SCHWARTZ HANNUM PC
Guiding Employers & Educators

Labor and Employment Law Update

SEPTEMBER 2014

IN THIS ISSUE

Judges Offer Tips On Discovery Issues In Employment Cases At Program For Practicing Lawyers

By Todd A. Newman and Hillary J. Massey

Two Massachusetts judges and a Federal magistrate judge addressed the topic "Discovery Issues in Employment Cases" at a recent Boston Bar Association ("BBA") program that was also moderated by and featured Schwartz Hannum PC attorneys.

The insight provided by Judge Mitchell H. Kaplan of the Massachusetts Superior Court (Business Litigation Session), Judge Paul D. Wilson of the Massachusetts Superior Court, and Magistrate Judge Robert B. Collings of the United States District Court for the District of Massachusetts contained the following practical tips.

- Thoroughly "meet and confer" with opposing counsel before filing a discovery motion. If it becomes apparent at the motion hearing that reasonable efforts to meet and confer have not been exhausted, the judge may deny the motion without prejudice pending further efforts by the parties to resolve the matter on their own.
- Do not overreach in discovery motions. Questionable discovery motions may result in a

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Religious Attire And Grooming At Work: The EEOC's New Guidance

By Brian D. Carlson and Soyoung Yoon[1]

The U.S. Equal Employment Opportunity Commission ("EEOC") recently issued two guidance documents that highlight employers' obligations under Title VII of the Civil Rights Act of 1964 ("Title VII") to make accommodations for dress and grooming practices motivated by employees' religious beliefs.

The EEOC's guidance documents come as the number of religion-based discrimination charges filed with the agency continues to grow. In fiscal year 2013, the EEOC received 3,721 charges alleging religious discrimination, an increase of 47% over fiscal year 2003, and of more than 100% over fiscal year 1997.

Although the guidance documents are not binding, most of the principles they detail are well-established, and courts often give significant weight to the EEOC's views in deciding Title VII cases. Further, EEOC investigators will almost certainly consider the guidance documents in evaluating potential claims of religious discrimination and deciding whether to initiate litigation. Accordingly, employers should carefully review the guidance documents and consider whether their policies and practices regarding accommo-

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1 *A previous version of this article appeared in* Massachusetts Lawyers Weekly ("MLW"), Rhode Island Lawyers Weekly ("RILW") *and* The Idaho Business Review ("IBR"). *The Firm is grateful to* MLW, RILW, *and* IBR *for their support in publishing this article.*

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LABOR AND EMPLOYMENT LAW UPDATE SEPTEMBER 2014

Independent Schools: Foreign Exchange Programs Raise Student Visa Issues

By Julie A. Galvin

As independent schools strive to foster diverse student bodies, student foreign exchange programs are becoming an increasingly popular way to do so. However, it is important that schools understand the complex laws and regulations associated with student visas to ensure that their exchange programs are in compliance.

Visa Options

In order to study in the U.S., every foreign student must obtain a temporary visa. There are two main visa options for secondary students who wish to participate in a foreign exchange program run by an independent school: the J-1 visa and the F-1 visa. Unlike some employment-related visas, these visas are not subject to a quota. However, each of these visas has specific requirements and carries potential advantages and disadvantages for independent schools.

J-1 Visa.

First, the J-1 visa, known as the Exchange Visitor Visa, is administered by the U.S. Department of State ("DOS"). The J-1 program allows foreign visitors to participate in programs that promote cultural exchange in the fields of education, arts, and sciences.

The J-1 visa has a number of subcategories. In the context of secondary schools, the J-1 visa allows students who are between 15 and 18-and-a-half years of age to attend secondary school in the United States. Attendance is limited to one or two semesters.

To obtain a J-1 visa, a secondary student must first find and apply to an organization that has been designated by DOS to sponsor J-1 visas. The program sponsor issues the student a Form DS-2019, which details the student's proposed stay in the U.S. The student then takes this form and applies for the J-1 visa at a U.S. embassy or consulate abroad.

