

# Labor and Employment Law Update

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## MySpace, Facebook and More: Personal Blogs and Employers' Rights

*By Mary Pat Hagan*

Many employers have policies that limit employees' use of the employer's communication systems, like e-mail and internet access, to business purposes only, and direct that employees must not disclose the employer's confidential or proprietary information. These policies are designed to protect the employer's business interests and to prevent employees from disclosing sensitive business information, using their employer's communication systems for personal reasons, and engaging in harassing or defamatory conduct by e-mail.

Few of these policies address, or even contemplate, however, the recent explosion of blogs, on-line chat rooms, and websites such as MySpace and Facebook on which employees may post profiles, photos and almost any other information that they wish to share. While some of these sites may require passwords or limit access to “members” of the site, blogs are generally accessible by anyone with an internet connection. Through these sites, employees may share their tales of woe from the dating scene, success – or failure – on the latest diet, or express frustration with their co-workers or employer.

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*A well-drafted policy that reflects the employer's culture and attitude towards employees' personal use of the internet can be effective to inform employees about what conduct is – and is not – allowed, in order to protect the employer's business interests.*

## The Race is On – Plan Now for Fiscal Year 2009 H-1B Visas

*By David S. Merson*

Beginning April 1, 2008, employers may file petitions for H-1B visas on behalf of foreign nationals who are employed in specialty occupations that require the application of highly specialized knowledge and completion of a Bachelor's degree or higher in the specialty occupation, for start work dates of October 1, 2008 (the beginning of fiscal year 2009) (“FY2009”), or later. The annual cap on H-1B visas is 58,200 (6,800 additional H-1B visas are reserved for citizens of Chile and Singapore pursuant to treaty obligations, for a total cap of 65,000 visas annually). Notably, the

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## The New Form I-9 Is Here

As expected, the United States Citizenship & Immigration Services (USCIS) released a new Form I-9, Employment Eligibility Verification, and M-274, Handbook for Employers, Instructions for Completing the Form I-9 on November 7, 2007. Employers should start using this new Form immediately. All previous versions of the Form I-9 are no longer valid. However, the USCIS will not assess penalties for use of earlier forms until thirty (30) days after the new Form is posted in the Federal Register.

Employers must complete a Form I-9 for all employees within the first three days of employment, and retain the Form for one year after termination of employment, or three years, whichever is longer.

This new Form I-9 is part of USCIS' effort to streamline the employment verification process and comply with the document reduc-

tion requirements of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which reduced the number of documents that employers may accept from newly hired employees during the employment eligibility verification process. In 1997, the former Immigration and Naturalization Service (INS) published an interim final rule eliminating some of the documents that IIRIRA slated for removal. However, Form I-9 was not updated to reflect the revised List of Acceptable Documents at that time.

The most significant change to the revised Form I-9 is the elimination of the following five documents from List A of the List of Acceptable Documents (because they lack sufficient features to help deter counterfeiting, tampering and fraud):

- Certificate of U.S. Citizenship (Form N-560 or N-561)

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## MySpace, Facebook and More: Personal Blogs and Employers' Rights

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Employers are understandably concerned about their employees' posts since the posts have the potential to reach a global audience at virtually no cost to the employee. Through their posts, employees may, either intentionally or inadvertently, broadcast trade secrets, sensitive business data, or insider information. In a similar vein, but with different content, employee posts may harass or defame colleagues, or they may just share information that casts the employer in a negative or embarrassing light. Employers have more to be concerned about since once information is posted on the internet, it may be downloaded or copied onto other sites without the original poster's knowledge or direction, and therefore may remain in circulation even after the original posting has been removed from the internet.

To address these and other concerns, many employers have implemented policies to address employees' personal blogs, chat room postings, and internet profiles. A well-drafted policy that reflects the employer's culture

even if highly critical of her employer, would likely be protected by the NLRA, and any adverse employment action based on the blog's content could be unlawful.

In addition to these federal law issues, several states, including California, Colorado and New York, have enacted legislation that limits an employer's ability to discipline employees for their off-duty conduct. While these statutes typically permit discipline when the employee's off-duty conduct conflicts with the interests of the employer, employers should always consider the laws of each relevant state when developing policies and disciplining employees for off-duty conduct.

