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Guiding Employers & Educators

Labor and Employment Law Update

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IN THIS ISSUE

Supreme Court's DOMA Ruling Raises Issues For Employers

By Suzanne W. King and Julie A. Galvin

In late June, the United States Supreme Court struck down Section 3 of the Defense of Marriage Act ("DOMA"), which defined marriage, for purposes of federal law, as a union between a man and a woman and prohibited the federal government from recognizing marriages between same-sex couples. The Court found this provision of DOMA unconstitutional, on the basis that it failed to respect states' rights to give equal recognition to same-sex and opposite-sex marriages. Significantly, the Court did not strike down Section 2 of DOMA, under which states are not required to recognize same-sex marriages performed in other states.

As a result of the Court's ruling, same-sex married couples working in states that recognize their marriages are now entitled to the same benefits, rights and protections under federal law as opposite-sex couples. The Court's decision, however, leaves open some important and potentially complex issues that are likely to take time to be resolved.

Background And Case History

The Supreme Court's decision, in *U.S. v. Windsor,* involved a same-sex couple, Edith Windsor and Thea Spyer, who were married in Ontario, Canada, but resided in New York, which recognizes same-sex marriages. When Spyer died, she left her entire estate to Windsor, who sought to claim the federal estate tax exemption for surviving spouses. Windsor, however, was barred from doing so by Section 3 of DOMA, despite the fact that her marriage to Spyer was recognized by the state of New York. As a result, Windsor was forced to pay $363,053 in federal estate taxes.

After the IRS denied her request for a refund of the estate taxes, Windsor brought suit in a New York federal district court, arguing that DOMA violated her equal-protection rights under the Constitution, since Windsor would have been entitled to the federal estate tax exemption if she had been married to a man. The district court found in Windsor's favor, and the Court of Appeals for the Second Circuit affirmed the district court's ruling. Subsequently, the Supreme Court agreed to hear the case.

Supreme Court's Decision

In a decision by Justice Kennedy, the Supreme Court majority struck down Section 3 of DOMA. Noting that "[b]y history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate states," Justice Kennedy determined that, by failing to respect New York's decision to afford equal recognition to same-sex and traditional marriages, this provision of DOMA had an impermissible "purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." In addition, Justice Kennedy argued, Section 3 of DOMA inappropriately served to "create second-class marriages for the purpose of federal law" by "writing inequality into the entire United States Code."

Accordingly, the Court concluded that Section 3 of DOMA was unconstitutional. As a result, same-sex married couples working in states that recognize their marriages no longer need to be treated differently, for purposes of federal law, from opposite-sex couples.

Notably, Justice Kennedy's opinion made clear that the Court's decision was limited to same-sex marriages in states that recognize such marriages. Currently, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minne-

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NLRB's Workplace Poster Rule Remains In Limbo, But Employers Must Stay Vigilant

By Jaimie A. McKean

Two federal appellate courts have now affirmed lower court decisions to invalidate the "notice posting" rule of the National Labor Relations Board ("Board" or "NLRB"). If eventually allowed to take effect, this rule would require employers to post a notice of employee rights under federal labor law, including the rights to form, join, or assist labor unions.

While these rulings enable employers to continue to refrain from posting the Board's notice, employers must remain vigilant of potential union organizing at their workplaces, as the publicity generated by the Board's rule and its continuing plight through the courts is believed to have provided a rallying cry for organized labor. Steps that employers should consider taking now to protect themselves against union organizing are outlined below.

Background

The Board's rule, issued in August 2011, would require most private-sector employers to post a notice informing employees of their rights under the National Labor Relations Act (the "NLRA"). These rights largely involve bringing a labor union into the workplace to collectively bargain with and to pursue "grievances" against the employer.

The rule also provides that it would be an unfair labor practice for an employer to fail to post the notice and that this, in turn, would operate to "toll" (*i.e.*, suspend) the six-month statute of limitations for employees to file unfair labor practice charges against the employer under the NLRA.

Soon after the Board issued the "notice posting" rule, trade organizations challenged it in federal district courts in the District of Columbia and South Carolina. The District of Columbia court struck down certain portions of the rule, while the South Carolina court invalidated it entirely. Both rulings were appealed, and the NLRB announced that it would delay implementation of the rule while the legal proceedings continued.

Appellate Courts' Decisions

In May, the United States Court of Appeals for the District of Columbia Circuit struck down the rule in its entirety. The D.C. Circuit held that the rule violated Section 8(c) of the NLRA, which, in accordance with the First Amendment, prohibits the NLRB from penalizing an employer for non-coercive speech. Noting that free-speech rights encompass both a right to speak and a right *not* to speak, the D.C. Circuit held that by making a failure to post the notice an unfair labor practice, the rule impermissibly punished employers for "not speaking."

