SCHWARTZ HANNUM PC
Guiding Employers & Educators

SHPC Legal Update

THE LATEST IN LABOR, EMPLOYMENT & EDUCATION LAW

SEPTEMBER 2016

IN THIS ISSUE

DOL's Final "Persuader Rule" On Hold Pending Court Challenge

By Matthew D. Batastini

After nearly five years of stops and starts, the United States Department of Labor's ("DOL") new interpretation of the so-called "Persuader Rule" went into effect on April 25, 2016, and was slated to begin requiring new disclosures beginning July 1, 2016. For the first time, employers would be required to report to the DOL their outside law firms' indirect efforts to plan, direct or coordinate communications to employees regarding union organizing, such as drafting handouts or scripting talking points. Previously, only *direct* communications between outside counsel and employees had to be reported.

On June 27, 2016, just days before the new reporting obligations were to commence, a Texas federal district court issued a nationwide preliminary injunction preventing the DOL from enforcing its new interpretation of the Persuader Rule (the "Final Rule"). That order, which was sought and won by several pro-business organizations, is only a temporary injunction, and at some point the Final Rule will be subject to further review by the district court, the Fifth Circuit Court of Appeals, or ultimately, the United States Supreme Court. And while the order represents

continued on page 2

The DOL's New Overtime Rules: What They Require, And How Employers Can Start Preparing

By Brian D. Carlson

The U.S. Department of Labor ("DOL") recently released its long-awaited Final Rule implementing significant changes to the overtime regulations under the Fair Labor Standards Act ("FLSA"). Most significantly, the Final Rule substantially increases the minimum weekly salary required for most employees to qualify for the FLSA's "white collar" overtime exemptions.

Although the Final Rule does not take effect until December 1, 2016, given the major changes it will bring, employers should begin preparing now to comply with it. Below, we provide a number of practical tips to help employers do so.

FLSA Essentials

Under the FLSA, employees must be paid at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek, unless they qualify as "exempt." The statute includes a number of exemptions from this overtime requirement, including the "white collar" exemptions that apply to certain executive, administrative and professional employees. In general, to fall within one of the white collar exemptions, an employee must be paid a minimum weekly salary, and his or her job duties must meet certain requirements. (Certain types of professional employees, however - including teachers - are not covered by the minimum weekly salary requirement.)

continued on page 4

continued from page 1

DOL's Final "Persuader Rule" On Hold Pending Court Challenge

an important victory for business interests, it also creates uncertainty for employers and their counsel about best practices for handling counseling regarding union organizing while the legal challenge plays out.

Background

The Persuader Rule has been part of the Labor Management Reporting And Disclosure Act (the "LMRDA") since the LMRDA was passed in 1959 in an effort to make labor-management relations more transparent and less corrupt. The LMRDA requires, in part, that both labor unions and employers make certain disclosures concerning their spending on union activities.

The disclosures required by the LMRDA are significant, as are the penalties for failing to make a required disclosure. An employer that contracts with an outside firm for reportable persuader activity must file with the DOL a form identifying the outside firm and all fees paid to the firm. The outside firm is also required to file a similar form. Employers or outside firms that fail to file required reports can be subject to civil or criminal penalties, including fines of up to $10,000 or one year in prison. All disclosure forms filed with the DOL are publicly available in a searchable database on the DOL's website.

Importantly, the LMRDA exempts "advice" from its reporting requirements, though it fails to precisely define the boundaries of that exemption. In 1962, in the wake of uncertainty concerning the "advice" exemption, the DOL issued a memorandum clarifying its scope. In that memorandum, the DOL explained that only direct persuader activity – where the outside firm communicated directly with employees regarding union organizing – was reportable under the LMRDA. Indirect activity, where the outside firm merely advised the employer with respect to its communications with employees, or even drafted those communications, was not reportable. This interpretation of the "advice" exemption was considered to be settled law for nearly 50 years.

Final Rule

In June 2011, the DOL announced a proposed rule intended to significantly narrow the longstanding "advice" exemption. Under the proposed rule, employers and their outside firms would be required, for the first time, to report indirect persuader activity concerning unionization. The DOL asserted that this change was necessary because employers and firms were "underreporting" their persuader activity, and that additional disclosures were "critical to helping workers make informed decisions" about organizing and bargaining.