Most independent schools, however, have not been designated by DOS to sponsor foreign students through the J-1 program. As a result, in order to enroll students under the program, a school may need to work with an organization that is a designated J-1 sponsor. The sponsoring organization would then be responsible for compliance with SEVIS (the Student and Exchange Visitor Information System, maintained by U.S. Immigrations and Customs Enforcement) and applicable DOS requirements, including screening and vetting host families, assessing students' English abilities, providing health insurance, and issuing the Form DS-2019 to students.

F-1 Visa.

A second option for independent schools and foreign students is the F-1 visa, which is available to secondary as well as post-secondary students. Unlike the J-1 visa, the F-1 visa allows students to remain in the U.S. for the duration of their studies, so long as they comply with the visa requirements. Additionally, the F-1 visa is not limited to students within a particular age range.

Likewise, the F-1 visa is not restricted to DOS-approved sponsoring organizations. However, in order to participate, a school must be certified by the U.S. Department of Homeland Security ("DHS") to administer the SEVIS database and to issue students Forms I-20 (which govern F-1 visa holders' stays in the U.S.).

After accepting a student into its program, a DHS-certified school provides a Form I-20 to the student, which the student takes to a U.S. embassy or consulate abroad to apply for an F-1 visa. For students whose F-1 visa applications are approved, schools are obligated to enter certain information into the SEVIS database, such as students' current addresses and whether they have dropped below a full course of study.

Although the F-1 visa does not require that a school provide student housing, in order to be eligible for a visa, a student must show that he or she has sufficient financial support, including the ability to locate and pay for suitable housing. This may be an obstacle for many day schools, which typically are not involved in students' housing arrangements.

Factors To Consider

In determining whether the J-1 or F-1 visa program may work better for a foreign exchange program, an independent school may want to give particular consideration to the following factors:

- Resources For Compliance – Does the school have the personnel (and experience) needed to administer the exchange program in compliance with SEVIS, as required by the F-1 visa program? If this is a concern, it may be preferable for the school to use the J-1 program and arrange for an outside, DOS-approved organization to handle the regulatory compliance aspects.
- Housing – Does the school provide housing or have a method to assist students in securing housing, as required by the F-1 program? If not, this factor as well may weigh in favor of using the J-1 program.

In order to study in the U.S., every foreign student must obtain a temporary visa.

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Independent Schools: Foreign Exchange Programs Raise Student Visa Issues

- Length Of Program – Can the exchange program meet its goals if foreign students' participation is limited to a semester or two, under the J-1 visa program? If the school prefers to enroll foreign students who can remain through graduation, the F-1 visa program may be a better option.
- Ages Of Students – Finally, is the school comfortable with limiting participation in the program to students who are between the ages of 15 and 18-and-a-half? If not, the school may find the F-1 program preferable.

Recommendations For Schools

There are a number of important immigration-related steps we recommend for independent schools that have, or are interested in adopting, foreign student exchange programs:

First, schools should closely review their exchange programs' current (or proposed) structure and practices to ensure compliance with relevant immigration laws and regulations. This review should be conducted in consultation with experienced immigration counsel.

Second, in considering whether the F-1 or the J-1 visa program would better fit their needs, schools should carefully consider the criteria noted above, as well as any other relevant factors.

Finally, schools should closely monitor future developments in this area of the law, particularly as the prospect of a comprehensive reform of U.S. immigration laws remains a real possibility.

Please feel free to contact us if you have any questions regarding visa issues associated with student exchange programs or any other immigration issues. The Firm regularly counsels schools regarding visa issues and would be happy to assist.

The Hidden Pitfalls Of EPLI Coverage

By Brian D. Carlson

In recent years, many employers have learned the hard way that Employment Practices Liability Insurance ("EPLI") does not always provide the protection that employers hoped and thought they had purchased. For example, insurers commonly deny coverage based on a variety of legal technicalities, such as an employer's failure to comply with EPLI reporting requirements, or a finding that a claim was not made during the coverage period or fell within an exclusion from coverage. Further, insurers are more often dictating the choice of an insured's employment counsel, rather than allowing employers to utilize their usual employment counsel. In light of these challenges, employers should carefully consider whether to purchase or renew EPLI coverage and how to negotiate the best coverage possible if EPLI is purchased or renewed.