The D.C. Circuit also found the tolling provision of the Board's rule invalid. In this regard, this appellate court found no evidence that at the time the NLRA was enacted in 1935, Congress intended to allow the Board to alter the NLRA's six-month statute of limitations for unfair labor practice charges.

In June, the United States Court of Appeals for the Fourth Circuit (the appeals court in the South Carolina case) also invalidated the rule, though on different grounds. The Fourth Circuit held that the NLRB lacked statutory authority to promulgate the rule, concluding that the Board's powers under the NLRA are limited to addressing unfair labor practice charges and conducting union elections. The court noted that while Congress has given other agencies express statutory authority to promulgate notice requirements, it has never granted similar authority to the Board.

Consistent with these rulings, the NLRB has continued to state on its website that the notice posting rule "will not take effect until the legal issues are resolved," adding that "[t]here is no new deadline for the posting requirement at this time."

Recommendations For Employers

In light of these appellate court decisions, employers that were preparing to comply with the Board's "notice posting" rule may continue to refrain from doing so. Eventually, the Supreme Court may be asked to resolve the issues raised by the rule, but the matter is presently not before it, leaving the fate of the rule on an uncertain path through the lower federal courts.

Meanwhile, employers should be aware of the likelihood of increased union organizing activity. Whether or not this rule ever goes into effect, the publicity surrounding it will almost certainly spur further organizing efforts among employees. Additionally, the Board remains on a pro-union course and is expected to continue in this direction for at least the remainder of President Obama's term.

Thus, we recommend that employers desiring to remain union-free take the following steps *before* union-organizing activity has begun:

- Adopt and enforce valid policies that limit when employees may solicit and distribute literature in the workplace, and that prevent unauthorized visitors from gaining access to employers' facilities. Because such policies are governed by complex legal standards, they should always be reviewed by labor counsel;
- Be sensitive to issues that are of concern to employees (such as management issues and employee compensation and benefit matters) and attempt to remedy legitimate complaints. A proactive approach to such matters can help to dissuade employees from believing that they need a union in order to have a voice in the workplace;
- Train supervisors, managers, and human resources personnel in how to recognize and respond appropriately to possible union organizing activity; and
- Develop a plan for systematically communicating the employer's position on unionization and related issues, both internally and externally.

Please feel free to contact us if you have any questions about the status or requirements of the Board's "notice posting" rule or any other labor-law issue.

New FMLA Regulations Concerning Military Families, Airline Flight Crews, And Intermittent Leave Take Effect

By Lori Rittman Clark

The U.S. Department of Labor ("DOL") has issued new Family and Medical Leave Act ("FMLA") regulations that expand military family leave, provide an alternate method for determining the eligibility of airline flight crews, and impose heightened requirements for intermittent leave. These new changes take effect immediately.

Military Family Leave

The new regulations expand military family leave to include care for (i) a current service member who suffers a serious injury or illness in the line of duty or (ii) a veteran discharged (other than dishonorably) within the past five years who is undergoing treatment, recuperation, or therapy for a serious injury or illness suffered in the line of duty. A qualifying illness or injury may involve an aggravation of a pre-existing condition.

Where leave is sought to care for a veteran, the serious injury or illness must be one of the following:

- A continuation of a serious injury or illness that was suffered or aggravated when the veteran was a member of the Armed Forces and that rendered the individual unable to perform his or her duties;
- A physical or mental condition for which the veteran has received a Department of Veterans Affairs service-related disability rating of 50% or greater;
- A physical or mental condition that substantially impairs the covered veteran's ability to work (or would do so absent treatment); or
- A physical or psychological injury due to which the veteran has enrolled in the Department of Veterans Affairs Comprehensive Assistance for Family Caregivers Program.

Separately, leave now may be taken to assist a service member's parent who is incapable of self-care (if the need results from the service member's active duty or call to active duty). Such leave is limited to non-routine activities, such as arranging for a parent's care.

The new regulations also triple the number of days (from five to fifteen) a family member may take to bond with a service member on rest or recuperation leave. This leave may be taken intermittently.

Airline Flight Crew Eligibility

The new regulations include an alternate method for determining whether airline flight crew employees have worked sufficient hours to be eligible for FMLA leave. Such employees now qualify if they have worked or been paid for (i) at least 60% of the applicable total monthly guarantee (or its equivalent) and (ii) at least 504 hours (not including commuting or leave time) during the previous 12 months. Airline flight crew employees remain subject to the FMLA's other eligibility requirements.

