Any other available information regarding the applicant's fitness for the position.

According to the EEOC, it is only after evaluating any such information provided by the applicant that the employer may reject the individual on the basis of his or her criminal conviction history.

In its Enforcement Guidance, the EEOC acknowledges that there may be circumstances in which employers do not need to carry out such individual assessments. For instance, various federal laws (such as banking and national-security statutes) forbid employers from hiring applicants

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1 *Brian gratefully acknowledges the efforts of Frances P. Barbieri of Schwartz Hannum PC for her help in preparing this article. This article previously appeared in the May 2012 edition of* New England In-House (NEIH). *The Firm is also grateful to* NEIH *for its support in publishing this article.*

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New EEOC Guidance Underscores Importance Of "Individualized Assessment" In Employers' Review Of Criminal Records

with convictions for certain offenses. Similarly, it may *never* be appropriate for an individual convicted of a sexual offense to be hired for a position involving unsupervised contact with children, regardless of the length of time that has passed since the conviction. However, exceptions such as these are fairly limited in scope.

Arrest Records

The EEOC's Enforcement Guidance notes that, in contrast to a conviction, an arrest is not proof of criminal conduct. Thus, according to the agency, a policy that excludes individuals from employment solely on the basis of arrest records will not be found to be job-related and consistent with business necessity, as required to shield an employer from potential disparate-impact liability.

However, the Enforcement Guidance also notes that an employer may consider evidence bearing on the *conduct* underlying an arrest. As an illustration, the Enforcement Guidance describes a scenario in which a school principal is arrested after being accused by a number of female students of having inappropriate physical contact with them and, in the course of the school's investigation, gives an evasive and unsatisfactory account of his actions. According to the EEOC, the school would not violate Title VII by terminating the principal in these circumstances – even before a conviction had been entered – because the school's action would be based on its findings as to the principal's conduct, and not the mere fact of his arrest.

Recommendations For Employers

In light of the EEOC's new Enforcement Guidance, employers should:

- Review their criminal history policies and practices in consultation with counsel and, if appropriate, revise such policies and practices to ensure that applicants with criminal conviction records are given individualized consideration;
- Ensure that all managers, supervisors and HR personnel receive appropriate training as to the use of criminal history information in employment decisions; and
- Confirm that their criminal history policies and practices comply with all other applicable federal and state laws. For instance, the federal Fair Credit Reporting Act imposes numerous obligations on employers that obtain criminal background information through consumer reporting agencies. Similarly, numerous state laws (including in Massachusetts) limit the extent to which employers may ask applicants about their criminal history or base employment decisions on such matters.

Schwartz Hannum PC Is Pleased To Announce That **Soyoung Yoon** Has Joined The Firm As An Associate

Soyoung received a Bachelor of Arts, *magna cum laude,* from Ewha Womans University, Seoul, Korea in 1991. She went on to earn a Master of Arts in Special Education (1992) and a Master of Education in Instructional Practice and Special Education (1996), from Columbia University, New York, NY. She also holds a Doctor of Philosophy in Applied Behavior Analysis and Special Education from Columbia (1998). Soyoung received her Juris Doctor Degree from Boston College School of Law, where she received the Massachusetts Academy of Trial Attorneys ("MATA") Outstanding Student Contribution Award, and co-authored, with the MATA, an Amicus Brief, in Sikorski v. City of Peabody (2009). She was a Staff Editor for the Intellectual Property & Technology Forum and a participant in the Wendell Grimes Moot Court Negotiation Competition.

While in law school, Soyoung served as a judicial intern at the Massachusetts Appeals Court, assisting the Honorable Cynthia J. Cohen and the Honorable Fernande R. V. Duffly with appellate opinions for civil cases. Soyoung also served as a law clerk for the hearing officers at the Bureau of Special Education Appeals. Soyoung represented low- to moderate-income clients through Boston College Legal Assistance Bureau Community Enterprise Clinic.