While EPLI coverage can be a valuable asset, employers should assess their goals with respect to purchasing and/or renewing EPLI coverage. Generally, EPLI policies are subject to a per-claim limit as well as an aggregate payout limit. The amount of coverage needed depends on the employer's particular circumstances, such as the nature of its business, how many people it employs, and the number of facilities the employer operates. Because the amount of the deductible impacts the premium cost, an employer should review its claim history to determine an appropriate deductible amount. In this regard, if the chief goal of EPLI coverage is to provide protection for catastrophic events, an employer may want to select a higher deductible and thereby lower its premium.

The following are a few important aspects of EPLI coverage that employers should consider before purchasing or renewing coverage:

Make Sure The Policy Covers All Potential Claims

An employer should review its EPLI policy to confirm that it does not contain exclusions for important categories of claims. For instance, it is not uncommon for EPLI policies to exclude claims of assault and battery in the harassment context; sexual harassment claims filed by non-employees; retaliation, wage-and-hour, and negligent hiring, training or supervision claims; and claims alleging violations of such laws as the Family and Medical Leave Act ("FMLA"), the Worker Adjustment and Retraining Notification Act ("WARN"), the National Labor Relations Act ("NLRA"), the Fair Labor Standards Act ("FLSA"), and the Occupational Safety and Health Act ("OSHA"). Many employers purchase EPLI coverage without realizing that their policies provide limited protection and leave them vulnerable to a variety of significant employment claims.

Reserve The Right To Control The Settlement Of Claims

Unlike other types of liability insurance, EPLI can vary widely. Thus, employers can negotiate, to some extent, the terms of EPLI coverage. Employers may want to negotiate with the insurance carrier to include a "consent to settle" provision in order to prevent the carrier from imposing settlements without the employer's consent. Often, EPLI policies require the insured to accept any settlement that is approved by the carrier, or lose insurance coverage for the claim. Moreover, the insurance carrier may insist on language reserving the right to deny coverage if the employer's refusal to consent to settlement is unreasonable and the case results in a significant judgment.

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Supreme Court Invalidates Hundreds Of NLRB Rulings

By Jessica M. Farrelly

In a landmark ruling, Noel Canning v. NLRB, *the U.S. Supreme Court recently invalidated President Obama's appointment of three new members to the National Labor Relations Board ("NLRB" or "Board") during a short Senate break in January 2012.*

As a result of the Supreme Court's holding, hundreds of Board decisions that were made over the ensuing year and a half have been nullified. The Board will now have to begin the arduous task of reevaluating and re-deciding these cases. That process may also hamper the agency's ability to take action in other arenas, including implementing proposed changes to the procedures governing union elections.

The Board will now have to begin the arduous task of reevaluating and re-deciding these cases.

Background

The NLRB is a five-member federal agency that bears primary responsibility for interpreting and applying the National Labor Relations Act ("NLRA"). Under a 2010 Supreme Court decision, the Board must have at least three members in order to issue decisions and take other official actions.

The expiration of Member Craig Becker's term on January 3, 2012, left the NLRB with only two members, Mark Gaston Pearce and Brian Hayes. At the time, President Obama had nominated three new Board members – Sharon Block, Terence Flynn, and Richard Griffin. However, due to a political logjam between the President and Senate Republicans, the Senate had not taken any action on those nominations. Thus, on January 4, 2012, the President announced that the three nominees would join the Board as recess appointments.

As authority for this action, President Obama cited the Recess Appointments Clause of the U.S. Constitution, which creates an exception to the requirement that the president obtain the "advice and consent" of the Senate before appointing government officials such as NLRB members. Specifically, the Recess Appointments Clause allows the president to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Unlike regular appointees, recess appointees do not need to be confirmed by vote of the Senate.

At the time of these appointments, the Senate had not formally recessed but was on a scheduled holiday break. During this break, the Senate formally reconvened for brief, *pro forma* sessions every three days but did not conduct any actual business. The President's recess appointments took place during a three-day break between these *pro forma* sessions.

Members Block, Flynn, and Griffin served on the NLRB until mid-2013, when four new Board members were confirmed by the Senate as part of a bipartisan agreement.