Tracking Intermittent Leave

Finally, the new regulations specify that an employer must track intermittent FMLA leave in the shortest increment the employer uses to account for other forms of leave. Thus, for instance, if an employer allows employees to take sick time in 15-minute increments, it must likewise allow employees to take intermittent FMLA leave in 15-minute increments. Significantly, an employer may not use a minimum increment greater than one hour.

Recommendations For Employers

We recommend that employers:

- Revise their FMLA policies and forms as necessary to comply with the new regulations;
- Train their supervisors and managers to ensure that they understand the rights, obligations, and procedures implicated by the new regulations; and
- Display DOL's revised FMLA poster.

Schwartz Hannum PC is proud to announce that **Sara Goldsmith Schwartz** has been recognized as a **Top Woman of Law** by *Massachusetts Lawyers Weekly.*

Sara will be honored at the Top Women of Law Awards Event on Thursday, October 31, 2013, at the Boston Park Plaza Hotel.

The Right Thing To Do: Preparing For And Responding To Allegations Of Sexual Abuse At Independent Schools

By William E. Hannum III

The sexual abuse scandals that have occurred at schools over the past couple of years are sobering reminders that the sexual abuse of children is not isolated and that educational institutions face a significant threat to children on their campuses. Since the Jerry Sandusky scandal at Penn State broke in 2011, there has been a steady stream of similar stories, from the Landmark School in Beverly, Massachusetts, where a number of former students came forward alleging past abuse, to the New England Conservatory, whose conductor was fired for knowingly hiring a convicted sex offender to videotape children in an orchestra, to the Horace Mann School in New York City, about which *The New York Times Magazine* ran an article chronicling decades of sexual abuse of students by teachers.

Having talked and worked through such scenarios with numerous educational institutions, including independent schools and universities, we are not surprised that elite institutions have tripped on their shoelaces when faced with the horrific allegations of sexual abuse. One fundamental problem is that educational institutions don't think this will ever happen to them, so they fail to get ready for it—even when they can see it coming.

Ultimately, when news of alleged sexual abuse breaks, the decision-making generally comes down to three factors: (1) What does the law require the school to do? (2) What are the public relations implications for the school? (3) What is the right (moral) thing to do? Perhaps not surprisingly, in this author's experience, the educational institutions that get through these situations in the best shape seem to be the ones that are guided by "doing the right thing," even when it is not legally required and even when it does not seem to be the best thing to do from a "P.R." standpoint.

When a sex abuse scandal comes to a school, it brings a storm of public relations and communications issues, and sorely tests the school's sense of the moral or right thing to do.

The Phone Call You Never Want To Receive

When an educational institution learns of alleged abuse, the immediate question should be whether the school is mandated to report the abuse to the authorities. If the victim is a child, mandated reporter obligations under state law will generally require that the school *immediately* report the allegation to the police or designated state authorities. On the other hand, there may not be a legal requirement to make a report. For example, if the alleged victim is no longer a child, the state mandated reporter law may not apply.

Before discussing the preliminary issue of whether a report is legally mandated, however, it is important to note—and emphasize—that schools should be prepared for more than just this first question. When a sex abuse scandal comes to a school, it brings a storm of public relations and communications issues, and sorely tests the school's sense of the moral or right thing to do. (For example, recall the erratic decisions by the Board of Trustees at Penn State during the first week of November 2011, in the immediate wake of the Sandusky scandal. Statements made by administrators at Penn State during that time period have subjected Penn State to a defamation lawsuit.)

One fundamental problem is that educational institutions don't think this will ever happen to them, so they fail to get ready for it—even when they can see it coming.

Mandated Reporter Laws

1. When Making A Report To The Authorities Is Mandatory

If a mandated report must be filed, generally it must be filed *immediately*—or school officials risk criminal charges and other penalties. For example, a Florida school took three days to file a mandatory report, because the school wanted to conduct its own investigation first, to be sure that the facts fully supported the claims. When the police learned of the three-day delay, they arrested the head of the school and two other school officials for failing to file the mandatory report immediately, as required by Florida law.

It is critically important to review applicable state law on these issues. State laws are changing in response to the recent sex abuse scandals. Also, state laws vary as to who is considered a mandated reporter, the circumstances under which a mandated reporter must make a report, and the procedure for making a mandated report.

Who Is A Mandated Reporter? Generally, school officials are mandated reporters, but this will depend on state law. Most states have detailed definitions of mandated reporters, some of which apply much more broadly than just to school officials. For example, New Hampshire requires *any* person who has reason to suspect that a child

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has been abused to report such abuse. Independent schools need to fully understand the applicable mandated reporter law—and train all relevant employees accordingly.