The DOL's announcement was met with widespread criticism and resistance from the business and legal communities. In September 2011, the American Bar Association (which asserts neutrality with respect to labor-management relations) wrote to the DOL expressing "serious concerns" concerning the new rule and the "unjustified and intrusive burden" it would cause to lawyers, law firms, and their clients. The United States Chamber of Commerce described the proposed rule as a "travesty," arguing that it "will not create a single new job, but will instead create a further drag on job creation."

Following this firestorm of criticism, the proposed interpretation remained in limbo for more than four years. On March 23, 2016, however, the DOL issued its Final Rule adopting the new interpretation of the Persuader Rule. Despite continuing attacks from business groups and the American Bar Association, the Final Rule went into effect on April 25, 2016.

Legal Challenges To The Final Rule

Following the DOL's March 23 announcement, three separate lawsuits were filed by business and trade groups challenging the Final Rule. These lawsuits asserted that the Final Rule improperly impinged the attorney-client relationship and privilege, violated employers' rights to free speech and effective legal counsel, and exceeded the regulatory authority conferred by the LMRDA. The lawsuits specifically sought emergency relief to block the July 1, 2016, implementation date.

On June 27, 2016, a U.S. District Court judge in the Northern District of Texas entered a preliminary injunction enjoining the DOL from implementing the Final Rule. Though its ruling was not a final decision, the court concluded that the challengers had identified several grounds creating a substantial likelihood of successfully overturning the rule. The preliminary injunction will remain in place until the case before the District Court is fully resolved, or until the order is reversed by the Fifth Circuit Court of Appeals or the United States Supreme Court.

Considerations And Guidance For Employers

The District Court's order enjoining the Final Rule is temporary and will be subject to further legal scrutiny. If and when the order is lifted, it is possible that the DOL will stand by its July 1, 2016, implementation date and seek to require indirect persuader activity undertaken after that date to be retroactively reported.

Below are some practical steps that employers should consider taking:

Review Current Practices

Employers should review whether their current engagements with outside labor counsel may be reportable under the DOL's Final Rule, if and when the Final Rule ultimately goes into effect. While the LMDRA's advice exemption will continue to protect legal representation and general advice

continued on page 3

continued from page 2

DOL's Final "Persuader Rule" On Hold Pending Court Challenge

provided by outside counsel, engagements related to persuader activity concerning union organizing would be reportable. This will likely include such activities as (i) drafting or revising scripts or talking points for communications to employees; (ii) drafting or revising language for pamphlets or other materials that will be distributed to employees; (iii) drafting personnel policies designed to persuade workers against union organizing; (iv) planning or orchestrating a campaign or program to avoid union organizing; and (v) conducting union avoidance training with managers. Experienced counsel can assist in evaluating current practices under the Final Rule.

Evaluate Tolerance For Disclosure

During this period of uncertainty, employers faced with ongoing or anticipated union organizing campaigns will need to evaluate their tolerance for the possibility of future mandated disclosures. Some employers may opt to avoid involving outside counsel in their communications with employees regarding unionization, so as to avoid the need to report if and when the Final Rule takes effect. Other employers may decide that the value of the input provided by experienced labor counsel outweighs the risk of future reports. Experienced counsel can help employers evaluate the many factors that will inform their decisions as to outside assistance with persuader activity.

Stay Tuned For Updates

Unfortunately, there is no definite date or timeline by which the uncertainty regarding persuader activity will be resolved. Nearly five years elapsed between the DOL's announcement of the proposed change and its attempted implementation of the Final Rule, and it could be several more years until ongoing legal challenges are completely resolved. In the meantime, employers should be on the lookout for future updates concerning the Final Rule.

Brian M. Doyle Joins Schwartz Hannum PC

Schwartz Hannum PC is thrilled to announce that Brian M. Doyle has joined the Firm.

Brian has extensive experience advising management and employers in all facets of labor and employment law, including the enforcement of post-employment restrictive covenants, the defense of discrimination claims, labor-management relations, wage and hour regulations, and related labor and employment issues. He has represented clients in a variety of industries, including national and multinational corporations, financial institutions, insurance brokers, shipping companies, construction companies, private wealth management offices, research and development laboratories, defense contractors, colleges, universities, independent secondary schools, and other educational institutions. Brian also has experience representing and providing strategic advice related to labor and employment issues to companies operating in the shared economy, such as online ride-hailing services and on-demand food delivery services.