With these restrictions in mind, we recommend that all employers consider implementing a workplace blogging policy that reflects the employer's culture and meets the employer's objectives. At a minimum, such a policy would serve to address any claim that the employee did not know the blog violated the employer's policies as well as undercut any claim by the employee that he or she

necessarily reflect the views of the employer;

- A prohibition on the use or disclosure of confidential, proprietary, sensitive and/or trade secret information of the employer, its clients and third-parties;
- An explicit statement that harassment of other employees will not be tolerated. The policy may further explain that employees should be respectful of others when posting to a blog, and should assume that people, including co-workers, are reading the blog;
- The policy should cross-reference any related employer policies such as the proper use of electronic resources, anti-harassment and discrimination, and addressing confidential and/or insider information;
- The policy should explain that the employer's policies regarding use of corporate logos and other branding and identity are applicable, and only individuals officially designated have the authority to speak on the company's behalf;
- The policy may explain the potential civil and criminal penalties of posting copyrighted material without authorization; and
- Perhaps most importantly, the policy should state that the employer reserves the right to take disciplinary action against an employee if his or her blog violates any of the employer's policies.

A blogging policy, or even a comprehensive communication systems policy, will not eliminate all the risks presented by employees' use of the internet. However, a well-drafted policy that reflects the employer's culture and that is legally compliant will ensure that employers have the tools to take corrective action when necessary.

We urge employers to review their existing policies and consider whether any revisions or additional policies are warranted. Please feel free to contact us for assistance. ◆

***Perhaps most importantly, the policy should state that the employer reserves the right to take disciplinary action against an employee if his or her blog violates any of the employer's policies.***

and attitude towards employees' personal use of the internet can be effective to inform employees about what conduct is – and is not – allowed, in order to protect the employer's business interests.

In developing such a policy, private-sector employers should keep in mind that, while blogging is not a constitutionally protected right of free speech, certain blogging activity may be covered by whistleblower laws, anti-discrimination laws, and the National Labor Relations Act ("NLRA"). For example, the NLRA gives all employees (unionized and non-unionized) the right to engage in "concerted activity" by discussing the terms and conditions of their employment with co-workers and outsiders. Given this protection, if an employee blogs about the terms and conditions of her employment, and restricts access to her blog to her current co-workers, her comments,

mistakenly believed that blogs are entitled to unlimited freedom of speech protection. A well-drafted policy would include:

- An introductory statement that the employer recognizes that some employees may wish to create and maintain personal web logs or "blogs," and that while the employer respects employees' rights to personal expression and views an employee's blog as the employee's personal project, an employee must also understand that his or her personal blog can impact the employer;
- A requirement that if the employee discusses his or her employment or identifies himself or herself as a employee in any way, the employee must include a disclaimer that the views expressed on the blog do not

# New Hampshire Civil Union Law Goes Into Effect

By Todd A. Newman

On January 1, 2008, New Hampshire's civil union law became effective. The law authorizes same-sex couples in New Hampshire to enter into civil unions, and makes same-sex couples "entitled to all the rights and subject to all the obligations and responsibilities provided for in state law" that apply to heterosexual couples in traditional marriages.

New Hampshire has become the fourth state to enact a civil union law, joining Connecticut, New Jersey and Vermont. Various other states, including California, the District of Columbia, Hawaii, Maine, Oregon and Washington, have similar laws that are typically styled as "domestic partnership" laws, allowing same-sex couples to enjoy certain spousal benefits, such as hospital visitation rights and inheritance without a will. (The Oregon domestic partnership law, which was scheduled to take effect on January 1, 2008, was stayed by a federal judge on December 28, 2007, in connection with a challenge to its validity.) Massachusetts remains the only state that allows same-sex marriage.

*New Hampshire has become the fourth state to enact a civil union law, joining Connecticut, New Jersey and Vermont.*

The employment-related implications of the New Hampshire civil union law are complex. This results largely from the interplay between state and federal law. In 1996, the United States Congress passed the Defense of Marriage Act (the "DOMA"), which defines "marriage" in any federal law as a legal union "between one man and one woman." The DOMA also defines the word "spouse" as a person of the opposite sex who is a husband or wife. As a result, civil unions are not recognized as "marriages" under federal law. This means that civil union partners are generally not entitled to "spousal" benefits under federal law.

This conflict is expected to pose numerous challenges in the administration of employee benefits in New Hampshire. To illustrate, although the New Hampshire civil union law appears to entitle civil union partners to cover each other under family group health and dental plans, the employee will not be entitled to a federal pre-tax deduction for the cost of the premium amount allocated to coverage for the civil union partner. This is because the civil union partner is not a "spouse" for purposes of this federal benefit.

Similarly, and by way of further example, employees in New Hampshire who are covered by the Family and Medical Leave Act still may not take time off under this federal law to care for their civil union partners—again, because civil union partners are not "spouses" within the meaning of federal law—although employers may voluntarily provide an identical benefit to civil union partners by contract or policy.

Clearly, though, employee spousal benefits governed solely by New Hampshire law must now be extended to civil union partners. This includes employee spousal benefits required by state statute, as well as employee spousal benefits provided through employment contracts and policies.