When And How Must The Report Be Filed? Mandated reporters may be required to make a report quite quickly after learning of the alleged abuse. For example, like Florida, Massachusetts requires a mandated reporter to verbally (orally) report the abuse *immediately* to the Massachusetts Department of Children and Families. Generally, the oral report must be followed by a written report in two days or less, depending upon state law. Again, independent schools should train all mandated reporters as to the rules under the applicable mandated reporter law(s).

Penalties. Independent schools are advised to take these obligations seriously. Failure to comply with mandatory reporting obligations may result in *civil and/or criminal penalties* for the institution and/or its personnel.

2. When Making A Report To The Authorities Is Moot

In many cases, there is no need for the school to decide whether to report the alleged abuse—because the victim has already done so or because the school learns of the abuse when the authorities arrest the alleged perpetrator. Of course, schools should consult with experienced counsel before concluding that there is no requirement to make a report.

3. When Making A Report To The Authorities Is "Optional"

If the alleged victim is no longer a child, then the question gets a bit trickier, in large part because the school generally has a choice whether to report or not to report. Generally, there will not be any mandated reporter obligations, due to the age of the alleged victim. Some police officials may even state that they do not want to receive a report of alleged abuse, except from the victim. At this point, the school's decision whether to make the report will be guided largely by its sense of what is the right thing to do, and its concerns about public relations.

Current Employees Vs. Former Employees. Often, an important factor in these "non-mandated" reporter situations is whether the alleged perpetrator is a current employee or a former employee. If s/he is a *current* employee, then the school may be more inclined to file a report, to force the authorities to reach some conclusion about whether the allegations have merit. (The current employee may be suspended pending an investigation by the authorities, or pending the school's own investigation.) Or perhaps the school will hesitate to file a report, out of concern about bad publicity or distrust of the allegations. Generally, there will be a variety of views among those involved in the discussion—senior administrators, trustees, etc. These debates about whether to report can go on for weeks, or longer.

Reasons For Filing "Optional" Reports. Educational institutions that promptly report allegations, when there is no legal obligation to do so, often do so out of concern that the alleged perpetrator is still working in a school environment and may harm another child. In other cases, schools make such optional reports out of a sense of moral duty: Why should the victim's current age absolve the school from the duty to file a report? These schools may be motivated by concern for the victim(s), or for potential, unknown victims, or both. Alternatively (or in addition), a school may be motivated by fear of a potential lawsuit if it does not report the allegations, even if the school has no legal duty to do so.

Other schools may file reports out of concern for the public relations nightmare that might ensue if they fail to report abuse allegations. (As recent headlines have demonstrated, bad news makes for bad headlines, even years after the fact.)

> *"Some people can't process the horror in front of them…when they find themselves in some unsettling circumstance, they shut down and pretend everything is normal."*

Some schools file optional reports in the hope that the authorities will investigate and resolve the situation. (School administrators often believe that the police and the district attorney will investigate and prosecute these types of crimes, no matter how much time has passed. However, what the authorities might do with a report of alleged abuse from decades in the past is not always consistent.)

Reasons For NOT Filing "Optional" Reports. Schools that do not report alleged abuse, where there is no legal obligation to report it, make that decision for a variety of reasons. For instance, a school may be concerned that the allegations may not be true, and that reporting false allegations would harm an innocent employee or former employee, and potentially even lead to a defamation lawsuit against the school.

Often, whether or not there is a mandatory reporting obligation, there is at least one constituent in a school's leadership team who opposes making a report. This may reflect the phenomenon that people do not want to face the horrific possibility that unspeakable crimes are happening, let alone happening on their campus. As David Brooks observed in *The New York Times:* "Some people can't process the horror in front of them…when they find themselves in some unsettling circumstance, they shut down and pretend everything is normal."

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Independent schools should be aware of this phenomenon—and should account for it in their policies, compliance practices, and training. Sex abuse is a difficult topic to discuss, and schools should be conscious of this fact in formulating their training and prevention protocols, if they want to do all that they reasonably can to protect the children entrusted to their care.

Other Potential Legal Claims

There are numerous legal issues raised by child sex abuse cases, beyond those imposed by mandatory reporting laws. Schools where students have been sexually abused must worry about being sued under a broad range of potential causes of action, which will vary depending on the states involved. As an example, the first civil complaint filed as a result of the Penn State scandal alleged the following claims against Jerry Sandusky, Penn State and/or The Second Mile (Sandusky's nonprofit for disadvantaged youths): (i) childhood sex abuse and vicarious liability, (ii) negligence, (iii) negligent supervision, (iv) premises liability, (v) negligent misrepresentation, (vi) intentional misrepresentation, (vii) negligence *per se,* (viii) conspiracy to endanger children, and (ix) intentional infliction of emotional distress.

