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SHPC Legal Update

THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

SEPTEMBER 2015

IN THIS ISSUE

Final Regulations Detail Employers' Obligations Under New Massachusetts Earned Sick Time Law

By Brian D. Carlson

This past June, the Massachusetts Attorney General's Office issued its long-awaited final regulations under the new Massachusetts earned sick time law, which went into effect on July 1, 2015. The final regulations, which significantly amended the proposed regulations previously issued, can be found at the following link: *http://www.mass.gov/ago/docs/regulations/940-cmr-33-00.pdf*.

While the final regulations do not address every potential issue under the new law, they provide useful guidance to employers on many important questions. The most significant provisions of the final regulations are detailed below, following a brief summary of the earned sick time law.

Earned Sick Time Law

Under the new earned sick time law, all Massachusetts employees must be allowed to accrue and use up to 40 hours of earned sick time per year, based on a minimum accrual formula of one hour of earned sick time for each 30 hours worked. For employers with at least eleven employees, sick time must be provided on a paid basis, whereas employers with fewer than eleven employees may provide unpaid sick time.

Employees must be allowed to begin accruing sick time immediately upon hire. However, employees are entitled to *use* accrued sick time only after 90 days of employment.

An employee may carry over up to 40 hours of accrued, unused sick time into the following year. Employees are not entitled to payment for

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Changes In H-1B Job Locations Now Require Amended Visa Petitions

By Julie A. Galvin

Under a decision issued this past April by the Administrative Appeals Office ("AAO") of U.S. Citizenship and Immigration Services ("USCIS"), employers are now generally required to file a new H-1B visa petition whenever an H-1B employee's job location changes. Previously, a change in job location required only submission of a new Labor Condition Application ("LCA").

On July 21, 2015, USCIS issued final guidance regarding the timeframes within which amended H-1B petitions must be filed under this new policy. Thus, H-1B employers should give prompt attention to this issue and prepare to file amended petitions as necessary.

H-1B Visas And Labor Condition Applications

H-1B visa petitions are filed on behalf of foreign national employees who work in occupations that require the application of highly specialized knowledge and completion of a Bachelor's degree or higher in the specialty occupation. As part of the H-1B petition process, an employer must

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first obtain a certified LCA from the U.S. Department of Labor ("DOL"), attesting, among other things, that the employer will pay at least the prevailing wage for the position in the geographic area where the H-1B employee will be located.

Generally, whenever a material change in the terms of employment occurs, the employer is required to file an amended H-1B petition. However, under previous USCIS guidance, a change in the job location of an H-1B employee required only a new certified LCA, and not an amended H-1B petition.

AAO Decision

USCIS reversed its longstanding position on this issue in the recent case of *Matter of Simeio Solutions, LLC*.

Simeio Solutions LLC, the petitioning company, filed an H-1B petition that included a certified LCA listing the H-1B employee's place of employment as Long Beach, California. When the employee applied for the H-1B visa at a U.S. consulate after traveling abroad, it became evident that the place of employment had changed.

H-1B employers should give prompt attention to this issue and prepare to file amended petitions as necessary.

The consulate notified USCIS of this change, resulting in a site visit by USCIS that revealed that the H-1B employee no longer worked at the Long Beach location. Simeio Solutions had submitted a new LCA listing Camarillo, California and Hoboken, New Jersey as the beneficiary employee's places of employment, but had not filed an amended H-1B petition with USCIS.

USCIS then revoked the H-1B visa, on the ground that the change in the beneficiary's place of employment constituted a material change in the terms of employment, requiring an amended H-1B petition. On review, the AAO agreed, finding that the change in job location could affect the beneficiary's eligibility for H-1B status, as the employer might be obligated to pay a higher wage.

Timeframes For Amended Petitions

Under the guidance recently issued by USCIS in the wake of the *Simeio Solutions* decision, employers with H-1B employees who changed locations prior to April 9, 2015, may choose to file amended H-1B petitions by January 15, 2016. If an employer chooses not to file an amended petition for such an employee, USCIS will generally not issue a denial or revocation. However, any denials or revocations issued by USCIS prior to the date of the guidance, July 21, 2015, will remain in effect.

For a change in job location occurring between April 9, 2015, and August 19, 2015, an amended H-1B petition must be filed by January 15, 2016. Finally, for a change in job location occurring after August 19, 2015, the employer must file an amended H-1B petition before the job location change takes effect.