Prior to law school, Soyoung was an ABA Instructor at the Westchester Board of Collaborative Education Service in Yorktown Heights, NY (2007); a School Supervisor at Hawthorne Country Day School in Hawthorne, NY (2002-2006); Adjunct Faculty at City College, City University of New York, NY (2000-2001); and Special Education Coordinator and Special Education Teacher at the Fred S. Keller School, Yonkers, NY (1995-2001). Soyoung has also authored several publications related to education.

For the past year, Soyoung has worked on matters pertaining to employment discrimination, non-competition agreements, commercial and business law, and school law. Soyoung also has experience with trademark, copyright and patent issues, and dispute resolutions.

Soyoung is admitted to practice in Massachusetts and New York, and is a member of the Massachusetts Bar Association and the New York State Bar Association.

"Hot Topics" In Immigration Law

By Julie A. Galvin

A number of immigration law developments of significance to employers have taken place in recent months. These developments include (i) the U.S. Supreme Court's clarification of the permissible reach of state immigration laws; (ii) the Department of Homeland Security's issuance of "deferred action" guidelines that will permit certain undocumented aliens to apply for work authorization; (iii) the exhaustion of the annual H-1B visa quota for the current fiscal year; (iv) changes in the required fees for certain visas and Border Crossing Cards; and (v) the establishment of special kiosks in certain Canadian airports to expedite entry into the United States for pre-approved, low-risk travelers. These developments are summarized below.

U.S. Supreme Court Confirms Federal Government's Responsibility For Immigration, While Upholding Checking Of Documents Of Suspected Unauthorized Aliens

On June 25, 2012, the U.S. Supreme Court issued its decision in *Arizona v. United States*, addressing the constitutionality of the controversial Arizona immigration statute known as SB 1070. In a 5-3 ruling, the Justices struck down three of the four provisions at issue, holding that the state had improperly attempted to take federal immigration law into its own hands. Specifically, the Court found the following provisions of the statute unconstitutional:

- Section 3, which criminalized an undocumented immigrant's failure to "register" with the federal government and carry a registration card, if issued;
- Section 5(C), which made it a crime for an immigrant without employment authorization to apply for work, solicit work in a public place, or perform work within the state's borders; and
- Section 6, which authorized state and local police officers to arrest an immigrant without a warrant if "probable cause" existed to conclude that the immigrant had committed a public offense making him or her removable from the United States.

However, the Court left in place – at least for now – Section 2(B) of the Arizona statute, which requires state and local police officers to attempt to determine the immigration status of any person they lawfully stop if there is "reasonable suspicion" that the person is unlawfully present in the United States. In upholding this provision, the Court noted that its ruling did not foreclose future challenges to the application of Section 2(B) – for instance, a potential claim of race discrimination in the manner in which the provision is enforced.

"Deferred Action" Granted To Some Undocumented Aliens

On June 15, 2012, the U.S. Department of Homeland Security ("DHS") announced that it will offer "deferred action" to certain undocumented aliens, in accordance with an Obama Administration Executive Order. Those individuals granted deferred action will no longer be subject to automatic deportation and will be eligible to apply for work authorization. To be eligible, an individual must:

- Be 30 years of age or younger;
- Have entered the U.S. before the age of 16;
- Have continuously resided in the U.S. for at least five years prior to June 15, 2012, and have been physically present in the U.S. on that date;
- Be a current student, high school graduate, GED holder or honorably discharged veteran of the U.S. Coast Guard or Armed Forces; and
- Not have been convicted of a felony, a significant misdemeanor or multiple misdemeanors, or otherwise pose a threat to national security or public safety.

Deferred action will be granted for a period of two years and will be eligible for renewal. According to the Obama Administration, this new program is not intended to provide a path to permanent residence or U.S. citizenship. Guidance regarding application procedures will be forthcoming from DHS.