The claims against Penn State are based in part on allegations that Penn State knew or should have known about Sandusky's sexual misconduct, failed to act to stop the abuse or to protect the plaintiffs from it, and indeed conspired to conceal it.

In cases of sexual abuse, schools receiving federal financial assistance may also have potential liability under Title IX.

In October 2012, Penn State was also sued by a former graduate assistant coach who witnessed Jerry Sandusky abusing a young boy in the showers on campus. The former graduate assistant coach alleges that he was treated in a discriminatory fashion and his employment was terminated unlawfully because of his cooperation with investigators and his testimony in front of the grand jury and at hearings. He further alleges that statements made by the former president of Penn State defamed him and caused irreparable harm to his reputation. He also alleges that he relied on representations made by members of the administration at Penn State that they would take appropriate action in response to the abuse, but they did not and as a result, he was "labeled and branded as being part of a cover-up." In April 2013, despite Penn State's attempts to get the lawsuit dismissed, the court allowed it to proceed.

In cases of sexual abuse, schools receiving federal financial assistance may also have potential liability under Title IX. Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…" The majority of independent schools do not receive federal financial assistance and therefore, are not covered by Title IX.

In addition, the alleged *perpetrator* of sexual abuse may file legal claims against the school. In this regard, each statement made by the school about the alleged abuse can become the basis for a new defamation claim by the alleged perpetrator. Thus, to minimize the risk of potential defamation liability, schools must exercise extreme caution in all communications, particularly when neither the victims nor the authorities have publicly disclosed the allegations.

How Independent Schools Can Better Protect Students And Themselves

Independent schools can benefit from ensuring that appropriate safeguards are in place to minimize the risk of child sex abuse. These compliance measures include communicating with and training faculty, staff, students, and parents, and preparing to respond to reports of abuse when they arise.

Ideally, an independent school will begin to address these issues *before* there is an allegation of abuse. But it is never too soon or too late to begin to implement the compliance measures, training, and crisis communications plan described below.

Mandated Reporter Compliance. An independent school should be sure that its mandated reporter compliance protocols are up-to-date, including policies, procedures, and training for all relevant employees. The school should also ensure that it is prepared to meet its obligation to report child abuse to the appropriate authorities within the timeframe required by state law. Schools should consult with legal counsel now to prepare to meet their legal obligations under their state mandatory reporting laws, should the need arise. Having a clear understanding of the applicable state's mandatory reporting requirements and procedures is crucial to being able to promptly respond to a situation involving alleged sexual abuse. Policies should be updated regularly, and all employees should receive periodic training.

Conduct Background Checks. Generally, independent schools should conduct background checks on faculty, staff, independent contractors, and volunteers, at least to the extent that they have access to children. These background checks may include criminal history checks, sex offender registry checks, detailed reference checks, educational credential verification and possibly more. Background checks

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should be conducted in accordance with applicable state and federal laws. Policies should be updated regularly, and applicable employees should receive training.

Establish Clear Policies And Procedures Against Abuse. The school's student handbook, employee handbook, crisis management plan, and other applicable policies should be revised to ensure that they clearly articulate what faculty, parents, students, and staff should do if they suspect someone is being sexually abused. There should be multiple avenues of complaint available to facilitate reports of sexual abuse. All employees should receive appropriate training in how to report sexual abuse and how to respond to reports of it.

Training For All Managers And Employees. Independent schools should train *all* employees as to the appropriate boundaries between students and employees and how to respond if they see child abuse. Training *all* employees, and not just faculty, is critically important, so that even janitors and other staff who typically do not interact with children will know to report abuse immediately (and to whom to report it). Likewise, schools should train all managers and supervisors in how to handle any report they hear about. Managers and supervisors are agents of the school, and thus they should know better than to simply ignore information about potential abuse.

Foster An Open Culture. Independent schools should consider having an "open door policy," including a no-retaliation provision, and clearly communicate that policy to all employees, so that employees know that they can report any disturbing conduct they may see or hear about, whether sexual abuse or otherwise. An open door policy encourages employees to discuss any concerns or problems they may experience or notice with the administrators at the school. It is vital that faculty, students, and staff feel comfortable reporting inappropriate behavior.

Develop And Implement A Crisis Management Plan. Independent schools should consider developing and implementing a crisis management plan before a crisis arises. This plan should identify crisis team members, including board members, legal counsel, and communications experts. The plan should also include protocols to follow in the event of a crisis, including a report of sexual abuse. The school should also periodically review and update its crisis management plan to ensure that it is in compliance with legal requirements and best practices. In addition, schools should consider conducting "fire drill" training on the crisis management plan, so that when there is a crisis, everyone knows what to do.