Exceptions

It is important to note that certain types of job location changes still do not require an amended H-1B petition:

- If an H-1B employee is moving to a new job location within the same Metropolitan Statistical Area or area of intended employment listed in the LCA, an amended H-1B petition is not required. (Nor is an updated LCA required in these circumstances, though the employer must post the original LCA at the new work location.)
- The short-term placement rules under the applicable Department of Labor regulations will still apply. Therefore, temporary placement of an H-1B employee at a new job site for a period of no more than 30 days (or 60 days if the employee is still based at his or her original location) will not require an amended petition.
- If an H-1B employee attends a seminar, conference, or meeting at a non-worksite location, an amended H-1B petition is not required.
- Finally, amended H-1B petitions need not be filed for employees who are primarily based in one location and regularly travel to other locations (such as client sites) for short-term work.

Recommendations

In light of the *Simeio Solutions* decision and the USCIS guidance applying it, we recommend that H-1B employers do the following:

- Review their workforce to determine if any H-1B employees have changed worksites;
- If a change in worksite has occurred, confer with experienced immigration counsel to determine whether an amended H-1B petition and new LCA must be submitted by the January 15, 2016, deadline; and
- Going forward, carefully monitor job location changes for H-1B employees and promptly file amended petitions as necessary.

Please feel free to contact us if you have questions about the Simeio Solutions *decision, or if you require assistance with filing amended H-1B petitions or any other aspect of the H-1B filing process. The Firm regularly assists employers with preparing and processing H-1B and other employment-based non-immigrant and immigrant visa applications, and we would be happy to help.*

SJC Changes Subpoena Rules For Massachusetts Litigants

By Jaimie A. McKean

Earlier this year, the Supreme Judicial Court ("SJC") announced some important changes to Rule 45 of the Massachusetts Rules of Civil Procedure, which governs subpoenas served on non-parties in the course of lawsuits in Massachusetts courts.

Most significantly, Rule 45 now explicitly permits a litigant to serve a "documents only" subpoena on a non-party – *i.e.*, a request that the person or entity provide certain documents, without any accompanying request for attendance at a deposition.

Prior Version Of Rule

Commonly, a litigant in a civil suit simply wants to obtain specific documents from a non-party and does not anticipate that deposition testimony by the non-party will be needed. Previously, however, Rule 45 did not provide a mechanism for such a "documents only" subpoena.

Thus, in order to obtain documents from a non-party, litigants in Massachusetts courts had to go through the somewhat laborious process of serving a deposition subpoena *duces tecum* (*i.e.*, a notice to appear for a deposition along with specified documents) on the non-party, accompanied by an explanation that the non-party would not actually be required to appear for a deposition as long as the requested documents were produced by a certain date. This process resulted in unnecessary paperwork and expense, as well as potential confusion for non-parties receiving such subpoenas.

New Procedures

Rule 45 now explicitly authorizes "documents only" subpoenas and sets forth certain procedures for them. In particular, the party serving such a subpoena must serve a copy of it on each of the other parties *before* serving it on the non-party to whom it is directed. Unlike the equivalent federal rule, Rule 45 does not require that a separate notice of subpoena be served, in addition to the subpoena itself.

If a non-party receiving a "documents only" subpoena objects to it, the serving party must serve a copy of the objection on each party, as well as a notice of any document production made by the non-party. If the non-party does not object to the subpoena, the serving party must provide a copy of the non-party's document production to each party. Here, as well, the equivalent federal rule does not include such requirements.

Another difference between the new Rule 45 and the federal rules is the requirement that a court order to compel production "protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance." The Reporter's Notes accompanying the revised Rule 45 point out that this language is an "intentional variation from the federal rules," which simply require that a non-party be protected from "significant expense resulting from compliance" with a subpoena. The Reporter's Notes go on to state that the revisions to Rule 45 are intended to provide a court with broad discretion to require appropriate cost-sharing as part of an order to produce documents.

Other Amendments To Rule 45

Other new provisions incorporated in the amended Rule 45 include the following:

- The requirement that witness fees accompany subpoenas served on non-parties does not apply to "documents only" subpoenas.
- Copies of subpoenaed documents, as opposed to originals, may be produced, as long as all parties have a "fair opportunity to verify the copies by comparison with the originals."
- Documents responsive to a subpoena may be produced "by electronic means."
- A "privilege log" (which describes documents withheld on the basis of a claim of privilege, such as the attorney-client privilege) need not be prepared, unless the court orders a privilege log to be prepared, or the parties agree to do so.