We recommend that organizations with New Hampshire employees promptly audit their employee benefits and payroll policies and practices to ensure that (a) all employee spousal benefits implicating both federal law and the New Hampshire civil union law are administered in a way that violates neither and complies with both, and (b) all employee spousal benefits governed solely by New Hampshire law extend equally and unambiguously to civil union partners.

We are available to address any questions you may have, and to assist as needed. ◆

## The New Form I-9 Is Here

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- Certificate of Naturalization (Form N-550 or N-570)
- Alien Registration Receipt Card (Form I-151)
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)

Also, the following document was added to List A of the List of Acceptable Documents:

- Unexpired Employment Authorization Document (I-766)

Additionally, with the new Form I-9 come other changes, including the following:

- Employees are not obliged to provide their Social Security Number in Section 1 of Form I-9 – unless the employer participates in E-Verify.
- Employers only need to complete the new version of Form I-9 for new employees. Employers do not need to complete new forms for existing employees for whom an I-9 has been completed. However, when re-verifying employees, employers should ensure they use the new Form I-9 with its updated list of acceptable documents.
- The Form I-9 is available in English and Spanish. However, only employers in Puerto Rico may have employees complete the Spanish version for their records. Employers in the 50 states and other U.S. territories may use the Spanish version as a translation guide for Spanish-speaking employees, but must complete the English version for their records.

If you need assistance with compliance issues, such as completing the new Form I-9, with other employment eligibility questions or with employment and business-immigration questions in general, please do not hesitate to contact the Firm. ◆

## New Jersey Employers Be “WARNed!” State Enacts New Mass Layoff Law

By G. Michael Palladino

The state of New Jersey has enacted a “Mini-WARN” law in an attempt to supplement employer obligations under the federal Worker Adjustment and Retraining Notification Act (“WARN Act”). While the new state law mirrors the federal WARN Act in many ways, New Jersey employers should be aware that the new law does expand employer notice requirements in the event of a plant closing or mass layoff, and significantly stiffens penalties for non-compliance. Employers in other states are reminded that sixteen (16) states now have their own laws that may provide additional protections to employees in the event of a plant closing or mass layoff.

Effective December 20, 2007, the Millville Dallas Airmotive Plant Job Loss Notification Act (the “Mini-WARN Act”), which supplements Title 34 of the New Jersey Revised Statutes, governs employer notice requirements in the event of a plant closing or mass layoff. Specifically, the Mini-WARN Act requires New Jersey “establishments” to provide affected employees, the Commissioner of Labor and Workforce Development, the chief elected official of the municipality where the establishment is located and any collective bargaining units with at least sixty (60) days’ notice in advance of the first employee’s termination of employment in connection with a termination or transfer of employer operations or a mass layoff. The Mini-WARN Act defines an “establishment” as a private employer with one hundred (100) or more full-time employees that has operated for more than three (3) years. An establishment may include a single location or a group of contiguous locations, including a group of locations that forms an office or industrial park, or separate facilities across the street from each other. Part-time employees, or those that work an average of fewer than twenty (20) hours per week or worked fewer than six (6) of the previous (12) months prior to the date of the required notice, are excluded from the calculation of the number of full-time employees. The law is silent as to whether the full-time employees must be located within the boundaries of the state of New Jersey for the purposes of calculating the number of employees for coverage under the new law.

The employer notice requirement is triggered by one of the following events:

- **a termination of operations**, defined as the permanent or temporary shutdown of a single establishment, or of one or more facilities or operating units within a single establishment, except because of a fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from Medicare or Medicaid program, or health care license revocation,

which results in the termination of employment of fifty (50) or more employees within thirty (30) days.

- **a transfer of operations**, defined as the permanent or temporary transfer of a single establishment to another location, inside or outside the state of New Jersey, which results in the termination of employment of fifty (50) or more employees within thirty (30) days; or
- **a mass layoff**, defined as a reduction in force which is not the result of a transfer or termination of operations, which results in the termination of employment during any thirty (30) day period for five hundred (500) or more full-time employees or for fifty (50) or more of the full-time employees representing one third (1/3) or more of the full-time employees at the establishment.

*Employers in other states are reminded that sixteen (16) states now have their own laws that may provide additional protections to employees in the event of a plant closing or mass layoff.*

The New Jersey law’s definition of transfer or termination of operations is broader than the federal WARN Act “plant closing” definition and does not provide the notice exceptions for “faltering company” or “unforeseeable business circumstances,” as provided under the federal law. However, the new law does provide a new exception for a layoff of more than six (6) months which, at the outset, was announced to be a layoff of six (6) months or less, but required an extension of the layoff due to “business circumstances not reasonably foreseeable” at the time of the initial layoff.