Insurance Policies. Independent schools should address whether they have adequate insurance coverage for situations involving sexual abuse, and (if so) maintain copies of relevant insurance policies, including not only current policies, but also past policies. Also, schools should be prepared to comply with any notification requirements under applicable insurance policies when an allegation of abuse is made.

Be Prepared To Conduct An Internal Investigation. Generally, if there is an allegation of abuse involving a current or former employee, the school should be prepared to conduct a prompt internal investigation, with the assistance of experienced counsel. While an investigation is pending, appropriate measures should be taken to protect all involved; for example, any alleged abusers should be placed on administrative leave from the school and instructed to stay off campus. The school must assess the available facts (including the results of its own internal investigation) and take appropriate steps based on its findings.

> *All employees should receive appropriate training in how to report sexual abuse and how to respond to reports of it.*

Independent schools should establish these protocols now to minimize the risks of child sex abuse. In addition, taking these steps now will help to ensure that the school is fully prepared, and that appropriate authorities are promptly notified, if sexual abuse allegations surface.

Doing The Right Thing

Many educational institutions that have lived through allegations of abuse have confirmed that the single best piece of advice they received was simply to do the right thing. Allegations of child sex abuse raise myriad legal issues, which vary from one state to the next, and they raise terrifying public relations issues for an institution that is entrusted with children.

But the single most important issue to get clear on, when facing a sex abuse crisis, is the school's sense of its moral duty and what it means to do the right thing. When the moment of crisis arrives, the legal and practical complexities can seem overwhelming to an institution that is unprepared.

The educational institutions that seem to do the best in these worst-of-times situations are those that are well prepared and that stay committed to doing the right thing for the right reasons.

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Supreme Court's DOMA Ruling Raises Issues For Employers

The implications of the Windsor *decision are far-reaching… the Court made clear that its holding extended to more than 1,000 federal statutes and regulations that currently restrict benefits to opposite-sex married couples.*

sota, New Hampshire, New York, Rhode Island, Vermont, Washington, and Washington D.C. all recognize same-sex marriages. By contrast, the *Windsor* decision does not apply to same-sex couples in states that do not recognize same-sex marriage, or to unmarried couples in registered domestic partnerships. Because Section 2 of DOMA was not struck down by the Court in *Windsor*, states are free to deny recognition of same-sex marriages performed in other states.

Implications Of *Windsor* Decision

The implications of the *Windsor* decision are far-reaching. Although the case involved the federal estate tax specifically, the Court made clear that its holding extended to more than 1,000 federal statutes and regulations that currently restrict benefits to opposite-sex married couples.

In particular, because many employee benefit plans and policies are governed by federal law, the *Windsor* decision will have a significant impact on employers in states that recognize same-sex marriage. Employers will have to take care to ensure that same-sex married couples residing in such states are treated the same as opposite-sex married couples with regard to federal benefits.

Thus, for instance, same-sex spouses of employees in states recognizing their marriages will now be eligible for health insurance through their spouses' employers, without having to pay federal income taxes on the value of the benefits. Similarly, same-sex spouses will be considered "spouses" for purposes of COBRA health insurance continuation, as well as the Family and Medical Leave Act ("FMLA"), which entitles employees to take leave to care for a spouse with a serious health condition.

However, the *Windsor* decision also leaves some important questions unanswered. In this regard, many federal laws governing spousal benefits do not specify which law determines whether a person is "married," instead deferring to state law on this issue. Thus, it may be difficult for an employer to determine, for instance, whether a same-sex couple who was married in a state that recognizes such marriages, but who now lives or works in a state that does not recognize same-sex marriage, should be treated as married for purposes of federally-governed benefits. Presumably, further guidance will emerge on these issues, in the form of executive orders, agency regulations and/or court decisions.

Also, because the Court held that Section 3 of DOMA was unconstitutional from its inception in 1996, employers may face retroactive benefits claims by employees in same-sex marriages. Along similar lines, some employers may consider seeking refunds of FICA taxes that they have paid on imputed income resulting from health benefits provided to same-sex spouses. As the Court's opinion did not directly address the issue of retroactivity, it is unclear how such claims will fare in the courts.