NLRB's *Noel Canning* Decision

In February 2012, a three-member panel of the Board held that Noel Canning, a Pepsi bottler in Washington state, had violated the NLRA by refusing to reduce to writing and execute a collective bargaining agreement containing terms to which Noel Canning and a union representing its employees had agreed.

Noel Canning appealed the Board's decision to the U.S. Court of Appeals for the D.C. Circuit. In support of its appeal, Noel Canning argued that the President's recess appointments were constitutionally invalid because the three-day interval between *pro forma* Senate sessions during which the appointments were made was not long enough to trigger President Obama's powers under the Recess Appointments Clause. Thus, Noel Canning contended, the Board lacked a valid quorum when it decided the case, thereby nullifying its ruling.

D.C. Circuit's Holding

The D.C. Circuit agreed with Noel Canning's position that the President's appointments were constitutionally invalid, but on different grounds. The court held that the term "the Recess," as used in the Recess Appointments Clause, refers only to breaks between formal sessions of Congress and does not include intra-session breaks or adjournments. Thus, since the Senate had not formally recessed when the President made these appointments to the NLRB, the D.C.

Noel Canning argued that the President's recess appointments were constitutionally invalid…

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Supreme Court Invalidates Hundreds Of NLRB Rulings

Circuit concluded that the appointments were null and void.

Further, the D.C. Circuit held that a recess appointment can be made only if the vacancy first comes into existence during a formal Senate recess, which was not the case here.

Supreme Court's Decision

At the Board's request, the Supreme Court agreed to review the case. Subsequently, the Court unanimously affirmed the D.C. Circuit's holding, concluding that the recess appointments, and thus the Board's *Noel Canning* decision, were constitutionally invalid.

The Supreme Court, however, based its decision on narrower grounds than the D.C. Circuit. Specifically, the Supreme Court held – in agreement with Noel Canning's original argument – that the three-day Senate recess during which the appointments were made was too brief to trigger the President's powers under the Recess Appointments Clause. While declining to establish a bright-line rule, the court indicated that Senate recesses of fewer than ten days are "presumptively too short" for recess appointments to be made.

In addition, a majority of the Court held that recess appointments may be made during an inter-session or intra-session Senate recess, and regardless of whether the vacancy to be filled by an appointment arose during or prior to the recess.

Implications Of Decision

The Supreme Court's *Noel Canning* decision has far-reaching repercussions. Most significantly, hundreds of Board rulings that were issued with the involvement of Members Block, Flynn, or Griffin have been invalidated and will have to be re-decided. Many of these decisions involved controversial and important rulings adverse to employers, such as the following:

- WKYC-TV, Gannet Co. This Board decision reversed longstanding precedent and held that an employer must continue to honor a dues check-off provision in a collective bargaining agreement ("CBA") after the CBA expires, while the parties are negotiating a new CBA.
- Piedmont Gardens. In this case, the Board overturned longstanding case law under which employers could refuse to provide unions with witness statements obtained in the course of investigating employee misconduct. The Board instead held that an employer must demonstrate a specific confidentiality concern that justifies its refusal to produce witness statements.
- Banner Health System. This decision by the NLRB significantly restricted employers' ability to require employees to keep internal investigations confidential.
- Costco Wholesale Corp. And Knauz BMW. In these decisions, the Board held that employer social media policies were overly broad and violated employees' NLRA rights to engage in concerted activity.

These and other pro-labor holdings may largely be rubber-stamped when they are re-decided, in light of the Board's continued union-friendly bent. Given, however, that the agency now has two Republican members who could comprise a majority of the panel deciding a matter, this is not a foregone conclusion in every case. Nonetheless, employers would be wise to act in the assumption that the Board is likely to reaffirm the vast majority of the holdings invalidated by the Supreme Court's *Noel Canning* decision.