Similar to the federal WARN Act, the New Jersey Mini-WARN Act has an aggregation provision, whereby the notice requirements may be prompted by a series of

smaller reductions in force over a ninety (90) day period, but where the termination numbers add up to a number that would otherwise require WARN notice. Similarly, the employer may demonstrate that there are separate and distinct causes for each of the smaller terminations in order to fall outside the notice requirements.

The content of the employer’s notice under the New Jersey Mini-WARN Act is significantly more expansive than is required by the federal WARN Act. Specifically, the notice to the affected employee must contain the following:

- A statement of the number of employees whose employment will be terminated in connection with the mass layoff or transfer or termination of operations of the establishment, the date or dates on which the mass layoff or transfer or termination of operations and each termination of employment will occur;

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- A statement of the reasons for the mass layoff or transfer or termination of operations;
- A statement of any employment available to employees at any other establishment operated by the employer, and information regarding benefits, pay and other terms and conditions of that employment and the location of the other establishment;
- A statement of any employee rights with respect to wages, severance pay, benefits, pension or other terms of employment as they relate to the termination, including, but not limited to, any rights based on a collective bargaining agreement or other existing employer policy;
- A disclosure of the amount of the severance pay being paid, if the employer has failed to give the required notice in a timely manner; and
- A statement of the employees' right to receive, from a newly created State Response Team, information, referral and counseling regarding: public programs that may make it possible to delay or prevent the transfer or termination of operation or mass layoff; public programs and benefits to assist the employees; and employee rights based on law.

Finally, the New Jersey Mini-WARN Act provides significantly stiffer penalties for employer non-compliance with the notice requirements. For example, providing the prospectively terminated employee with only one (1) day less than the required notice would expose the employer to a severance payment to the employee equal to one week of pay for each full year of employment. The severance payment rate is calculated at the average rate of compensation for the employee during the past three (3) years or the employee's last rate of compensation, whichever is higher. This severance payment penalty may be offset by any back pay damages paid due to a violation of the federal WARN Act. Moreover, while under the federal WARN Act a delayed notice would entitle the employee to damages equal to back pay for each day the employer failed to provide notice, the New Jersey Mini-WARN Act would provide back pay damages to the employee in the amount of one day's pay times sixty (60) (for the entire sixty (60) days' notice period). Therefore, if an employer is one (1) day late with its WARN notice, it may be required to pay damages equivalent to an employer who provided no notice at all.

\*            \*            \*

Employers with operations in the state of New Jersey are urged to familiarize themselves with this new law in the event of a potential plant closing or mass layoff. The triggering events and notice requirements under both federal and state laws can be a minefield for employers, particularly as they relate to calculating the number of affected employees and timeframes.

We are available to assist you with a plant closing or mass layoff, drafting separation agreements and with the complex employee benefit implications of a reduction in force.

## New OSHA Rule: Employer Pays For Personal Protective Equipment

*By G. Michael Palladino*

The federal Occupational Safety and Health Administration ("OSHA") has issued a final rule (the "Final Rule") clarifying that employers generally must pay for the personal protective equipment ("PPE") that they require their employees to wear in order to comply with OSHA standards. The Final Rule becomes effective on February 13, 2008, but OSHA is giving employers until May 15, 2008 to achieve full compliance. OSHA intends to commence enforcement immediately thereafter.

The Final Rule was almost ten years in the making. In 1999, OSHA announced that it was considering a new rule concerning payment requirements for PPE. In the intervening years, OSHA sought public comment and received numerous unsolicited requests for clarification from both employer and union representatives. Although the reasons for the delay in promulgating the Final Rule are unknown, OSHA has finally resolved the uncertainty regarding who must pay for mandatory PPE.

The Final Rule does not impose new PPE requirements. Rather, it clarifies that to the extent that OSHA requires the use of PPE, the employer must pay for it, with four limited exceptions:

- Non-specialty safety-toe protective footwear and non-specialty prescription safety eyewear that the employee is allowed to wear off-site;
- Shoes with integrated metatarsal protection, if the employer otherwise provides and pays for detachable metatarsal guards;
- Logging boots, if payment responsibility under the existing OSHA standard is left open to negotiation between the employee and employer; and
- Everyday clothing, such as long-sleeve shirts, long pants, street shoes, normal work boots and certain types of weather gear, that may serve as PPE.

Under the Final Rule, employers must pay only for the minimum level of PPE required by OSHA. However, if an employer upgrades its PPE, then the employer must pay for the upgrade. If an employer provides the required PPE but an employee wishes to use alternative OSHA-compliant PPE, then the employer may approve the alternative PPE but is not required to pay for it. Similarly, an employer is not required to reimburse an employee for PPE that the employee personally owns and voluntarily asks to use.