USCIS Reaches H-1B Quota For Fiscal Year 2013

U.S. Citizenship and Immigration Services ("USCIS") recently announced that it had accepted a sufficient number of H-1B petitions to meet its annual 65,000 quota for fiscal year 2013. H-1B visas are used to employ foreign nationals in "specialty occupations" requiring the application of theoretical and practical knowledge, such as engineers, lawyers, doctors, and scientists.

June 11, 2012, was the last day on which USCIS accepted quota-subject H-1B petitions. The quota for H-1B visas was exhausted much earlier than in the previous fiscal year, a fact that may be attributable to an improving economy.

USCIS will not accept any further quota-subject H-1B petitions until April 1, 2013, for an employment start date of October 1, 2013. However, USCIS will continue to accept H-1B petitions that are exempt from the annual quota. These include:

- Petitions from institutions that are exempt from the quota, including universities and certain affiliated organizations;
- Petitions for extensions and amendments for those already in H-1B status;
- Petitions for concurrent employment for those already in H-1B status; and
- Petitions for beneficiaries who are out of the U.S. but who were in H-1B status within the last six years and have time remaining on the six-year limit.

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"Hot Topics" In Immigration Law

New Consular Fees

The U.S. Department of State recently announced increases in the fees for most nonimmigrant visa applications and Border Crossing Cards. Conversely, immigrant visa processing fees have been decreased.

The new fees (which went into effect on April 13, 2012) can be viewed through the following link: *http://www.state.gov/r/pa/prs/ps/2012/03/187114.htm.*

Global Entry Now Available At All Canadian Preclearance Airports

U.S. Customs and Border Protection ("CBP") recently announced that all eight preclearance airports in Canada now have Global Entry kiosks. Global Entry allows pre-approved, low-risk travelers the ability to bypass the traditional CBP inspection process and use automated kiosks to expedite entry into the U.S.

To obtain a five-year membership in Global Entry, an individual must apply online using the CBP Global Online Enrollment System ("GOES") and submit a non-refundable $100 fee. An applicant must also complete an in-person interview and fingerprinting at an enrollment center. Those enrolled in the NEXUS Trusted Traveler Center may also begin using the kiosks.

Recommendations For Employers

In light of these developments, we recommend that employers take the following steps:

- Consult with counsel before employing previously undocumented workers under DHS's new deferred action program. Employers will need to comply strictly with the terms of that program and DHS's forthcoming regulations in order to avoid the severe sanctions that can be imposed when unauthorized workers are employed.
- Start planning early if interested in obtaining H-1B visas for fiscal year 2014. We recommend that employers be prepared to file H-1B applications on April 1, 2013.
- Ensure compliance with all other employment-related obligations imposed by the immigration laws. In particular, employers should be diligent in completing I-9 forms for new employees and make certain that, in doing so, they do not require specific documents or treat employees differently based on race or ethnicity.

Please do not hesitate to contact us if you have questions about any of these developments or any other immigration law matter.

Schwartz Hannum PC Is Pleased To Announce That **Jessica M. Farrelly** Has Joined The Firm As An Associate

Jessica M. Farrelly received her law degree from Suffolk University Law School, *cum laude.* She received her undergraduate degree from University of Dayton, *cum laude,* with a Bachelor of Arts in English. Prior to joining the Firm, Jessica worked with the Boston Firm of Melick, Porter & Shea, LLP where she focused on litigation, including employment litigation. Jessica has counseled employers on developing preventative measures to minimize such claims and conducted training on various employment law issues. She has represented national and local businesses in employment discrimination claims at the administrative, trial, and appellate levels in both Massachusetts and Florida. Jessica has experience litigating claims related to hiring and termination issues, pregnancy, race and gender discrimination, sexual harassment, hostile work environment, disability discrimination under the ADA, age discrimination under the ADEA and constructive discharge and retaliation.

Jessica has tremendous litigation experience across a broad spectrum of issues. She has handled complex general liability matters including negligence, premises liability, wrongful death, professional liability, and insurance agent errors and omissions. Jessica also has experience with products liability and insurance coverage issues.