Further, the challenges the Board will likely face in attempting to process the backlog of invalidated decisions may temporarily impede its abilities to take action on other fronts. In particular, the Board may need to delay implementing the significant, labor-friendly changes to union election procedures that the agency announced earlier this year. (A recent article by Schwartz Hannum detailing those proposed changes can be found here: *http://shpclaw.com/Schwartz-Resources/employers-beware-new-nlrb-rules-will-radically-streamline-union-election-process-2/.*)

Recommendations

In light of *Noel Canning,* we recommend that employers:

- Act on the assumption that the Board decisions nullified by the Supreme Court in *Noel Canning* will eventually be reaffirmed, at least until the Board rules otherwise in a particular case;
- Closely monitor the NLRB's disposition of those invalidated decisions; and
- Remain vigilant on other matters on which the Board has indicated its intention to take action, including, particularly, the proposed changes to union election procedures.

If you have any questions about Noel Canning *or would like guidance on any other labor-law issue, please don't hesitate to contact us.*

Most significantly, hundreds of Board rulings that were issued with the involvement of Members Block, Flynn, or Griffin have been invalidated and will have to be re-decided.

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Religious Attire And Grooming At Work: The EEOC's New Guidance

dating religious attire and grooming need to be modified.

Overview Of Guidance Documents

The EEOC's guidance documents consist of a detailed question-and-answer guide and an accompanying fact sheet. While this article does not cover every aspect of the guidance documents, most of the key issues they address are outlined below:

General Accommodation Obligations.

The guidance documents emphasize that if an employee asks an employer to make an exception to its dress or grooming requirements in order to accommodate the employee's sincerely held religious beliefs, the employer must grant the exception, unless doing so would pose an "undue hardship" to the employer.

The guidance documents provide specific examples of religiously motivated workplace dress and grooming practices that are generally protected under Title VII. These examples include wearing religious clothing or articles, such as a Christian cross, a Muslim hijab (headscarf), or a Sikh turban; observing a religious prohibition against wearing certain garments (*e.g.*, a Muslim, Pentecostal Christian, or Orthodox Jewish woman's practice of wearing modest clothing and not wearing pants or short skirts); and adhering to religious requirements relating to shaving or hair length, such as Rastafarian dreadlocks, uncut hair for Sikh men, or Jewish peyes (sidelocks).

The EEOC emphasizes that an employer should determine on a case-by-case basis how best to accommodate an employee's religious attire or grooming. For example, asking an employee to cover religious attire while at work may be a reasonable accommodation if the employee's religious beliefs permit covering the attire, but imposing such a requirement might not be permissible if covering the attire would violate the employee's religious beliefs.

By contrast, the EEOC takes the view that it is *never* permissible for an employer to exclude an employee from a position or assignment out of concern that customers or co-workers may react negatively to the employee's religious attire or grooming. As one example, the guidance documents cite an applicant for an airline ticket counter position who wears a Muslim hijab. According to the EEOC, it would be a violation of Title VII for the airline to decide to offer the applicant a job in its call center instead of at its ticket counter in order to prevent travelers from coming into contact with her.

Importantly, the EEOC takes the position that neither customer preference nor co-worker disgruntlement can constitute undue hardship.

Nature Of Undue Hardship.

The EEOC indicates that a proposed religious accommodation would constitute an undue hardship if it would impose "a more than de minimis" cost or burden on an employer's operations. Under this standard, a requested accommodation may pose an undue hardship where it would implicate legitimate safety, security, or health concerns, but the EEOC may apply this concept more narrowly than employers might prefer.

For example, the guidance documents posit a restaurant that requires its servers to keep their hair short, for hygiene reasons. An applicant for a server position who wears his hair long, due to his Native American religious beliefs, offers to wear it in a ponytail or held up with a clip. In the EEOC's view, the applicant's proposed accommodation should allay the employer's hygiene concerns, preventing the employer from establishing undue hardship.

Importantly, the EEOC takes the position that neither customer preference nor co-worker disgruntlement can constitute undue hardship. Thus, the EEOC recommends that employers "communicate clearly to managers that customer preference about religious beliefs and practices is not a lawful basis for employment decisions."

Recognizing Requests For Accommodations.