Brian regularly represents educational institutions in connection with regulatory compliance, Title IX and Title IV, and issues related to students and faculty.

Brian has briefed and argued dispositive motions in federal and state court, taken and defended multiple depositions, and represented clients in mediations, arbitrations and judicial proceedings. In addition, he has briefed issues on appeal before the U.S. Court of Appeals for the First Circuit, the United States Supreme Court, and appellate courts of the Commonwealth of Massachusetts.

Brian received his B.A. from the College of the Holy Cross, and his J.D., *cum laude,* from Albany Law School. He is a member of the Board of Directors for the Coalition of Schools Educating Boys of Color (COSEBOC) and the Best Buddies Hyannisport Challenge Executive Committee.

continued from page 1

The DOL's New Overtime Rules: What They Require, And How Employers Can Start Preparing

Along with the white collar exemptions, the FLSA provides for various other overtime exemptions. For instance, an employee who does not fall within the executive, administrative or professional exemption may still be exempted as a "highly compensated employee," if the employee's work is white collar in nature and his or her annual salary meets a certain threshold.

Summary Of Final Rule

The DOL's Final Rule significantly impacts these requirements. Its major provisions include the following:

- The minimum weekly salary required for most employees to fall within the executive, administrative or professional exemption will more than double, from $455 per week to $913 per week - *i.e.*, from $23,660 to $47,476 on an annualized basis.
- The minimum annual salary required for an employee to qualify for the "highly compensated employee" exemption will jump from $100,000 to $134,004.
- Automatic adjustments to these salary thresholds (based on cost-of-living increases) will be made every three years, beginning in January 2020.
- Employers have until December 1, 2016 to comply with the new requirements. (Previously, the changes to the overtime regulations had been expected to take effect 60 days after their announcement, so this extended compliance period came as welcome news for employers.)

Notably, the Final Rule does not change any of the current job duty requirements for the overtime exemptions.

What Employers Should Do

Although the Final Rule's December 1, 2016, effective date gives employers some time to bring their operations into compliance, employers would be wise to begin this process now. Following are some recommended steps:

- Determine which employees will be impacted. Employers should start by identifying any exempt employees who currently earn less than $913 per week, as well any employees treated as exempt under the "highly compensated employee" exemption who are currently paid less than $134,004 annually. Employees falling within these categories will be directly affected by the new requirements.
- Review job descriptions. After determining which employees will be impacted by the Final Rule, employers should thoroughly review those employees' job descriptions, as well as their actual, day-to-day job duties, to ensure that the positions meet the duties tests of the applicable overtime exemptions.
- Evaluate whether affected employees should be reclassified or given salary increases. For each exempt employee whose salary does not meet the new threshold, an employer will need to decide whether to increase the employee's salary or reclassify the employee as non-exempt. For employees whose current salaries are close to the new thresholds, this may be a relatively simple decision. In other instances, however, an employer may decide that it is preferable to reclassify exempt employees as non-exempt.
- Inform employees of their reclassifications. Employers should provide advance, written notice to employees whose payroll status will change as a result of the Final Rule, and be sure to file copies of those notices in affected employees' personnel files. Employers should keep in mind, too, that some employees may be unhappy about their reclassification, perhaps viewing a change from exempt to non-exempt status as a demotion. Human Resources personnel and managers should be prepared to respond appropriately to such concerns.
- Prepare any other required notices of reclassification. Employers should determine, in consultation with legal counsel, whether any other formal notices should be provided in connection with employees' FLSA reclassification. For instance, some states have wage laws requiring that a written notice of any payroll reclassification be provided to the employee by a specified number of days prior to the change. Similarly, employers that are parties to collective bargaining agreements with unions may have special contractual notice obligations.
- Provide appropriate training. Managers should be trained (or refreshed) on the nuances of supervising non-exempt employees, particularly managing overtime work in accordance with budget constraints. Similarly, previously exempt employees who are reclassified as non-exempt should be trained on the employer's policies governing recording work hours and obtaining permission for overtime work. For instance, employees who have flexible work arrangements should be reminded to keep accurate time records even when working off-site or during evenings or weekends.