Recommendations For Employers

It is likely to be some time before all of the issues raised by the *Windsor* ruling are resolved. For now, however, employers should take the following initial steps to address this important change in the law:

- Employers in Massachusetts (and other states that recognize same-sex marriage) who have been providing health benefits to the same-sex spouse of an employee and treating the value of that coverage as taxable income to the employee should immediately stop imputing such income to the employee. Same-sex spouses are now entitled to the same favorable tax treatment as opposite-sex spouses. Unfortunately, it is unclear at this point how employers should handle the imputed income already recognized during the first half of 2013.
- Employers in states that do not recognize same-sex marriages will have to continue to treat as taxable income the value of health insurance provided to the same-sex spouses of employees. Multi-state employers will have to ensure that their payroll systems are designed to handle this different tax treatment correctly depending on the state in which an employee works.
- Benefit plans and handbook provisions regarding the tax treatment of health insurance premiums must also be revised.
- All employers should review and revise as necessary all federally-governed benefits plans, policies and consent forms to include a same-sex spouse within the definition of a covered spouse. Because there are so many questions remaining regarding the impact of the *Windsor* decision on employer benefits, employers should consult counsel to ensure that these plans are revised in accordance with the decision and the guidance that will be issued in the future.
- Finally, employers should monitor the news for agency decisions, regulations and other guidance as to the issues left unresolved by the *Windsor* ruling.

Please feel free to contact us if you have any questions about the impact of the DOMA ruling on your workplace.

Options Remain For Employers Following Completion Of H-1B Visa Lottery

By Julie A. Galvin

U.S. Citizenship and Immigration Services ("USCIS") has announced that it has selected for processing a sufficient number of H-1B visa petitions to meet the statutory quota for Fiscal Year 2014. While, in most cases, employers will now have to wait until April 1, 2014, to submit further H-1B visa petitions, alternatives may be available for employers that wish to hire foreign nationals before then, such as petitions that are exempt from the quota.

Background

H-1B visa petitions are filed on behalf of foreign nationals whom employers wish to hire in occupations that require the application of highly specialized knowledge and completion of at least a Bachelor's degree in the field. Examples of such occupations include engineers, physicians, teachers, and accountants.

H-1B Visa Lottery

H-1B visas are subject to an annual, statutory quota. Under federal regulations, USCIS is permitted to use a lottery system to select the H-1B petitions to be processed in a given year if the petitions it receives during the first five business days of the application period exceed the annual quota. This year, during that five-day period, USCIS received substantially more petitions than the number of available H-1B visas, leading USCIS to use the lottery system for the first time since 2008.

In April of this year, USCIS randomly chose a sufficient number of H-1B petitions to meet the statutory quota for Fiscal Year 2014. Those petitions that were not selected through the lottery will be rejected, and USCIS will return the accompanying filing fees.

Possible Alternatives For Employers

Employers must now wait until April 1, 2014, to submit further H-1B petitions that are subject to the annual quota. However, USCIS will continue to accept and process petitions that are exempt from the quota, such as petitions to allow workers who have already been approved for H-1B visas to change employers, extend their status, change the terms of a previously approved petition, or work concurrently under a second H-1B petition.

Additionally, USCIS will continue to accept and process H-1B petitions from employers that are exempt from the annual quota. Such employers include U.S. colleges and universities and certain non-profit institutions affiliated with them, as well as certain non-profit and governmental research institutions.

Recommendations For Employers

In light of the completion of the H-1B visa lottery, we recommend that employers take the following measures:

- Employers whose H-1B petitions were not selected through the lottery should examine whether the foreign national workers may be eligible for any other types of employment-based visas.
- Non-profit employers whose petitions were not selected should examine their relationships, if any, with colleges and universities and consider whether the workers might qualify for H-1B visas based on such relationships.
- In addition, private employers whose beneficiary workers would be physically placed at a college or university should examine whether the workers could qualify for a quota-exempt H-1B visa.
- Employers that plan to apply for H-1B visas for Fiscal Year 2015 should ensure that the visa petitions are ready to be filed with USCIS on April 1, 2014.
- Finally, employers should closely monitor the news for further developments in immigration law, including any potential changes to the H-1B program.

Please contact us if you have any questions regarding the H-1B program or any other immigration issue. The Firm regularly assists employers with preparing and processing employment-based visa applications, and we would welcome the opportunity to assist you.

Out Of Sight, Not Out Of Mind: Massachusetts Wage Act Extends To Salesperson Living And Working Outside Massachusetts

By Jessica M. Farrelly

In light of a recent Massachusetts Appeals Court decision, Massachusetts employers should be mindful of potential liability under the Wage Act for unpaid wages, including sales commissions, to employees who reside outside the Commonwealth and who perform their day-to-day sales activities by traveling and telecommuting from other states. Failing to recognize that Wage Act protection could extend to these remote employees could prove costly for employers and their officers (who, under the Wage Act, may be held individually liable).