The guidance documents note that an issue involving accommodation of religious garb or grooming generally arises when an applicant or employee is notified of an employer's dress or grooming policies and requests an accommodation based on his or her religious beliefs. In seeking an accommodation, an individual need not use any "magic words," such as "accommodation" or "Title VII," if the substance of the request makes clear that the individual is seeking a religious-based accommodation.

By contrast, if an individual does not request an exception to a dress or grooming policy, or does not indicate that such a request is for religious reasons, the employer generally is not obligated to make an exception to its policy. However, according to the EEOC, "[i]n some instances, even absent a request, it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed." Unfortunately, the guidance documents do not provide an example of such a scenario.

Nature Of Religious Beliefs.

The EEOC notes that the scope of Title VII's protection of religious beliefs is broad, encompassing not only the tenets of established religions but also beliefs that are new

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Religious Attire And Grooming At Work: The EEOC's New Guidance

or uncommon, not endorsed by any formal organization, or seemingly "illogical or unreasonable." Moreover, in the EEOC's view, Title VII extends even to "non-theistic moral or ethical beliefs as to what is right or wrong," if such beliefs "are sincerely held with the strength of traditional religious views."

According to the EEOC, the "sincerity" of an individual's stated religious beliefs is usually not in dispute. In this regard, the EEOC emphasizes that even if an individual's beliefs or practices deviate from the official or commonly followed tenets of his or her religion, this should not automatically be taken as evidence that his or her beliefs are not sincere. An individual's religious beliefs may remain "sincerely held" even while changing over time, such as where an employee converts from one religion to another.

If an employer has a legitimate reason to doubt the sincerity of a belief for which an employee has requested an accommodation, or if it is unclear whether an accommodation has been requested for religious reasons, the employer may ask the employee for information reasonably needed to determine if an accommodation may be warranted.

Exceptions For Secular Reasons.

Title VII's religious accommodation protections extend only to practices that are motivated by sincerely held religious beliefs and, as such, do not cover "me too" requests by co-workers who would like the same accommodations but who do not have a religious basis for them. For instance, if an employer agrees to permit a Sikh employee to wear his hair and beard uncut for religious reasons, this would not require the employer to extend this accommodation to others who might wish to have long hair or beards based on secular fashion preferences.

Recommendations For Employers

In light of the issues highlighted in the EEOC's guidance documents, we suggest that employers take the following steps:

- Review the guidance documents carefully with managers, supervisors, and human resources representatives;
- Review policies and practices relating to employee dress and grooming and, in consultation with employment counsel, revise them if necessary to comply with Title VII; and
- Provide training on handling requests for religious accommodations, recognizing situations where a request has not been made but where an accommodation might nonetheless be appropriate, and responding appropriately to the employees involved.

Given the rapid growth of religion-discrimination charges in recent years, attention to these issues is critical.

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Judges Offer Tips On Discovery Issues In Employment Cases At Program For Practicing Lawyers

notice that sanctions against the losing party will be considered at the motion hearing if the matter is not reported as resolved by then.

- When a confidentiality agreement is appropriate, such as in a trade secrets case, be cautious about withholding discovery unless the opponent agrees to an "attorneys' eyes only" provision. While judges will allow such provisions when agreed upon, judges generally will not impose them on unwilling parties.
- If seeking to enforce a noncompetition, nonsolicitation, or nondisclosure agreement against a former employee, consider asking the court for expedited discovery if evidence from the opposing party may be needed to support a motion for injunctive relief.
- Similarly, in cases alleging theft of trade secrets or confidential business information, consider having a computer forensics expert determine if an electronic "footprint" of such theft appears to exist. This can be highly persuasive, particularly when an injunction is being sought.
- If resolution of a single issue would resolve the entire case, consider requesting a Rule 16 litigation control conference. It might be possible to obtain an order requiring discovery to take place in stages, with discovery concerning the dispositive issue scheduled to take place first.

Hillary Massey acted as Moderator, and Todd Newman was a Panelist, at this BBA program.

The Firm represents employers in state and federal courts, before various administrative agencies, and in labor and employment arbitrations. Please feel free to contact us if you have any questions about the discovery process or other aspects of employment litigation.

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The Hidden Pitfalls Of EPLI Coverage

Employers should review such provisions closely before signing on the dotted line.