Other Requirements

In other significant aspects, the amended Rule 45 does not differ from the prior version. For example:

- A party issuing a subpoena still must take "reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."
- If a subpoena appears too broad or otherwise unduly burdensome, the person to whom the subpoena is directed may serve a written objection within 10 days after service of the subpoena. The serving party may then file a motion to compel production of the requested documents.
- Residents of the Commonwealth may not be required to attend a deposition more than 50 airline miles from their residence, place of business, or place of employment.

Recommendations For Employers

Employers are advised to review the recent amendments to Rule 45, as these changes may affect ongoing or future litigation in Massachusetts courts. In addition, employers should monitor further developments in this area, including court decisions applying the new provisions of the rule.

If you have any questions about the amendments to Rule 45 or any other litigation-related issue, please do not hesitate to contact us.

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accrued, unused sick time upon separation from employment.

The chief requirements of the earned sick time law are further detailed in an e-alert previously published by the Firm: *http://shpclaw.com/Schwartz-Resources/mandatory-paid-sick-times-coming-soon-to-massachusetts/*.

Final Regulations

The final earned sick time regulations expand upon these requirements, including with regard to the following:

Employer Size. An employer must provide paid earned sick time if it maintained an average of eleven or more employees on its payroll during the preceding benefit year. This number is calculated by counting the number of employees – including full-time, part-time, seasonal, and temporary employees (whether paid directly by the employer or through a temporary agency) – on the payroll during each pay period and dividing by the number of pay periods. Before switching from paid to unpaid earned sick time (or vice versa) based on a change in its headcount, an employer must provide employees with at least 30 days' written notice.

Employee Eligibility. An employee is entitled to accrue and use earned sick time if his or her primary place of work is in Massachusetts, regardless of the employer's location. If an employee meets that requirement, the employee is eligible to accrue earned sick time on all of his or her work hours, including work outside of Massachusetts.

Benefit Years. An employee's annual earned sick time entitlement may be determined on the basis of any 12-month time period chosen by the employer. For instance, earned sick time may be provided based on each employee's anniversary date of employment. Alternatively, earned sick time may be tied to calendar or fiscal years.

Lump-Sum Accruals. If an employer provides employees, up front, with at least 40 hours of earned sick time at the start of each benefit year, the employer need not track accrual of earned sick time or allow unused accrued time to be carried over into the next benefit year.

PTO Policies. In lieu of a separate paid sick time policy, an employer may maintain an overall paid time off ("PTO") policy, so long as the PTO policy allows employees to accrue and use PTO in the same manner as under the earned sick time law. Further, if an employee uses 40 hours or more in accrued PTO for other purposes (*e.g.*, vacation), the employer need not provide additional earned sick time, so long as the employer's policies make clear that such additional leave will not be given.

Notification. Except in the event of an unforeseeable absence, an employee must provide prior notification of his or her intention to use earned sick time. In the case of foreseeable or prescheduled use, an employer may require up to seven days' advance notice. For unforeseeable absences, notice must be "reasonable."

Increments Of Use. For an absence of up to one hour, an employer can require an employee to use a full hour of earned sick time. For absences greater than one hour, an employer must track the absence using the smallest increment the employer uses to track other types of absences.

Documentation. An employer may require written documentation when an employee uses earned sick time exceeding (i) 24 consecutively scheduled work hours or (ii) three consecutive days on which the employee was scheduled to work. In addition, documentation may be required where an employee takes sick time during his or her final two scheduled weeks of work or takes more than four unforeseeable, undocumented absences within a three-month period. The regulations specify that, in providing documentation, an employee cannot be required to explain the nature of his or her illness or the details of a domestic violence situation.

Failure To Provide Documentation. If an employee unreasonably fails to provide required documentation for paid earned sick time, the employer may recoup the amount paid from the employee's future pay, so long as employees have been put on notice of such a practice. In the case of unpaid earned sick time, the employer may deny the employee future use of an equivalent amount of earned sick time until the documentation has been provided. The employer may not, however, take any further adverse action.

Use Restricted To Scheduled Work Time. An employee may use earned sick time only for scheduled work time, and may not accept a work assignment with the intention of calling out sick for some or all of the assignment.

Concurrent Use. Earned sick time taken under the statute may run concurrently with leave taken for similar purposes under other leave laws (*e.g.*, the Family and Medical Leave Act).

Breaks In Service. The regulations prescribe the following rules for breaks in service: (i) following a break in service of up to four months, an employee must be allowed to retain all accrued earned sick time; (ii) following a break in service of between four and twelve months, an employee is entitled to retain all accrued earned sick time so long as he or she had at least ten hours of accrued time; (iii) after returning from a break in service of up to twelve months, an employee maintains his or her original vesting date and need not start a new 90-day period before using earned sick time.