The Final Rule does not apply to PPE that is not required by OSHA, such as work uniforms, or sanitary equipment used in food service or health care for purposes of protecting food

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## New OSHA Rule: Employer Pays For Personal Protective Equipment

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and consumer/patient health.

The purposes of the Final Rule are to: (i) provide OSHA with an enforcement tool to ensure that the employer pays for any means necessary to create a safe and healthful workplace; (ii) decrease the incidence of work-related injury and disease; and (iii) clarify for employers and employees any confusion over which PPE employers must furnish at no cost to employees.

In this regard, OSHA expressed concern that employees who are required to pay for their own PPE might “cut corners” and fail to provide themselves with adequate protection. In OSHA’s view, requiring employers to pay for mandatory PPE is more likely to ensure that the PPE is correct and in good condition. The new pay rule is also expected to improve the workplace safety and health culture by encouraging employees “to participate whole-heartedly in an employer’s safety and health program.”

### The Race is On – Plan Now for Fiscal Year 2009 H-1B Visas

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annual visa cap does not apply to H-1B visa transfers or foreign nationals in H-1B status who have pending applications for permanent residence and need to obtain annual extensions of their H-1B status until a determination is made regarding the application for permanent residence.

In addition, 20,000 additional visas are available during FY2009 to foreign nationals who hold an advanced degree from a U.S. academic institution (commonly referred to as “advanced degree” H-1B visas). Employers should consider using this category of H-1B visa for candidates who meet the educational requirements of the advanced degree.

We strongly encourage employers to prepare new H-1B petitions promptly because the annual allotment of visas will likely be exhausted within the first day of filing eligibility. Last year, the annual allotment was effectively exhausted the first day! The Firm intends to file all of our clients’ H-1B petitions for FY2009 on April 1, 2008, and we are requesting that clients provide all required documents to Schwartz Hannum PC no later than March 1, 2008. We also suggest that all applications be filed “Premium Processing” to increase the likelihood of capturing an available visa.

We understand that this is an issue of significant and immediate concern to employers. The Firm regularly assists employers with preparing and processing employment-based non-immigrant and immigrant visa applications. We welcome the opportunity to assist you or to answer any questions that you may have. ◆

OSHA’s PPE requirements arise from the Occupational Safety and Health Act, which directs every employer “to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” OSHA implemented this directive by formulating safety and health standards for various industries. The OSHA standards specify when PPE is required but are largely silent as to who must pay for it. The Final Rule fills this gap.

During its development of the Final Rule, OSHA discovered a wide disparity among employers regarding who paid for mandatory PPE. OSHA noted that the disparity was caused by many factors, including varying provisions of collective bargaining agreements and tradition. OSHA found that, in some instances, the employer and employee split the cost of mandatory PPE, while in other cases, either the employer or the employee paid for the more expensive or technologically-advanced equipment, leaving the other to pay for the more “common” PPE.

In light of the Final Rule and its limited compliance grace period, employers should review and, as necessary, revise their PPE policies and practices to achieve full compliance. (A full text of the Final Rule and Supplementary Information can be obtained at the U.S. Department of Labor’s OSHA website at [www.osha.gov](http://www.osha.gov).) As failure to comply with the Final Rule and related PPE requirements can result in substantial civil and criminal penalties, including fines and imprisonment, employers should undertake this review promptly. We are available to assist in determining which PPE is mandatory in your industry and your corresponding payment obligations. ◆

*The new pay rule is also expected to improve the workplace safety and health culture by encouraging employees “to participate whole-heartedly in an employer’s safety and health program.”*

If you prefer to receive a copy of the Firm’s Labor and Employment Law Update by e-mail in pdf (portable document format), please contact Anu Gupta-Lundberg at [alundberg@shpclaw.com](mailto:alundberg@shpclaw.com) or (978) 623-0900 to let us know and to provide us with your correct e-mail address. (As you may know, you must have Adobe Acrobat Reader to view the Update in pdf format.)

A searchable archive of past Update Articles and E-Alerts is available on the Firm’s website, at [www.shpclaw.com](http://www.shpclaw.com).

## Employers Can Restrict Union Use of Employer E-mail System

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damentally “changed the pattern of industrial life” at the newspaper to justify such a limitation on the newspaper’s property rights. The NLRB then ruled that employees do not have a statutory right under the NLRA to use an employer’s equipment or media to conduct NLRA-protected communications.