While the DOL's Final Rule will create compliance challenges for employers, starting to prepare now can make this process as smooth as possible. Our attorneys have a wealth of experience assisting employers with overtime and other FLSA issues, and we would be thrilled to help your organization.

Recent Settlements Underscore Risks Of Discriminatory Form I-9 Practices

By Julie A. Galvin

The U.S. Department of Justice's ("DOJ") Office of Special Counsel ("OSC") recently announced settlement agreements with two employers – a large public school system and a small business – regarding allegations that they engaged in discriminatory practices during the employment verification, or Form I-9, process. As part of the settlements, both employers agreed to pay hefty fines.

These costly settlements serve as an important reminder to all employers to review their own Form I-9 processes to ensure that their verification procedures are not discriminatory.

Background: Form I-9 Requirements

Under the Immigration Reform and Control Act of 1986 ("IRCA"), employers are prohibited from knowingly hiring workers who are not authorized to work in the United States. Therefore, for each employee hired after November 6, 1986, employers must complete a Form I-9 to establish the individual's identity and right to work in the United States.

As part of the I-9 verification process, employers must examine original documentation, such as passports, driver's licenses, or Social Security cards (among other acceptable documents). In certain cases, employers are also required to re-verify an individual's employment eligibility when authorization documents have expired.

At the same time, however, the Immigration and Nationality Act ("INA") prohibits employers from carrying out the Form I-9 process in a discriminatory manner, such as on the basis of citizenship, immigration status or national origin. The recent settlements announced by the OSC serve as examples of unlawful discriminatory practices that may prove costly for employers.

Settlements

In two recent, similar investigations, the OSC found that Sunny Grove Landscaping & Nursery ("Sunny Grove") and the Miami-Dade County Public Schools had discriminated against non-U.S. citizens by requiring them to produce green cards when completing Form I-9, while U.S. citizens could choose any acceptable form of documentation to prove their employment authorization.

To resolve the matter, Sunny Grove agreed to pay $7,500 in civil penalties and undergo DOJ training on the anti-discrimination provisions of the INA. The Miami-Dade County Public Schools agreed to even more severe sanctions, including paying a $90,000 civil penalty, setting up a $125,000 fund to compensate employees for lost wages, and undergoing compliance monitoring and training for three years.

As these settlements highlight, under the Form I-9 rules, lawful permanent U.S. residents cannot be required to show their green cards but must be permitted to choose any valid documentation to establish their employment authorization. Employers that treat foreign national workers differently from U.S. citizens in conducting the employment authorization process act at their peril.

Other Discriminatory Practices

Form I-9 rules also prohibit employers from requiring re-authorization of lawful permanent residents once their green cards expire. Lawful permanent residents are permitted to live and work in the U.S. indefinitely, and the expiration of a green card does not mean that an individual's employment authorization has expired. Therefore, if an employee's green card is valid at the time the Form I-9 is completed, the employer should not require reverification when it expires.

Employers are also prohibited from engaging in certain other practices in the course of the I-9 verification process, including document abuse – *i.e.,* over-documenting, or asking employees for more than the required documentation.

Recommendations

In light of these recent I-9 settlements, we recommend that employers:

- Review their Form I-9 policies and practices to ensure compliance with all requirements. For example, employers should confirm that they do not re-verify green card holders or ask individuals for specific documents when completing Form I-9;
- Train employees responsible for conducting the Form I-9 process on the anti-discrimination provisions of the INA, including when an employment authorization document should be re-verified; and
- Consult experienced immigration counsel with any questions about the Form I-9 verification process.

> "These costly settlements serve as an important reminder to all employers to review their own Form I-9 processes…"

Please feel free to contact us if you have questions about these recent I-9 settlements or the employment verification process generally. We regularly counsel employers on these issues and would be happy to help.

DOL Takes Aim At Potential Joint Employers

By Soyoung Yoon[1]

The U.S. Department of Labor's Wage & Hour Division ("WHD") recently issued a controversial new Administrator's Interpretation detailing the WHD's views on "joint employment" under the federal Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA").