Insist Upon Your Right To Select Counsel

Insurance companies generally have the right to select the attorneys who will defend cases covered by EPLI, unless the employer has negotiated in advance an endorsement to the policy allowing the employer to retain the right to select counsel. When policies do not contain this important endorsement, insurers are increasingly requiring employers to use lawyers from a pre-approved list of "panel counsel," even when the employers' own attorneys have greater expertise, substantial familiarity with the employer, and strong working relationships with the employer. Perhaps most disturbingly, employers have found that such "panel counsel" often appear to act with greater allegiance to the insurer than to the employer.

Make Sure The Policy Covers All Appropriate Entities And Individuals

If an employer is composed of several business units or entities, it is important to ensure that the EPLI policy covers all appropriate ones. Otherwise, an employment claim may be deemed to be uncovered or to fall within an exclusion. Additionally, individuals filing suit against employers often identify the business unit or entity incorrectly in court documents, which can result in protracted disputes regarding coverage. Employers should also make sure the EPLI policy covers all claims filed by applicants, employees, and independent contractors.

Confer With Counsel Before Signing

Finally, before deciding to purchase or renew an EPLI policy, an employer should carefully consider these issues in consultation with counsel. The Firm can assist in reviewing and negotiating EPLI policies to determine if the coverage is appropriate and to help obtain the best value and protection possible.

Please contact us if you have any questions regarding EPLI policy coverage. We regularly assist employers with such matters, and we would welcome the opportunity to assist you.

Schwartz Hannum Attorneys Recognized By Chambers USA

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

The rankings were published in the 2014 edition of ***Chambers USA America's Leading Lawyers for Business.***

This is the ninth consecutive year that Sara has been honored by Chambers. Chambers commented that Sara ***"maintains a sterling practice, with particular strength in discrimination matters. Clients say she is 'very well informed, and very nuanced in her judgment and analysis of situations' and marketplace commentators note that she 'takes no prisoners when it comes to defending her clients.'"***

Chambers praised Will for his client service and noted that he is regarded as ***"very thoughtful, very responsive and thorough. He has comprehensive expertise in the labor and employment field, and counts a number of educational establishments among his client base."*** This is the third year that Will 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 and Will!

CHAMBERS AND PARTNERS

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Monitoring Students And Faculty Online: "Big Brother" Or "Wise Risk Management"?

Generally, there does not seem to be any federal law that imposes upon all independent schools an affirmative duty to monitor – or that restrict the schools' ability to monitor – students' and employees' use of the school-owned system. However, it is important that the school be aware of any triggers that may bring the school within the reach of any legal requirements. For example, if the school participates in the E-rate program, it is subject to the federal Children's Internet Protection Act, which requires covered schools to adopt and enforce an Internet safety policy, including monitoring the online activities of minors (*e.g.*, restricting minors' access to materials harmful to them) and taking technology protection measures (*e.g.*, blocking or filtering).

…it is important that the school be aware of any triggers that may bring the school within the reach of any legal requirements.

Because there may be specific requirements that vary greatly among states, it is critical that each school carefully consider, with the assistance of legal counsel, the laws applicable to monitoring the use of the school-owned system by students and/or employees in its jurisdiction. For example, some states require the school to give notice to its employees prior to monitoring e-mail communications or Internet access (*e.g.*, Connecticut and Delaware). Also, most states generally limit such monitoring to the purposes of protecting legitimate business interests (*e.g.*, employees' excessive personal use of the Internet, students' derogatory comments about a teacher on the Internet, illegal activities, or any improper purposes).

Further, schools should be aware of state-specific privacy concerns that may limit the scope of monitoring the use of the school-owned system. For example, privileged information (*e.g.*, attorney-client communications) and/or information that is highly personal in nature may be protected by state privacy laws, even if such information is contained in the school-owned system. For example, in a case recently settled in Pennsylvania, the school allegedly violated students' privacy rights by remotely accessing its school-issued laptops to secretly snap pictures of students in their homes (200 times in a two-week period for one student), although the initial purpose of camera monitoring was to locate missing school-issued laptops. As this case illustrates, it is important that each school investigate and consider a well-designed monitoring process and adopt a number of technological measures to achieve the legitimate purposes of monitoring while avoiding violating the privacy interests of students and employees.