Jessica has extensive experience in conducting depositions, mediations, arbitrations and trials. She has also prepared many briefs and participated in oral arguments before several appellate courts. And she has advised and represented cities, counties, local school boards, and other federal and state government bodies in discrimination litigation.

Jessica is a member of the bars of the Commonwealth of Massachusetts and State of Florida. She is also admitted to practice before the United States District Court for the District of Massachusetts, the Northern, Middle and Southern Districts of Florida and the United States Court of Appeals for the Eleventh Circuit.

Jessica is a member of the Boston Bar Association, the Massachusetts Bar Association and the Women's Bar Association.

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Federal Court Strikes Down NLRB's Election Rule Changes

However, Judge Boasberg also noted that his ruling "need not spell the end of the final rule for all time," as "nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the [election changes] if it has the desire to do so."

Recommendations For Employers

The court's decision gives employers a golden opportunity to confer with counsel on how best to minimize the likelihood and effectiveness of union organizing, with the goal of avoiding union elections altogether. At a minimum, employers should:

- Adopt and enforce valid policies that (i) limit when employees may solicit and distribute literature in the workplace and (ii) prevent unauthorized visitors from gaining access to the premises. Such policies should always be reviewed by labor counsel, as the rules governing them are complex;
- Be sensitive to issues that are of concern to employees, and attempt to remedy legitimate complaints. A proactive approach on such matters can help to alleviate the dissatisfaction among employees that often spawns union organizing campaigns;
- Train supervisors, managers, and human resources personnel in how to recognize and respond appropriately to possible union organizing activity; and
- Develop a plan for communicating the employer's position on unionization and related issues both internally and externally.

Significantly, enacting some of these recommendations *after a union organizing campaign is under way* may be viewed as unlawful retaliation against union activity and, in turn, support an unfair labor practice charge against the employer. Accordingly, employers that wish to remain union-free should act *now* to implement such protections.

Please do not hesitate to contact us if you have questions about the court's decision on the Board's new election procedures, or if we can assist with any other labor-related matter.

SUCCESS STORY:

John D. and Jane D. v. Private Club

Case Nos. 11NEM***** and 11NEM*****
(Massachusetts Commission Against Discrimination)

The Firm successfully represented a private club in obtaining dismissals of charges of discrimination filed by two former employees of the club. William E. Hannum III and Brian D. Carlson were the attorneys involved.

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The Importance Of Thorough Witness Preparation

some cases, a deposition will be the only means for questioning a potential witness before trial.

Second, *meet* with all potential witnesses whenever possible. While information can be gathered via telephone, only an in-person meeting allows one to gauge the witness's body language and the implications and inferences that may flow from it. For example, such factors as whether the witness makes eye contact, looks away when addressing difficult questions, has good posture, and uses hand gestures effectively can say a lot about the effectiveness of the witness – and can best be observed in person.

Third, when preparing a party's own witnesses to testify, review not only the facts of the case but also the purpose of the testimony and the procedures that will apply when he or she offers the testimony. As to the latter point, a witness needs to know if he or she may be subject to cross-examination and should be given a realistic expectation of what that might entail.

Fourth, have a party's own witnesses practice answering anticipated questions in both "direct examination" and "cross examination" mode. Making a witness realize that he or she will not be able to control much of the questioning – and that opposing counsel may focus on the most difficult aspects of the case – is an invaluable way to hone the testimony and to protect the witness from any inclination to overreach. Attorneys might even videotape these practice sessions and review them with the witnesses as a means to emphasize the "do's and don'ts."

Fifth, carefully and thoroughly discuss any problematic issues with a party's witnesses so that they are prepared to address difficult questions in a straightforward and credible manner. When a witness addresses such issues for the first time from the witness stand, the result is usually not good (except, of course, for the other side).