Notably, in this formal guidance, the WHD indicates an intention to expand the joint employment doctrine well beyond its traditional boundaries, as delineated in the current FLSA regulations. This expansion, if adopted by courts, could carry expensive repercussions for many employers.

Background And Overview

In general, under the FLSA, the MSPA and similar statutes, separate businesses may be found to be joint employers of a worker if they bear a significant connection to one another in relation to the worker's services.

A finding of joint employer status can have major consequences for a business. In particular, where an employee is jointly employed by two or more employers, all of the hours worked by the employee for the joint employers during a workweek are aggregated for purposes of determining entitlement to overtime pay. Similarly, if an employer fails to pay an employee in accordance with minimum wage requirements, a joint employer of the employee may be held liable for the resulting damages.

According to the WHD, the Administrator's Interpretation was issued due to an increasing proliferation of business models involving potential joint employment relationships, particularly in the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries. Thus, employers in those industries, in particular, should give close attention to the issues raised by the new guidance, as it appears that the DOL may have such employers in its crosshairs.

Horizontal Joint Employment

In the Administrator's Interpretation, the WHD explicitly differentiates between so-called "horizontal" and "vertical" joint employment relationships. While the WHD's delineation of horizontal joint employment standards adheres to established legal principles, its intended standard for evaluating potential vertical joint employment relationships represents a significant change from existing law.

As the WHD's guidance notes, horizontal joint employment characterizes a scenario in which two or more employers (i) separately employ an employee and (ii) bear a significant connection to one another in relation to the employee. For example, an employee might simultaneously work for two restaurants that are owned and managed by the same persons. In such situations, the businesses may be found to be horizontal joint employers.

The Administrator's Interpretation indicates that potential horizontal joint employment relationships will be assessed under the existing standards for joint employment set forth in the FLSA regulations. Under those standards, relevant factors include, among others:

- The ownership structures of the potential joint employers (*e.g.*, whether one business owns all or part of another, or whether the businesses have common owners);
- Whether the potential joint employers have overlapping officers, directors, executives or managers;
- The extent to which the businesses' operations (*e.g.*, hiring, firing, scheduling, payroll, advertising) are intermingled or commonly controlled;
- Whether the businesses share a "pool" of employees who are, effectively, available to each of them;
- The degree to which supervisory authority over the businesses' respective workers is shared;
- The extent to which the businesses have clients or customers in common; and
- Any agreements (*e.g.*, management agreements) between the potential joint employers.

Of course, by itself, the fact that an employee works for multiple employers will not result in a finding of horizontal joint employment status, if the employers act independently of each other with respect to the employee. For example, two retail stores might simultaneously employ an individual on a part-time basis without being deemed joint employers, provided that the stores are not associated with each other in relation to the individual's employment.

Vertical Joint Employment

By contrast, vertical joint employment typically arises where an individual is directly employed by a business that serves as an "intermediary" for another organization that ultimately benefits from the individual's services. A common example is an employer's obtaining workers through a temporary staffing agency. The focus of the vertical joint employer analysis is the relationship between the workers and the potential joint employer – as opposed to horizontal joint employment's focus on the connections between the separate businesses.

It is in this area that the Administrator's Interpretation explicitly and dramatically departs from existing legal standards. Specifically, the WHD takes the position that potential vertical joint employment relationships should be evaluated from an "economic realities" perspective – in other words, if a worker is economically depen-

continued on page 7

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

continued from page 6

DOL Takes Aim At Potential Joint Employers

dent on a potential joint employer, then a joint employment relationship is likely to be found to exist.

Notably, the WHD's new "economic realities" standard for vertical joint employment is not derived from the language of the FLSA or MSPA. Further, while the MSPA regulations cite a number of "economic reality" factors as bearing on joint employment analyses, those factors do not appear in the FLSA regulations. Instead, the FLSA regulations incorporate a narrower standard, under which joint employment may be found where (i) there is an arrangement between the employers to share an employee's services; (ii) one employer is acting, directly or indirectly, in the interest of the other employer in relation to the employee; or (iii) the employers are not completely disassociated with respect to the employee and are commonly controlled in some respect.