Schools can and should also partner with parents to ask them for assistance in monitoring student use of the school-owned system – when students are at home, on vacation, or even over the summer if the student will be returning to the school in the fall – if such activity impacts the experience of others at the school. By encouraging parents to come to the school with any concerns about technology use, the school may expand the scope of misconduct, including cyber-bullying, that it can address. But such policies should also be careful to provide the school with discretion to mete out discipline as it deems appropriate.

In an effort to minimize the school's exposure to potential legal risks associated with monitoring the use of the school-owned system, and as best practices, we recommend that independent schools consider adopting the following measures:

- Evaluate, update, as needed, or create the school's acceptable use policy that identifies the school's practices with respect to the filtering and monitoring of the school-owned system;
- Explicitly inform students and employees (through the acceptable use of technology policy) that there is no expectation of privacy when using the school-owned system and that the school reserves the right to filter and monitor the use of the school-owned system by its students and employees;
- Obtain a signed and written acknowledgement from employees and students (and their parents) that they have received and read the acceptable use of technology policy; and
- Educate (train) faculty, staff, other employees, students and their parents regarding the school's policies and procedures pertaining to related topics, such as the appropriate use of social media, cell phones and texting, and cyber-bullying.

A robust and comprehensive acceptable use policy should signal to those using technology in an appropriate manner that they have nothing to fear in terms of unwarranted intrusion into their cyber-activity on the school-owned system. By contrast, those who are tempted to misuse this resource should understand that the school has the right and ability to monitor the school-owned system and will not tolerate its misuse.

Monitoring Students And Faculty Online: "Big Brother" Or "Wise Risk Management"?

By Sara Goldsmith Schwartz and Suzanne W. King

Recently a substitute teacher in Florida was charged after she allegedly exchanged with a student inappropriate text messages, including a picture of the student half-dressed. While social media texting, tweeting, and postings are becoming all part of modern day routine, there has been an increase in news coverage of similar issues, involving bullying, harassment, sexting, or discussion of violence, substance abuse, or even suicide by/among students and/or employees through electronic communication systems. As more independent schools are considering taking some proactive measures to prevent the school-owned electronic communication system (the "school-owned system") from becoming a medium through which such inappropriate conduct is exhibited and cultivated, more schools are asking about legal requirements, and the practical and technological implications associated with monitoring the use of the school-owned system by students, faculty and other employees.

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Independent School Training Events

September 17, 2014
Risk Management Strategies For Off-Campus Trips And Activities
8:30 a.m. – 10:30 a.m.

October 15, 2014
Transgender Employees And Students In Independent Schools: Best Practices Related To Gender Identity And Expression
8:30 a.m. – 10:30 a.m.

October 29, 2014
Contracts And Compensation For The Head Of School: Tips, Traps And Best Practices
8:30 a.m. – 10:30 a.m.

November 12, 2014
Legal Adventures And Hot Topics In Independent Schools
8:30 a.m. – 10:30 a.m.

Labor And Employment Training Events

September 23, 2014
Conducting An I-9 Audit: Tips, Traps And Best Practices
9:30 a.m. – 12:00 p.m.

October 1 & 2, 2014
Employment Law Boot Camp (Two-Day Program)
October 1: 8:30 a.m. – 4:00 p.m.
October 2: 8:30 a.m. – 4:30 p.m.

October 30, 2014
Annual Hot Topics In Labor And Employment Law
The Andover Inn
4 Chapel Avenue, Andover, MA 01810
8:00 a.m. – 11:30 a.m.

December 11, 2014
The Nuts And Bolts Of Compliance With The Family And Medical Leave Act
8:30 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.

Schwartz Hannum PC 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 PC represents hundreds of clients in industries that include financial services, healthcare, hospitality, manufacturing, non-profit, and technology, and handles the full spectrum of issues facing educational institutions. Small organizations and Fortune 100 companies alike rely on Schwartz Hannum PC for thoughtful legal solutions that help achieve their broader goals and objectives.

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