In the decision, the NLRB also modified its standard for determining whether an employer applied an e-mail usage policy in a discriminatory manner to adversely affect protected NLRA-related communications to employees. In the past, if an employer permitted employee use of the e-mail system for any personal purpose, the employer generally lost all rights to prohibit any other type of personal use based on the NLRB’s broad view of disparate treatment. In this decision however, the NLRB clarified, and narrowed, its disparate treatment analysis to “communications of a similar character.” In so ruling, the NLRB rejected its past rulings in the bulletin board context that held employers violated the NLRA when they allowed personal, non-work related postings like wedding announcements and for-sale notices, but prohibited the posting of solicitations generally.

This decision indicates that going-forward, the NLRB will distinguish between individual and personal non-work-related postings, such as for-sale notices and wedding announcements, and “group” or “organizational” postings such as union materials. Employers may now, without violating the NLRA, distinguish between charitable solicitations and non-charitable solicitations; solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products); and invitations for an organization and invitations of a personal nature. An employer will still violate the

NLRA if it permits employees to solicit for one union but not another, or if it permits solicitation by anti-union employees but not solicitation by pro-union employees.

Applying this standard, the NLRB found that the newspaper did not violate the NLRA when it disciplined the employee/union president for sending union-related e-mails even though it allowed other employees to send personal e-mails for social gatherings and other non-work-related announcements.

In short, this decision means that absent a statutory basis in the NLRA for an asserted employee right to use employer’s e-mail systems for union organizational purposes, and in the absence of disparate treatment, employers may prohibit unions from using company e-mail for union organizing.

Based on this decision, employers should review and, if appropriate, consider revising relevant policies contained in handbooks and policy manuals regarding the use of employer communication systems. This decision provides NLRB-precedent for employers to prohibit personal use of employer e-mail systems. Moreover, if an employer determines that enforcement of such a policy is not feasible, the employer may implement a policy that allows certain types of personal use of the employer’s e-mail system, but prohibits all types of solicitation. Employers should consult with counsel when considering whether to implement or revise an existing communication systems policy.

As always, if you have any questions regarding this decision or communication systems policies in general, please do not hesitate to contact the Firm. ◆

## States Continue To Enact Restrictions On Mandatory Overtime For Nurses

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Any employer who willfully violates this new law may be subject to a penalty of up to Two Thousand Five Hundred Dollars (\$2,500).

### Federal Legislation

In addition to state legislation, bills have been introduced at the federal level to limit mandatory overtime for nurses and impose minimum nurse staffing ratios on certain health care providers participating in the Medicare program. Pursuant to the Safe Nursing and Patient Care Act of 2007, a Medicare provider would be prohibited from requiring a nurse to work in excess of any of the following: (i) the scheduled work shift or duty period of the nurse; (ii) twelve (12) hours in a twenty-four (24)-hour period; or (iii) eighty (80) hours in a consecutive fourteen (14)-day period, except during a declared state of emergency. Under the Registered Nurse Safe Staffing Act of 2007, hospitals participating in Medicare would be required to

adopt and implement a staffing system that ensures a number of registered nurses on each shift and in each unit of the hospital to ensure appropriate staffing levels for patient care. Identical bills were introduced in the House and Senate and have been referred to the appropriate Committees for consideration. Whether, or the extent to which, these bills will become law is uncertain.

### Impact of Legislation

Health care entities in Rhode Island and New Hampshire must ensure they are in compliance with these new laws. We will continue to keep you informed of pending state and federal legislation that may affect overtime and staffing procedures in the near future.

If you have any questions about healthcare related employment issues in any of the states in which you operate, please contact one of the Firm’s attorneys for assistance. ◆

# States Continue To Enact Restrictions On Mandatory Overtime For Nurses

By Jessica L. Herbster

Widespread concern regarding overworked nurses and patient safety has led Rhode Island and New Hampshire to join a growing number of states (including Maine, Connecticut and New Jersey) that restrict or prohibit mandatory overtime for nurses. Proponents of this type of legislation have argued that nurses who work more than twelve (12) hours per day are exhausted, less efficient, and at risk for making mistakes that harm patients, and that job dissatisfaction and overtime work have contributed to the departure of many qualified nurses from the profession.

## Rhode Island

Beginning March 4, 2008, health care facilities in Rhode Island will be fined if they require nurses to work overtime in excess of an agreed to, predetermined scheduled work shift of eight (8), ten (10), or twelve (12) hours, unless there is an unforeseeable emergent circumstance. "Unforeseeable emergent circumstance" is defined under the Rhode Island law as an unpredictable occurrence relating to health care delivery that requires immediate action, including a major power outage, a public health emergency, an irregular increase in patient census, or an irregular increase in the number of employees not reporting for predetermined scheduled work shifts. The law does not apply in the event of an unforeseeable emergent circumstance when: (i) the overtime is required only as a last resort and is not used to fill vacancies resulting from chronic short staffing; and (ii) the employer has exhausted reasonable efforts to obtain staffing. Even in the event of an unforeseeable emergent circumstance, no health care facility may require a nurse or nurse assistant to work in excess of twelve (12) consecutive hours.