Sixth, be mindful of both the protections and limitations of the attorney-client privilege when dealing with witnesses. For example, if the client is a corporation, officers and managing agents generally will be considered agents of the corporation for purposes of the attorney-client privilege, but lower level employees generally will not. Special care is required in dealing with this latter group, as the corporate attorney's communications with them may be discoverable. Similarly, when the proceedings are before a government agency, such as the National Labor Relations Board, agency rules and regulations may impose limitations on witness interviews with non-managerial staff.

Finally, remember that thorough witness preparation is as vital for a deposition as for a trial. In this regard, unprepared deposition witnesses may hurt the cause by providing inaccurate, unclear, and incomplete information, and it is difficult for such witnesses to alter their deposition testimony at trial without damaging their credibility.

Annual Seminar:
Hot Topics in Labor and Employment Law

Registration, Breakfast and Networking (7:45 a.m. – 8:30 a.m.)

Welcome (8:30 a.m. – 8:35 a.m.)

Annual Labor and Employment Update: Overview of Significant Legal Decisions and Legislative Changes (8:35 a.m. – 9:45 a.m.)

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: new developments pertaining to the Americans with Disabilities Act, class action certification, EEOC guidance regarding criminal records, unemployment as a protected class, gender identity, new developments in Massachusetts data security regulations, credit check restrictions, civil unions and gay marriage, gun laws, employer access to social media passwords, anti-smoking laws, independent contractor misclassifications, California and Massachusetts wage and hour developments, minimum wage, new developments in outside sales and administrative exemptions, unpaid interns, sick leave, and NLRB issues.

Networking and Refreshment Break (9:45 a.m. – 10:00 a.m.)

Deep Dives

Health Care Reform (10:00 a.m. – 10:30 a.m.)
William E. Hannum III

Dual Use Devices In The Workplace (10:30 a.m. – 11:00 a.m.)
Suzanne W. King

Criminal Background Checks (11:00 a.m. – 11:25 a.m.)
Jessica L. Herbster

Immigration Update (11:25 a.m. – 11:45 a.m.)
Julie A. Galvin

Ask the Experts (11:45 a.m. – 12:00 p.m.)

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

Andover Country Club
60 Canterbury Street
Andover, Massachusetts 01810

NOVEMBER 8, 2012

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

7:45 a.m. to 8:30 a.m.
Registration, Breakfast and Networking

8:30 a.m. to 8:35 a.m.
Welcome

8:35 a.m. to 12:00 p.m.
Presentations

TUITION

Early Registration For Clients $175
(before October 1, 2012)

Early Registration For All Others $225
(before October 1, 2012)

Late Registration $250
(on or after October 1, 2012)

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

REGISTRATION

Annual Seminar:
Hot Topics in Labor and Employment Law

LOCATION

Andover Country Club
60 Canterbury Street
Andover, MA 01810

DATES

November 8, 2012
7:45 a.m. to 12:00 p.m.

TUITION

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

Registration Form

Name

Title

E-mail Address

Telephone Cell Phone

Organization

Street

City State Zip

Payment Options

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

Credit Card: ◯ Visa ◯ Master Card

Credit Card Number Expiration date

Signature Date

Please fill out this registration form completely and return it with payment to:
Kathie Duffy, Schwartz Hannum PC, 11 Chestnut Street, Andover, MA 01810, T: (978) 623-0900, F: (978) 623-0908
kduffy@shpclaw.com

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Laws Regulating Guns In The Workplace Are Coming To New England

will preserve its immunity from liability, but may increase the likelihood that a violent incident will occur.

A Wisconsin employer that prohibits guns on the premises must post signs (at least five inches by seven inches in size) that (i) state that concealed or open firearms are prohibited in the building and/or on the premises, and (ii) specify the area or areas to which the prohibition applies. Such signs must be placed "in a prominent place near all of the entrances to the part of the building to which the restriction applies and [where] any individual entering the building can be reasonably expected to see the sign." As noted, however, this does *not* protect the employer against liability in the event that an individual violates this prohibition and causes a gun-related injury or death.