Attendance/Holiday Incentives. The earned sick time law does not preclude employers from maintaining policies that reward employees for good attendance or for working immediately prior to or after holidays.

Fraud/Misuse. Employees may be disciplined for fraud or misuse of earned sick time. If an employee demonstrates a suspicious pattern of absences (*e.g.*, regularly calling out sick prior to or after weekends or holidays), the employee may be required to provide verification of proper use of earned sick time, or face discipline.

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Distribution Of Policy. In addition to displaying a required workplace notice issued by the Attorney General (see *http://shpclaw.com/Schwartz-Resources/mandatory-workplace-notice-issued-under-massachusetts-earned-sick-time-law/*), Massachusetts employers must provide employees with written notice of their rights under the earned sick time law. An employer may satisfy this requirement by e-mailing the Attorney General's notice to employees or by including an appropriate sick time policy in its employee handbook.

Recommendations

Massachusetts employers should carefully consider, in consultation with experienced employment counsel, how their sick time policies may need to be revised to comply with the new earned sick time law. In this regard, before the law went into effect on July 1, 2015, the Attorney General announced a "safe harbor" under which employers with existing sick time (or PTO) policies meeting certain requirements would be permitted to take until January 1, 2016, to come into full compliance with the law. The requirements for the safe harbor are incorporated in the final regulations.

In addition, employers should ensure that all managers, HR employees and benefits personnel receive appropriate training on the requirements of the new law. The Firm regularly provides such training, both in our Andover office and at client sites.

Please don't hesitate to contact us if you have any questions about your organization's obligations under the new Massachusetts earned sick time law.

Amy E. Hunter, Gary D. Finley & Kristin L. Van Arsdale Join Schwartz Hannum PC

Amy E. Hunter

Amy E. Hunter joins Schwartz Hannum after being a Senior Attorney at the U.S. Department of Education for 14 years, where she provided legal counsel in the evaluation, investigation and resolution of discrimination complaints involving educational institutions. She has participated in public forums regarding laws enforced by the agency, most recently in the areas of sexual violence and mental health student-related matters in higher education. Amy has conducted numerous trainings related to civil rights regulatory compliance, including in the areas of sexual misconduct and disability-related matters. She also has significant experience providing guidance to educational institutions in the area of regulatory compliance, including student-related policy and procedure development.

Amy has extensive experience in Title IX and disability law, including sexual harassment and violence, LGBTQ issues, equity in athletics, and student accommodations and campus physical and program accessibility. She has also worked in the areas of different treatment and harassment based on race, national origin and ethnicity. She has routinely conducted and overseen investigations, provided training and policy and procedure guidance, and consulted independent schools regarding risk management.

Amy received her Juris Doctor degree from Northeastern University School of Law in Boston, MA and her Bachelor of Arts in U.S. History from Earlham College in Richmond, IN. Amy is admitted to practice in the Commonwealth of Massachusetts and the State of California. Amy is a member of the Boston Bar Association and the Massachusetts LGBTQ Bar. She will serve as an adjunct professor for the Boston University School of Law in the fall of 2015.

Gary D. Finley

Gary D. Finley joins Schwartz Hannum after several years as a litigation associate at Choate, Hall & Stewart in Boston, where he assisted clients with employment litigation and commercial litigation matters in state and federal court, including complex commercial transactions, employment disputes, government investigations, insurance and reinsurance disputes, intellectual property, and bankruptcy. Prior to that, Gary received his Juris Doctor degree from Cornell Law School in Ithaca, NY. While in law school, Gary was an Honors Fellow in Cornell's Lawyering program, served as a peer tutor, and worked as a research assistant. In 2011, he published the article "Langdell and the Leviathan: Improving the First Year Law School Curriculum by Incorporating *Moby Dick*" in the *Cornell Law Review*.

Before law school, Gary taught English at St. Thomas Aquinas High School in Dover, NH for 13 years. He also served as the school's Admissions Director. Gary previously received his Bachelor of Arts in English Literature from St. Anselm College in Manchester, NH. Gary is admitted to practice in the Commonwealth of Massachusetts.

Kristin L. Van Arsdale

Kristin L. Van Arsdale joins Schwartz Hannum after several years as an attorney at Brown & Connery, LLP in New Jersey, where she concentrated her practice on labor and employment litigation. Kristin has experience in a variety of labor and employment matters, including drafting, reviewing and revising employer handbooks, compliance with federal and state laws, and various aspects of the litigation process.