Nonetheless, with regard to FLSA as well as MSPA compliance, the Administrator's Interpretation instructs employers to assess potential vertical joint relationships under this new "economic realities" standard, with reference to the specific factors set forth in the MSPA regulations. Those factors include:

- Which business controls an individual's day-to-day services and/or his or her terms and conditions of employment.
- Whether the work relationship is temporary or indefinite. (According to the WHD, an indefinite relationship suggests that the worker is economically dependent upon the putative joint employer.)
- Whether the work is rote or repetitive. (In the WHD's view, employees performing such work are more likely to be economically dependent upon the business for whose benefit the services are performed.)
- Whether the work is integral to the potential joint employer's business and/or is performed on its premises. (Such factors, as well, tend to suggest that the "economic realities" standard is met.)
- The extent to which the potential joint employer performs employment-related functions with regard to a worker (*e.g.*, handling payroll, providing workers' compensation insurance, and supplying tools and equipment).

Opposition By Employer Groups

Employer groups have reacted strongly to the WHD's efforts to expand the joint employment doctrine through its recent Administrator's Interpretation. For instance, organizations such as the National Council of Chain Restaurants and the National Retail Federation have charged that adoption of this broadened standard would substantially and unfairly increase businesses' exposure to potential wage claims by employees of subcontractors or franchisees.

Additionally, the Administrator's Interpretation might well be viewed as a *sub rosa* attempt by the WHD to amend the current FLSA regulations with regard to joint employment standards. If so, the new guidance may be vulnerable to a legal challenge, as the WHD did not provide a notice-and-comment period before issuing the Administrator's Interpretation, as is required when a federal agency seeks to amend its regulations.

Recommendations For Employers

Employers would be well-advised to review the Administrator's Interpretation carefully, in consultation with experienced employment counsel. While it remains to be seen whether courts will uphold the WHD's effort to expand the joint employment doctrine in this manner, employers should nonetheless consider whether any aspects of their operations might be revised to minimize potential exposure.

In addition, given the possibility of court challenges to the WHD's new standard, employers should stay alert for further developments in this area.

Joseph Santucci Is Recognized As *"Lawyer of the Year"* By *Best Lawyers In America*

Schwartz Hannum is pleased to announce that Senior Counsel Joseph E. Santucci, Jr. has been recognized by *Best Lawyers* as the 2017 Labor Law – Management "Lawyer of the Year".

A nationally-renowned labor and employment law attorney, Joe has extensive experience advising clients with collective bargaining, labor and employment counseling and litigation, and arbitration. Joe has been selected for inclusion on the *Best Lawyers* list for almost 20 years. This is the second year Joe has been selected as "Lawyer of the Year" in Labor Law, first in Washington DC and now in Boston. Joe has been admitted to practice before numerous federal district and appellate courts. He is a member of the Bar of the U.S. Supreme Court, District of Columbia, and the Commonwealth of Virginia.

Published since 1983, *Best Lawyers* is called "the definitive guide to legal excellence" because it is based on over four million detailed evaluations of lawyers by other lawyers. Lawyers are selected for inclusion on the *Best Lawyers in America* list based exclusively on merit. Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity.

Massachusetts SJC Adopts Changes To Discovery Rules

By Brian D. Carlson

The Massachusetts Supreme Judicial Court ("SJC") recently implemented significant changes to the Massachusetts Rules of Civil Procedure ("MRCP"), affecting discovery procedures in lawsuits in Massachusetts state courts.

The changes made to the MRCP, which went into effect this past summer, are summarized below.

Rule 26

Under the revised MRCP 26 adopted by the SJC, trial judges are explicitly authorized to take into account proportionality considerations in determining whether to issue a protective order limiting the extent to which a party must produce documents or information in response to another party's discovery requests.

Specifically, a judge may consider:

- Whether it is possible for the requesting party to obtain the information from some other source that is more convenient or less burdensome or expensive;
- Whether the discovery sought is unreasonable, cumulative or duplicative; and
- Whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account (i) the parties' relative access to the information, (ii) the amount in controversy, (iii) the resources of the parties, (iv) the importance of the issues, and (v) the importance of the requested discovery in resolving the issues.