The new law applies to all nurses and nurse assistants who work on an hourly basis in any private, public, or state hospital. The law does not apply to certified registered nurse anesthetists, resident physicians, or employees who are working pre-scheduled "on-call time" in the surgical department of a health care facility. While nurses and nurse assistants may

voluntarily agree to work overtime, employers cannot discipline these employees for refusing overtime. The law is not intended to negate any rights an employee may have pursuant to a collective bargaining agreement.

Any employer who violates the law will be subject to a fine of Three Hundred Dollars (\$300) for each violation.

## New Hampshire

As of January 1, 2008, registered nurses, licensed practical nurses, and licensed nursing assistants in New Hampshire cannot be disciplined, or lose any right, benefit, or privilege for refusing to work more than twelve (12) consecutive hours. The prohibition does not apply to:

1. A nurse participating in surgery, until the surgery is completed;
2. A nurse working in a critical care unit,

until another employee beginning a scheduled work shift relieves him or her;

3. A nurse working in a home health care setting, until another qualified nurse or customary caregiver relieves him or her;
4. A public health emergency; or
5. A nurse covered by a collective bargaining agreement containing provisions addressing the issue of mandatory overtime.

If a nurse is required to work more than twelve (12) consecutive hours under any of the above-listed circumstances, the nurse must be allowed at least eight (8) consecutive hours of off-duty time immediately following the worked overtime.

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## Employers Can Restrict Union Use of Employer E-mail System

By Mary Pat Hagan

In a long-awaited decision, the National Labor Relations Board ("NLRB") has ruled that employers may prohibit employees from using employer e-mail systems to send union-related messages even when the employer allows – or merely tolerates – employees' personal use of the employer's e-mail system.

In a 3-2 decision, the NLRB majority ruled that such an e-mail policy, of a newspaper based in Eugene, Oregon, "The Register-Guard," did not violate the National Labor Relations Act ("NLRA"). The newspaper's written policy limited employee e-mail use to business-related purposes and explicitly prohibited the use of e-mail for "non-job-related solicitations." In practice, however, the newspaper allowed a number of non-work-related employee e-mails, such as invitations for social gatherings, jokes, baby announcements, and ticket offers. Significantly, though, there was no evidence that the newspaper permitted e-mails urging support for groups or organizations.

The case arose after the newspaper issued two written warnings to an employee who was also president of her union, after the employee/union president sent e-mails to fellow employees about union activities and urging support for the union.

The NLRB's General Counsel argued that e-mail had become the principal means for employee communication at work, and therefore, employees should have greater rights to use their employer's e-mail systems compared to other types of employer property. However, the NLRB rejected this argument, finding instead that e-mail had not so fun-

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# Risky Business For Physicians: Practical Tips for Limiting Liability

*Presented by Sara Goldsmith Schwartz  
Managing Partner, Schwartz Hannum PC*

The ever-changing demographics and legal protections in today's work environment, whether in an office or an operating room, often foster ambiguity about the parameters of acceptable workplace behavior. Providing excellent medical care while maintaining a work culture that effectively accepts and incorporates differences, is possible, but only where the commitment to diversity and sensitivity in the workplace is universal. This seminar qualifies for Risk Management CME credits, and can be tailored for physicians who are employed by a health care institution and/or physicians who merely have medical staff privileges at a health care institution.

This interactive presentation will transcend typical diversity and sensitivity programs to address the unique issues that physicians encounter when managing employees and working with patients and family members. Physicians will learn about developing areas of employment law and how risky subjects can lead to harassment, discrimination, retaliation and other legal claims. This program will focus on practical solutions for effectively managing workplace diversity, as well as the potential individual and corporate exposure resulting from a failure to appropriately adapt behavior and conduct.

## Topics may include:

- The Hospital's Written And Unwritten Codes Of Conduct
- Risky Subjects That Lead To Workplace Complaints
- Harassment: It's Not Just About Sex Anymore
- Avoiding The Cursed Lawsuit By Swearing Not To Swear
- Bullying In The Workplace
- Improving Communication Skills Despite Language Barriers
- Trends In Discrimination Law: Transgender Employees And Family Responsibilities Discrimination
- Why Do Patients And Family Members Have Similar Rights As Employees?
- The Physician's Unique Responsibilities As A Manager
- The Physician's Role When Misconduct Occurs

*For information regarding this presentation, please contact Sara Goldsmith Schwartz at 978-623-0900 or [schwartz@shpclaw.com](mailto:schwartz@shpclaw.com)*



## About Sara Goldsmith Schwartz

Schwartz Hannum PC is a law firm based in Andover, MA, providing labor and employment counsel to a wide variety of businesses and non-profit organizations, including many health care institutions and medical practices.