Kristin is a 2011 graduate of the Villanova University School of Law. While in law school, she was the Secretary of the Student Bar Association and an Editor of the *Villanova Sports and Entertainment Law Journal*, and studied for a summer abroad in Rome. She also worked as an Extern at the United States Court of Appeals for the Third Circuit in Philadelphia. Kristin received her Bachelor of Arts in Communications from Villanova University in 2005.

Kristin is admitted to practice in the Commonwealth of Pennsylvania and the State of New Jersey, as well as the United States District Courts for the District of New Jersey and Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit. Her Massachusetts Bar admission is pending.

Federal Government Takes Aim At Sexual Orientation And Gender Identity Discrimination

By Brian D. Carlson[1]

The federal government is taking aggressive action through various enforcement agencies to ban employment discrimination based on sexual orientation and gender identity. These efforts affect private employers, public employers, and federal contractors. Accordingly, all employers should review their policies and procedures to determine if changes are warranted, and should consider training managers and human resources personnel on best practices in this emerging area of the law.

Background

Currently, 21 states and the District of Columbia ("DC") have statutes prohibiting sexual orientation discrimination in employment, and 18 states and DC have statutes prohibiting gender identity discrimination in employment. However, there is no corresponding federal law. A proposed federal law, the Employment Non-Discrimination Act ("ENDA"), would have amended Title VII of the Civil Rights Act of 1964 ("Title VII") to include "sexual orientation" and "gender identity" as protected categories. ENDA, however, has failed in Congress.

Notwithstanding ENDA's fate, various federal agencies are construing "sex discrimination" broadly to encompass discrimination based on sexual orientation and gender identity. Specifically:

- The U.S. Equal Employment Opportunity Commission ("EEOC") recently ruled, in a case brought by a federal employee, that discrimination based on sexual orientation constitutes unlawful sex discrimination under Title VII.
- Likewise, the EEOC has argued in lawsuits, "friend of the court" briefs, and administrative rulings that adverse employment actions based on sexual orientation and gender identity are, *ipso facto*, motivated by unlawful sex discrimination.
- The U.S. Department of Justice ("DOJ") has expanded its definition of sex discrimination to include discrimination based on gender identity.
- In implementing a Presidential Executive Order, the Office of Federal Contract Compliance Programs ("OFCCP") of the U.S. Department of Labor has banned federal contractors from discriminating on the basis of sexual orientation and gender identity.
- The U.S. Office of Special Counsel ("OSC"), which investigates and prosecutes complaints by federal employees, has ruled that the Department of the Army (the "Army") committed sex discrimination in its handling of a worker's gender transition.

The EEOC

As "coverage of lesbian, bisexual and transgender individuals under Title VII's sex discrimination provisions" is a top "enforcement priority" at the EEOC, the agency filed two lawsuits last year charging employers (a Michigan funeral home and a Florida eye-and-ear clinic) with unlawfully terminating employees for transitioning from male to female.

In the Michigan case, the EEOC alleges that a funeral home illegally fired its director of 14 years after the employee announced that she was transitioning from male to female and would soon start to "present" (or dress) in women's clothes.

In the Florida case, the EEOC claimed that an eye-and-ear clinic illegally fired its director of hearing services for wearing feminine clothing and announcing that she had begun transitioning from male to female. Subsequently, the EEOC secured a settlement of that lawsuit, under which the clinic agreed to pay the former employee $150,000 for back pay and emotional distress, to implement a transgender non-discrimination policy, and to provide appropriate training to all of its employees regarding that policy.

The EEOC has also filed "friend of the court" briefs in cases involving similar issues. For example, the EEOC asked the U.S. Court of Appeals for the Seventh Circuit to reconsider a decision indicating that Title VII does not encompass sexual orientation discrimination. The Seventh Circuit, in turn, amended its opinion to remove such statements and supporting citations.

In support of its position that discrimination based on sexual orientation and gender identity is a form of sex discrimination prohibited by Title VII, the EEOC relies on the U.S. Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*. The Court ruled in that case that an adverse employment action based on an employee's failure to conform to gender stereotypes is a form of sex discrimination.

In 2012, the EEOC applied this expansive view of sex discrimination in deciding an administrative appeal within the federal civil-service system. In *Macy v. Holder*, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") rejected a job applicant based on her transgender status. When the applicant appealed, the EEOC ruled that ATF had committed sex discrimination under Title VII in its handling of the application.