Appeals Court's Decision

In the decision, *Dow v. Casale*, the Appeals Court affirmed a judgment of more than $300,000 (plus attorneys' fees) for a Florida-based sales director against the CEO of a Massachusetts-based company. Applying Massachusetts choice-of-law principles, the Appeals Court determined that Massachusetts had the most significant relationship to the parties' employment relationship, irrespective of where the plaintiff lived and was physically located from day to day. As a result, the court concluded it was appropriate and reasonable to apply Massachusetts law to the plaintiff's claims and to afford him the remedies provided under the Wage Act.

As a result of the *Dow* ruling, Massachusetts employers should recognize that the potential scope of the Wage Act extends beyond the physical boundaries of the Commonwealth. In today's telecommuting world, in which many employees work from locations other than a company's Massachusetts headquarters or local offices, it is easy for employers to forget the potential costly ramifications of failing to timely pay such employees wages they are owed. In light of the Wage Act's mandatory treble damages and attorneys' fees provisions, an employer's "out of sight, out of mind" attitude could prove costly.

Recommendations For Employers

As a result of the *Dow* decision, Massachusetts employers with employees who work out of state are advised to:

- Audit their payroll practices concerning out-of-state employees;
- Consider taking steps to reduce the scope of such employees' contact with Massachusetts. For example, an employer might arrange to have customer paperwork generated from out-of-state employees' work locations, rather than Massachusetts, and instruct employees to use their local contact information on their business cards; and
- Confer with employment counsel concerning compliance with the Massachusetts Wage Act for out-of-state employees.

The Firm is thrilled to announce that **Sara Goldsmith Schwartz, William E. Hannum III** and **Lori Rittman Clark** have all been recognized by Chambers and Partners as leading attorneys in labor and employment law in Massachusetts.

The rankings were published in the 2013 edition of *Chambers USA America's Leading Lawyers for Business.*

This is the eighth consecutive year that Sara has been honored by Chambers. Chambers commented that *"Sara offers extensive experience in the representation of employers on a nationwide scale."* She *"has the ability to really listen to you, and boil down whatever your particular issues are in a very quick and succinct way."*

Chambers stated that Will *"is adept at handling high-profile employment matters, and is praised for his ability to work with all parties to find the best solution."* Clients comment that he *"is respectful and responsive, and people respond to that."* This is the second year that Will has been acknowledged by Chambers.

Chambers also commented that Lori *"has a management-side practice, and is highly experienced in a range of litigation and counseling matters."* This is the third year that Lori has been acknowledged by Chambers.

Chambers publishes guides world-wide, ranking law firms and lawyers, and is a recognized leader in its field. Congratulations to Sara, Will and Lori!

CHAMBERS AND PARTNERS

Annual Seminar:
Hot Topics In Labor And Employment Law

REGISTRATION, BREAKFAST AND NETWORKING (8:00 A.M. – 9:00 A.M.)

ANNUAL LABOR AND EMPLOYMENT UPDATE: (9:00 A.M. – 11:00 A.M.)
Overview Of Significant Legal Decisions And Legislative Changes

Sara Goldsmith Schwartz

This lively and interactive 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, but not limited to: EEOC guidance regarding the Americans with Disabilities Act, GINA claims and recordkeeping requirements, credit check restrictions, civil unions and same-sex marriage, gun laws, employer access to social media passwords, independent contractor misclassifications, wage and hour developments, medical marijuana laws, unpaid interns, paid sick leave, health care reform, restrictive covenants and NLRB activity.

ASK THE EXPERTS (11:00 A.M. – 11:30 A.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.

LOCATION

The Andover Inn
4 Chapel Avenue
Andover, MA 01810

DATE AND TIME

November 12, 2013
8:00 a.m. - 11:30 a.m.

REGISTRATION DEADLINE

November 5, 2013

TUITION

$175 **Early Registration** (before October 1, 2013)
$200 **Late Registration** (on or after October 1, 2013)
Note: Tuition is non-refundable

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

REGISTRATION FORM

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*

Name _____ Organization _____

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

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Fall Seminar Schedule

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

November 12, 2013
Annual Seminar:
Hot Topics In Labor And Employment Law
The Andover Inn
4 Chapel Avenue
Andover, MA 01810
8:00 a.m. – 11:30 a.m.

November 18, 2013
Trustee Boot Camp
8:30 a.m. – 4:30 p.m.

Please visit the Firm's website for further details.

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.

Webinar For Independent Schools

September 23, 2013
Accommodating Applicants And Students With Disabilities
12:00 p.m. – 1:30 p.m. (EST)

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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