Sara Goldsmith Schwartz, Managing Partner, is a *cum laude* graduate of both Yale College and Harvard Law School. She began her legal career at the law firm of Ropes & Gray in Boston, after completing a federal court clerkship with The Honorable William Young in Boston. Sara's practice includes the representation of employers with respect to employment discrimination claims in government agencies and courts throughout the United States, as well as counseling clients and representing them with respect to traditional labor law issues. Sara is a frequent speaker at seminars for attorneys, human resources professionals and physicians.

Sara was listed in the November 2007 issue of *Boston Magazine* and in *Massachusetts Super Lawyers 2007*, for the fourth consecutive year, as a Super Lawyer and top Labor and Employment attorney in Massachusetts. In 2006 and again in 2007, Sara was recognized by *Chambers USA* as a leading attorney in her area of expertise. *Chambers* publishes guides world-wide on law firms and lawyers and is a highly recognized leader in its field. Sara generated impressive feedback from *Chambers'* research sources who in 2006 cast her as a "smart and tenacious lawyer. She has the drive and determination to succeed." In 2007, sources described her as "a businesswoman: diligent, thorough and always prepared," with an "aggressive and adversarial style, much appreciated by her clients." Sara was selected as one of the "Up and Coming Lawyers in Massachusetts" in 2001 by *Massachusetts Lawyers Weekly*.

# Employment Law Boot Camp For Managers

*Do you know just enough about human resources practices and employment law to be dangerous?*

Schwartz Hannum PC has developed an intensive human resources skills development program in response to the growing challenges confronting our clients. Presented in an interactive seminar format, Employment Law Boot Camp For Managers reinforces participants' existing knowledge of fundamental employment laws and personnel practices by exploring major risk areas and problem-solving strategies. Expert attorney instructors will provide extensive written resources, engaging real-life role-plays, and valuable networking opportunities for participants. Participants will receive a comprehensive Toolkit containing essential compliance forms, checklists and guidance.

## Topics will include:

- Hiring And Firing Traps And Strategies
- Effectively Managing And Documenting Employee Performance
- Background Checks And Substance Abuse Testing For The Uninitiated
- Risk Factors That Cause Discrimination Claims
- Critical Employment Policies That Help Limit Liability And Exposure
- Limiting Exposure To A Wage And Hour Complaint
- Employee Rights And Responsibilities Related To Family, Medical And Other Leaves of Absence
- Employee Safety In Manufacturing And Non-Manufacturing Environments
- Harassment – It's Not Just About Sex Anymore
- How To Conduct An Investigation Of Employee Misconduct
- Employment, Severance, Non-Competition And Non-Disclosure Agreement Basics
- Union Avoidance For All Employers

## Who should attend?

Human resources managers and all level of managers, from senior-level managers to front line supervisors.

## Employment Law Boot Camp For Executives

Schwartz Hannum PC has also developed *Employment Law Boot Camp For Executives* – a similar program, covering the same topics in a more condensed fashion, expressly tailored for busy C-level executives (e.g., CEO, COO, CFO, CTO, CMO and CHRO). This abbreviated but intensive six-hour program provides a targeted overview of the topics listed above and addresses the unique human resources challenges facing C-level executives.

Please contact Elizabeth Morin or visit the Firm's website at [www.shpclaw.com](http://www.shpclaw.com) for details about dates and times for the Executive Program.

## Spring Registration Now Open

### Location:

Schwartz Hannum PC  
11 Chestnut Street  
Andover, MA 01810

### Spring, 2008 – Session I

8:30 a.m. to 11:30 a.m. on March 26, April 2, 9, 16 and 23

### Spring, 2008 – Session II

1:00 p.m. to 4:00 p.m. on May 1, 8, 15, 22 and 29

For each session, tuition is \$850 (\$750 per person for additional participants from same organization).

*Registration is limited. There will be a maximum of 15 participants per session.*

**To register, please contact Elizabeth Morin at (978) 623-0900 or [emorin@shpclaw.com](mailto:emorin@shpclaw.com).**

Schwartz Hannum PC also presents *Employment Law Boot Camp For Executives* and *Employment Law Boot Camp For Managers* at client facilities, tailoring it as requested with some or all of the above-listed topics in single or multi-day programs. For more information, please contact Mike Palladino at (978) 623-0900 or at [mpalladino@shpclaw.com](mailto:mpalladino@shpclaw.com).