Similarly, this past July, in a case brought by a Florida air traffic controller against Secretary of Transportation Anthony Foxx,

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1 *A previous version of this article appeared in* New England In House ("NEIH"). *The Firm is grateful to* NEIH *for its support in publishing this article.*

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the EEOC ruled, by a 3-2 margin, that discrimination on the basis of sexual orientation amounts to discrimination on the basis of sex and, accordingly, is unlawful. Acknowledging that Title VII does not explicitly include sexual orientation as a protected characteristic, the agency nonetheless concluded that an employer that acts on the basis of sexual orientation necessarily "relie[s] on sex-based considerations" and "take[s] gender into account" in making the decision.

Of the thirteen federal appeals courts, two (the Sixth and Eleventh Circuits) have adopted the EEOC's broad interpretation of sex discrimination under Title VII, and two more (the First and Ninth Circuits) have suggested that transgender plaintiffs may pursue sex-stereotyping theories under Title VII. The EEOC is expected to continue pressing its view on this issue until either all of the federal circuit courts adopt its position or a circuit split emerges (which would support a petition for the U.S. Supreme Court to decide the matter).

The EEOC should have ample opportunity to pursue this agenda. In the first three quarters of Fiscal Year 2014 (October 2013 – June 2014), the EEOC received 663 charges alleging sexual orientation discrimination and 140 charges alleging gender identity discrimination. These numbers are believed to be on the rise.

The DOJ

Taking the EEOC's lead, the DOJ has expanded its definition of sex discrimination to include discrimination based on gender identity. Marking a reversal in the DOJ's position, the U.S. Attorney General circulated a memo to DOJ components and U.S. attorneys barring the department from arguing that transgender individuals are not covered by Title VII. The decision also enables the DOJ's Civil Rights Division to file Title VII claims against state and local public employers on behalf of transgender individuals.

The OFCCP

As required by President Obama's Executive Order (the "Order"), the OFCCP has added sexual orientation and gender identity to the protected characteristics applicable to federal contractors. Under the Order, covered federal contractors are: (a) prohibited from making discriminatory employment decisions on the basis of sexual orientation or gender identity, and (b) required "to take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their . . . sexual orientation and gender identity."

The OFCCP's implementing regulations, which took effect April 8, 2015, apply to all covered contracts entered into or modified after that date. The regulations require contractors to: (a) update the Equal Employment Opportunity ("EEO") clause in new or modified contracts, subcontracts, and purchase orders to state that applicants and employees will be treated equally without regard to their "race, color, religion, sex, sexual orientation, gender identity, or national origin"; (b) similarly update the EEO language in job solicitations and posted workplace notices; and (c) ensure that applicants and employees are treated without regard to their sexual orientation and gender identity.

The OSC

Even the Army has not been immune from this federal campaign to accord protected status to sexual orientation and gender identity. In this regard, the OSC determined, in a landmark decision, that the Army discriminated against an employee after she announced a gender transition.

The matter involved a software quality specialist at an Army facility in Alabama. After the employee changed her name and began presenting as a woman, her supervisors said her use of the women's restroom was "making other employees uncomfortable" and asked her to use an individual, sex-neutral restroom. One manager continued to use male pronouns when referring to her and tried to restrict her conversations with co-workers out of a belief that they were uncomfortable with her transgender status.

The OSC found that, through such actions, the Army committed discrimination in violation of the Civil Service Reform Act. This law protects federal workers from adverse treatment based on conduct unrelated to job performance.

Recommendations For Employers

In light of this federal push to protect employees in all sectors from discrimination based on sexual orientation and gender identity, there are a number of steps that we recommend employers take.

First, employers should review both applicable law and their EEO policies and procedures with employment counsel to determine whether their policies and procedures adequately address discrimination based on sexual orientation and gender identity.

Second, employers are advised to provide training on sexual orientation and gender identity discrimination to their managers and human resources personnel, in order to reduce risky workplace behavior and the potential for liability.

Additionally, employers that are federal contractors should review and update all anti-discrimination policies, EEO clauses, affirmative action plans, contract provisions, job solicitations, posted workplace notices, and other materials to appropriately incorporate sexual orientation and gender identity as protected categories.

Finally, all employers should closely monitor further developments in this rapidly developing area of the law.

Employers' Experience Under New NLRB Election Rules Highlights Need For Preparation

By Brian D. Carlson

The new "ambush" election rules implemented by the National Labor Relations Board ("NLRB" or the "Board") this past April have already proved to be a boon to unions seeking to organize employees. Under the new rules, unions have filed an increased number of election petitions, and the median length of election campaigns has decreased substantially, making it much more difficult for employers to communicate their campaign messages to employees.