These changes to MRCP 26 – which closely mirror similar revisions made last year to Rule 26 of the Federal Rules of Civil Procedure ("FRCP") – are likely to strengthen the hands of parties objecting to discovery requests that they view as unreasonably broad or burdensome.

Rule 34

The SJC also adopted an amendment to MRCP 34, which governs requests for production of documents, to reflect the fact that litigants normally produce copies of requested documents, rather than originals. (Here, as well, a similar change was made to FRCP 34 in 2015.)

Under the amended MRCP 34, a party receiving copies of requested documents may request "a fair opportunity to verify the copies by comparison with the originals." However, the revised rule provides that if a party responding to a request for production of documents believes that producing the originals would be unduly burdensome or expensive, it may seek a protective order restricting access to the originals or requiring the requesting party to pay costs associated with producing the originals.

Rule 1

Finally, MRCP 1, which summarizes the overall purpose of the civil procedure rules, has been amended to provide that the rules"should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." This change – mirroring a similar 2015 amendment to the FRCP – is intended to underscore the overall spirit in which the MRCP are to be interpreted and applied.

Other Proposed Changes Not Adopted

The SJC also considered, but ultimately decided not to adopt, other proposed changes to MRCP 26 that would have narrowed the overall scope of pretrial discovery – again, similar to changes made last year to the FRCP.

Most notably, under the amended FRCP 26(b)(1), parties may seek discovery of relevant, non-privileged information that is both relevant and "proportional to the needs of the case." Prior to this amendment, FRCP 26(b)(1) did not include any proportionality requirement; rather, parties could seek discovery of any information "reasonably calculated to lead to the discovery of admissible evidence."

In accordance with the views expressed by a majority of the special committee advising the SJC on the proposed rule changes, the SJC decided to adopt a "wait and see" approach on this issue, to enable it to evaluate the impact of the revised FRCP 26(b)(1) before making a similar change to the MRCP.

Recommendations

We recommend that parties litigating in Massachusetts closely review these changes to the MRCP and, in conjunction with their counsel, consider how pending and future cases may be impacted.

In particular, as a result of the more limited changes to MRCP 26 adopted by the SJC, the scope of potential discovery in Massachusetts state-court actions now appears broader than in lawsuits brought in federal court. Thus, in cases over which the state and federal courts would both have subject-matter jurisdiction – such as diversity cases, as well as actions involving both federal and state claims – litigants may want to consider, in deciding whether to file in state or federal court or to remove a case to federal court, whether broader or narrower discovery standards would best serve their interests.

Please feel free to contact us if you have questions about the recent amendments to the MRCP or how they may impact current or future litigation involving your organization.

continued from page 10

When Cooperation Becomes Collusive: A Carolina Tale

The complaint goes on to allege that in late 2011, while Dr. Seaman was employed as an Assistant Professor of Radiology within the Cardiothoracic Imaging group at Duke's School of Medicine, she contacted the Chief of Cardiothoracic Imaging at UNC's School of Medicine, asking that UNC keep her in mind for any appropriate job openings in the future. Soon afterward, Dr. Seaman participated in a tour of UNC's facilities, took part in an informal interview, and was informed that UNC would consider her for future job openings.

In February 2015, Dr. Seaman sent an email to UNC's Chief of Cardiothoracic Imaging, indicating her desire to be considered for an advertised position as a Thoracic Radiologist. Dr. Seaman claims to have received a response stating, "I just received confirmation from the Dean's office that lateral moves of faculty between Duke and UNC are not permitted. There is reasoning for the 'guideline' which was agreed upon between the deans of UNC and Duke a few years back."

Later, UNC's Chief of Cardiothoracic Imaging allegedly explained to Dr. Seaman that the impetus for this agreement was Duke's earlier attempt to recruit "the entire UNC bone marrow transplant team; UNC had to generate a large retention package to keep the team intact."

Thus, Dr. Seaman's Complaint alleges a scheme between Duke and UNC aimed at preventing their medical faculty employees from moving from one institution to the other. The effects of such an agreement would include keeping those employees' salaries artificially low, as well as forcing them to decide whether to stay with their current employer, relocate to a similarly prestigious institution out of state, or settle for a position at a less prestigious institution nearby (in what would likely be a less lucrative capacity).