The Wisconsin law even extends to the employer's parking lots and into employee vehicles used off-site for business purposes. In this regard, the law states that an employer "may *not* prohibit an employee… from storing a weapon, a particular type of weapon, or ammunition in the employee's own motor vehicle, regardless of whether the motor vehicle is used in the course of employment or whether the motor vehicle is driven or parked on property used by the employer." Thus, employees in Wisconsin may store weapons in their vehicles at all times—even while making deliveries, driving clients to the airport, or performing any other work-related functions.

Recommendations For Employers

Employers, particularly those with multi-state operations, should work with counsel to determine if they are affected by the new Maine law—and multi-state employers should consider whether they are affected by the Wisconsin law or by the workplace gun laws of any other state. In this regard, at least 15 other states (Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, North Dakota, Oklahoma, Texas and Utah) have laws permitting guns on employer property. While these laws mainly concern guns in employee vehicles parked on the employer's property, each law has its own specific requirements and must be reviewed carefully.

For instance, while most Indiana employees may keep guns in the vehicles that they drive to work, their employers may not ask them if they own or transport guns, or require employees storing firearms in their vehicles to park off-site. The new Maine and Wisconsin statutes, as well as New Hampshire's HB 334, do not include such restrictions. Further, some states' workplace gun laws, including those of Arizona, Indiana, and Kansas, do not include employer immunity provisions, requiring heightened consideration of the policies, practices, and measures that employers should implement to prevent a workplace incident.

As these new bills and statutes are becoming more common, employers should keep a careful watch on these issues, particularly as employers cross state lines, to ensure compliance with all applicable laws.

Dead Ringers, Vol. II

Our tour of Hollywood East continues, as we troll the legal avenues of the Bay State for celebrity doppelgängers who are sure to induce double-takes from courtroom colleagues and public passers-by alike:

William E. Hannum III, Andover
NBC Nightly News anchor Brian Williams

SUCCESS STORY:

Security System Company v. John D. and Jane D.

Case No. MICV-2012-****
(Essex Superior Court)

The Firm successfully represented a provider of security system design and installation in obtaining a preliminary injunction to enforce the non-solicitation obligations of two former employees. Todd A. Newman and Michelle-Kim Lee were the attorneys involved.

SUCCESS STORY:

John D. v. Manufacturer

Case No. 01-CA-073***
(National Labor Relations Board)

The Firm successfully represented a leading manufacturer of dairy products in obtaining the dismissal of an unfair labor practice charge by a commercial driver who alleged that his discharge violated federal labor law. The firm also succeeded in upholding the dismissal on appeal. William E. Hannum III and Todd A. Newman were the attorneys involved.

Seminar Schedule

September 27 & 28, 2012
Employment Law Boot Camp
(Two-Day Seminar)
9/27: 8:30 a.m. – 4:30 p.m.
9/28: 8:30 a.m. – 5:00 p.m.

October 16, 2012
Dual Use Devices In The Workplace:
Understanding And Managing The Risks
11:30 a.m. – 1:30 p.m.

October 17, 2012
Conducting An I-9 Audit:
Tips, Traps And Best Practices
9:30 a.m. – 12:00 p.m.

October 25, 2012
Advanced Employment Law Boot Camp
8:30 a.m. – 4:30 p.m.

November 8, 2012
Annual Hot Topics Seminar
7:45 a.m. – 12:00 p.m.

November 27, 2012
Labor Law Traps For Non-Union Employers
9:00 a.m. – 11:00 a.m.

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

Seminar For Independent Schools

September 20, 2012
Hot Topics In Independent Schools:
The 2012 Seminar
8:30 a.m. – 11:30 a.m.

All listed seminars are being held at the Firm's Andover office at 11 Chestnut Street except for the Annual Hot Topics Seminar in November, which is being held at The Andover Country Club, 60 Canterbury Street, in Andover.

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

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