As the new election rules give unions numerous advantages that they have never previously enjoyed, it is vital that employers develop union campaign strategies and communications *now* – even before learning of any actual organizing activity at their facilities.

"Ambush" Election Rules

The new rules, which the NLRB adopted as of April 14, 2015, have been termed the "ambush" election rules, as they dramatically reduce the time between a union's petition for an election and the election itself.

The challenges employers face under the new rules include the following:

Fast-Track Timeline. Most significantly, the new rules permit an election to be scheduled for as soon as *ten days* after an election petition is filed. Previously, the typical length of time between the filing of a petition and the election was approximately five to six weeks.

Posting Requirement. Upon receipt of a union's representation petition, the NLRB sends the employer a Notice of Petition for Election, which must be posted in the workplace within two business days. The notice provides information about employees' rights to organize under federal law. Employers that use e-mail to communicate with employees also must distribute the notice electronically. Thus, almost immediately after learning of an election petition, an employer is forced to post a notice that can readily be interpreted as encouraging employees to vote in favor of unionization.

New Voter List Requirements. Within two business days after an election is scheduled, the employer must provide a voter list to the union. The list must include not only the names and home addresses of all employees in the petitioned-for unit, but also their personal phone numbers and e-mail addresses. (The prior rules required employers to provide only names and home addresses, and gave employers seven days to do so.) As a result, virtually from the outset of a campaign, a union can inundate employees with pro-unionization messages.

Pre-Election Hearing. If an employer opts to challenge the appropriateness of an election petition, a pre-election hearing is scheduled for eight days after the petition is filed. Thereafter, within seven days, the employer must file a detailed position statement raising *all potential challenges* to the petition. The employer will be deemed to have waived any challenge not raised in the position statement. Obviously, these extremely short timeframes create enormous challenges for employers.

Deferral Of Certain Challenges Until After The Election. Litigation over the inclusion of specific employees in the bargaining unit or their eligibility to vote is generally deferred until after the election, as such issues could be mooted by the election results (*e.g.*, if the union were to win by a large margin, the disputed ballots might be too few in number to change the result). Under the former election rules, employers were entitled to litigate voter eligibility and inclusion issues prior to the election.

Elimination Of Right To Submit Legal Briefs. After a pre-election hearing, the employer may not submit a written brief unless the NLRB's Regional Director deems it "necessary." Under the prior rules, an employer had a right to file a written brief. Thus, employers have been deprived of an important avenue for arguing their position on election issues.

Elimination Of Automatic Stay Of Election. Finally, representation elections are no longer stayed until 25 to 30 days following the Regional Director's ruling on the issues presented at a pre-election hearing. Previously, elections were routinely stayed to allow the Board to consider a potential request for review of the Regional Director's decision.

Employers' Experience Under New Rules

Although the "ambush" election rules have been in place for only a matter of months, available information suggests that they have already begun to tilt the playing field in unions' favor, just as employers had feared.

For instance, NLRB statistics indicate that the median time period between the filing of an election petition and the actual election has decreased from 38 days to 23 days. In other words, employers have lost *more than two weeks* of time to communicate their messages to employees. Further, since the 23-day figure is a median number, in a full 50 percent of recent elections, employers have had even less time than that to campaign.

Not surprisingly, the new rules also appear to have sparked a greater number of election petitions by unions. During the first month after the rule changes went into effect, 266 union certification petitions were filed with the NLRB – an increase of 24 percent from the previous five years' average for the same time period.

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Employers' Experience Under New NLRB Election Rules Highlights Need For Preparation

Finally, in *more than 98 percent* of election cases since the new rules were implemented, the employer has entered into a stipulated election agreement – *i.e.*, an agreement to waive any challenges to the petition and set an election date – rather than undertaking the intense, expedited process required to challenge an election petition. Previously, only about 80 percent of election petitions resulted in stipulated election agreements. Presumably, employers have concluded that with the scant campaign time available under the new rules, they cannot afford for the initial part of that short period to be consumed by a legal challenge to a petition.

Unsuccessful Court Challenges

While employer groups filed two federal lawsuits aimed at stopping the NLRB from implementing the new election rules, those legal challenges have proved unsuccessful.

In one of those cases, a federal district court in Texas dismissed a lawsuit challenging the new rules as, in part, a violation of employers' rights under the National Labor Relations Act, the Administrative Procedure Act, and the U.S. Constitution. That decision has been appealed to the U.S. Court of Appeals for the Fifth Circuit.