Case Status

The lawsuit is still in its initial stages. Duke's motion to dismiss Dr. Seaman's complaint, based on immunity allegedly derived from UNC's status as a state institution, was denied by the District Court in February 2016. Although the court gave Duke permission to seek an immediate appeal of its ruling from the U.S. Court of Appeals for the Fourth Circuit, the Fourth Circuit declined to hear the matter and returned the case to the District Court.

Barring a quick settlement, then, the litigation will proceed to discovery, a process that is likely to take at least several months and culminate in further motions aimed at disposing of the case before trial.

Recommendations

The Duke lawsuit is an important reminder that educational institutions, like other employers, are bound by the anti-trust laws, despite their non-profit status. While UNC's and Duke's apparent motivation in allegedly agreeing not to hire one another's medical faculty members may be understandable – a desire to retain skilled professionals and keep their labor costs down – the fact remains that broad no-hire agreements between competing employers, regardless of the industry, are almost always unlawful.

Instead, employers that are concerned about losing valuable employees should consider other potential means of retaining them. For instance:

- For certain types of employees – particularly those who are privy to trade secrets or other confidential business information – post-employment non-competition agreements may be worth exploring. (As the legal standards governing such agreements vary widely from state to state, and their enforceability depends heavily on the individual circumstances, employers are wise to consult legal counsel in connection with proposed non-competition agreements.)
- Employers might also consider potential deferred-compensation arrangements (such as Section 457 plans for non-profit organizations) to incentivize key employees to stay.

Ultimately, compensating employees fairly and providing a positive workplace environment that makes them feel that their efforts are valued and appreciated may well be the most important factor in encouraging employees to remain.

Please feel free to contact us if you have any questions about the Duke/UNC litigation or its implications for your organization.

Will Hannum Begins 2nd Year As BBA L&E Section Steering Committee Co-Chair

Will Hannum begins his second year as Co-Chair of the Labor & Employment Section for the Boston Bar Association (BBA). The Labor & Employment Section Steering Committee focuses on the sharing and expansion of expertise in the field. The Firm is proud to support the BBA.

When Cooperation Becomes Collusive: A Carolina Tale

By Gary D. Finley

As college sports fans know well, followers of the Duke University Blue Devils and the University of North Carolina Tar Heels are rarely accused of getting along too well with one another. Now, however, the two universities are alleged to have done just that – purportedly entering into an agreement not to hire away each other's medical faculty employees.

In a lawsuit pending in federal court, a professor within Duke's School of Medicine, Dr. Danielle Seaman, has brought a putative class action lawsuit against Duke University, the Duke University Medical System, and numerous individual defendants, alleging violations of federal anti-trust laws. *Seaman v. Duke University*, Case No. 1: 15-cv-462 (W.D.N.C., filed June 9, 2015).

The Lawsuit

In her court complaint, Dr. Seaman alleges that "a few years back," Duke attempted to lure away the entire UNC bone marrow transplant team. Upon learning of Duke's recruitment efforts, UNC put together a lucrative compensation counter-offer that succeeded in keeping its bone marrow transplant team intact.

Subsequently, in an effort to forestall further raids on one another's employees, the deans of the two universities' medical schools allegedly agreed that neither institution would recruit or hire the other's medical faculty employees.

continued on page 9

Seminar Schedule

October 20, 2016
The Nuts And Bolts Of Compliance With The Family And Medical Leave Act
8:30 a.m. – 10:30 a.m.

November 3 and 4, 2016
Employment Law Boot Camp (Two-Day Seminar)
November 3: 8:30 a.m. – 4:00 p.m.
November 4: 8:30 a.m. – 4:30 p.m.

December 8, 2016
Understanding The Massachusetts Sick Leave Law
8:30 a.m. – 10:30 a.m.

Webinar Schedule For Independent Schools

September 27, 2016
Drafting And Enforcing An Ideal Enrollment Agreement
3:00 p.m. – 4:30 p.m. (EST)

October 20, 2016
Drawing The Lines: Exploring Disciplinary Policies And Procedures
12:00 p.m. – 1:30 p.m. (EST)

November 9, 2016
Accommodating Applicants And Students With Disabilities
12:00 p.m. – 1:30 p.m. (EST)

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.

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