In the other lawsuit, a federal district court judge in Washington, D.C., recently granted summary judgment to the Board on a similar challenge to the new election rules lodged by other employer groups. That decision, as well, is being appealed.

At least for the foreseeable future, then, it appears that employers will have to accommodate themselves to the "ambush" election rules as best they can.

Recommendations

In light of the major challenges created by the NLRB's new election rules, it is vital that employers that wish to remain union-free take immediate steps to prepare for a potential union organizing campaign and election. In particular, employers should consider the following measures:

- Take stock of possible issues that may lead employees to explore unionizing – such as substandard wages or benefits, poor working conditions, or abrasive relationships with supervisors – and consider whether changes may be warranted. (Note, however, that it is generally unlawful for an employer to change, or promise to change, wages, hours, or working conditions after organizing activity begins.)
- Train managers and human resources personnel in how to respond lawfully to union organizing activity – and how to avoid unlawful knee-jerk reactions that may expose an employer to liability under federal labor law.
- Prepare union campaign strategies and communications *now,* as there will be little time to act after an election petition is filed.

Please let us know if you have any questions about the NLRB's "ambush" election rules, or if you may need assistance in preparing for actual or potential union organizing at your facility.

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Who Makes The Call And When: Mandated Reporter Laws From State To State

counselors are considered to be mandated reporters; but by virtue of someone speaking at a school, the mantle of "mandated reporter" does not automatically apply.

In other states, *anyone* – regardless of profession or school affiliation – is obligated to report suspected child abuse, sexual abuse or neglect. In those states, the speaker could have an obligation to report the misconduct – his telling school administrators what he heard may not be enough to satisfy that requirement.

Some states require that school employees first report their good-faith suspicions of child maltreatment directly to authorities, before informing even their supervisor or head of school.

Finally, most states penalize individuals who should have reported and do not, versus those who made a good-faith report of child maltreatment that later turns out to be unsubstantiated.

The take-away: the determination of who is legally obligated to report suspicions of child maltreatment is nuanced and highly dependent on knowing your school's state law. Take the time to educate your entire employee population – boundary training and mandated reporter training will help the community be ready for whatever may arise on campus.

If you have any questions about legal compliance for reporting suspected child abuse, sexual abuse or neglect, please do not hesitate to contact a member of the Firm's Education Practice Group.

Who Makes The Call And When: Mandated Reporter Laws From State To State

By Susan E. Schorr

Picture this: during an Upper School Assembly at Springtime Academy, a recent alumnus of the school gives a talk and video presentation about his recent adventure on Mount Kilimanjaro. He remains on campus for the day, attending classes and bonding with students. During a conversation after lunch, a couple of tenth graders reveal to the climber that some of their classmates recently engaged in sexual misconduct. The speaker tells the school administration about what he heard, but does not report the misconduct to the state child welfare authorities. Should he have?

Guess what the lawyers say? "It depends." It depends on how your state law defines "mandated reporters," or those who, by virtue of their profession, are considered to have a heightened responsibility to report good-faith suspicion that a child has been abused, sexually abused or neglected. Typically, such reports must be made to state child welfare agencies within 24-48 hours after the individual learns of the suspected misconduct.

In most states, those employed by schools (*e.g.*, administrators, coaches, teachers), doctors, social workers and other licensed

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Seminar Schedule

September 30 & October 1, 2015
Employment Law Boot Camp (Two-Day Program)
September 30: 8:30 a.m. – 4:00 p.m.
October 1: 8:30 a.m. – 4:30 p.m.

October 7, 2015
Mastering An Effective Investigation Of Alleged Employee Misconduct
9:00 a.m. – 1:00 p.m.

October 28, 2015
Getting It Write: Employee Handbooks
8:30 a.m. – 10:30 a.m.

November 5, 2015
Annual Hot Topics In Labor And Employment Law
The Andover Inn, Andover, MA
8:30 a.m. – 11:30 a.m.

December 9, 2015
Getting It Write: Employee Handbooks
8:30 a.m. – 10:30 a.m.

Seminar Schedule For Independent Schools

October 15, 2015
Contracts And Compensation For The Head Of School: Tips, Traps And Best Practices
8:30 a.m. – 10:30 a.m.

November 17, 2015
Risk Management For Off-Campus Trips And Activities
8:30 a.m. – 10:30 a.m.

December 15, 2015
LGBTQA Students And Employees In Independent Schools: Best Practices Related To Gender Identity And Expression
8:30 a.m. – 10:30 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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