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OF COUNSEL – SPRING 2006
the newsletter of

NORTHEASTERN UNIVERSITY
OFFICE OF THE UNIVERSITY COUNSEL

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Performer Withholding

Recent changes in Massachusetts state tax law now require the University to withhold taxes from payments made to performers (e.g. athletes, musicians and lecturers), instead of treating such persons as independent contractors. The definition of “performer” includes persons such as actors, musicians, dancers, writers, directors, coaches, trainers, celebrities, lecturers and production crews.

Due to the University’s nonprofit status, withholding is only required when total payments to all performers at a single event exceed \$10,000 (multiple performances within a short, defined period of time may count as a single event). If this threshold is reached, the university must withhold tax from payments made to individual performers or performing entities *only if* Northeastern has paid those performers or entities more than \$5,000 during the calendar year.

It is likely that withholding will only apply to performers who are not Massachusetts residents. Resident performers or performing entities who maintain an office in Massachusetts and who are up-to-date with their Massachusetts income taxes may apply to the Massachusetts Department of Revenue (DOR) for a waiver from the new withholding regulations. Waivers may also be obtained by performers who are already Northeastern employees, or by performing entities who are registered in Massachusetts to withhold taxes as an employer. **WAIVERS MUST BE OBTAINED AT LEAST 10 DAYS PRIOR TO THE EVENT!!**

If a performer is subject to withholding because they performed at an event for which more than \$10,000 was paid, AND because they received at least \$5,000 from the university in gross payments during that year, AND they have not obtained a waiver, Northeastern MUST withhold part of the payment as tax. The amount withheld should be equal to the individual income tax rate for Massachusetts (currently 5.3%) times the gross payment to the performer, and is payable to the DOR in the same manner as regular employee withholding.

Please note that this change applies only to the state of Massachusetts and does not affect federal tax law. **FAILURE TO COMPLY WITH THE LAW CAN RESULT IN CIVIL AND CRIMINAL PENALTIES!!!**

Example 1:

Three bands are coming to perform at Northeastern’s SpringFest. The first band, “Tax Law,” is paid \$7,000 for their set. The second band, “School Rocks,” is paid \$4,000 for their set. The third band, “Husky Love,” is paid \$6,000 for their set. This is the only Northeastern performance for all three bands during the year. Husky Love, a Boston-based group whose members are current with their Massachusetts state taxes, obtains a waiver from DOR two weeks prior to the show and thus is exempt from any withholding. School Rocks does not meet the \$5,000 individual

threshold and therefore is also not subject to withholding. Tax Law, however, was paid more than \$5,000 for a performance for which \$17,000 total was paid. Northeastern must withhold \$371 ($\$7,000 \times 5.3\%$) from its payment to Tax Law.

Example 2:

Danny Tanner is paid \$3,500 per lecture to present a series on microbiology for Northeastern's science club. He presents lectures in February, March and April. He is the sole lecturer at all three events. While Mr. Tanner's payments for the year do total more than \$5,000, no withholding is required, since none of the event totals exceeded \$10,000.

Example 3:

Former President Bill Clinton appears as the keynote speaker for commencement. Northeastern pays him \$50,000 for his services. Because the event total is more than \$10,000 and Clinton has received more than 5,000, Northeastern must withhold \$2,650 ($\$50,000 \times 5.3\%$) from his payment.

The following are commonly raised questions and responses regarding performer withholding:

Question 1:

Who is a "performer"?

Answer:

According to the Massachusetts Department of Revenue, a "performer" can be:

"(a) an athlete such as a wrestler, boxer, golfer, tennis player, sports team member or other athlete who is paid for competing, demonstrating, making a public appearance, or endorsing merchandise, as well as a person paid to further an athlete's performance or an athletic event, performing services such as owner or leader of a performing entity; agent or manager of a performing entity or performer; referee, coach, or trainer; member of a production crew; or

(b) a paid entertainer or speaker, such as an actor, singer, musician, dancer, circus performer, comedian, celebrity, public speaker or lecturer, as well as any person paid to further an entertainer's or speaker's performance such as owner or leader of a performing entity; agent or manager of a performing entity or performer; or writer, director, coach, designer, or member of a sound, light, stage or production crew."

Question 2:

How do I obtain a waiver?

Answer:

Waivers can be downloaded and printed from DOR's website at:

http://www.dor.state.ma.us/Forms/Wage_Rpt/PDFs/pwh_ww.pdf

Waivers must be filled out and mailed to DOR at least ten days before the performance. If the waiver request is granted, DOR will send a notice to Northeastern and the performer.

Question 3:

What is a “performing entity”?

Answer:

According to the DOR, a “performing entity” is “a corporation, partnership, limited partnership, limited liability company, corporate trust or other entity that employs, engages, or comprises one or more performers.”

Question 4:

Who is responsible for withholding?

Answer:

When Northeastern University contracts directly with performers, it must register as the performer withholding agent and will be responsible for any withholding associated with that performance. If Northeastern contracts with a performer through an agent, the agent is responsible for any withholding associated with that event.

Question 5:

Where can I go for more information about this topic?

Answer:

For more information, visit the Department of Revenue’s performer withholding directives site at:

http://www.dor.state.ma.us/rul_reg/dir/dir_05_4.htm

or check out the Guide to Withholding Taxes on Performers and Performing Entities at:

<http://www.massdor.com/Publ/PDFS/performers.pdf>

Subpoenas and Background Checks

It has been brought to the attention of the University Counsel’s Office that there is some confusion over what to do when a university department or staff member is served with a court subpoena. Please be advised that the Counsel’s Office is the registered agent for Northeastern University, meaning that ***all subpoenas must be served on the Counsel*** and should not be directed to any other department.

A subpoena is an official court document that requires the recipient to appear in court, and often to produce documents. If you are served with a subpoena, please inform the server that you are not authorized to receive it and ask that they bring it directly to the University Counsel’s office. This is extremely important. Please do not try to execute the subpoena’s request on your own, even if the request seems simple and straightforward, as it may have serious legal consequences on the University. Once the University Counsel receives the subpoena, we may ask your department to produce certain records or other information requested in the subpoena. Generally, the registrar’s office facilitates this process, and may also ask you for documents. We ask that you please cooperate with the registrar’s office and respond quickly to their needs. If you have any questions about requests, please feel free to contact our office.

In addition to persons serving subpoenas, you may also be approached by someone who is looking for private information about a student or who wants to perform a background check. Please be advised that anyone requesting these items should be directed to the Counsel’s office. It

is imperative that we check an individual's credentials before providing him or her with confidential documents.

It is hoped that this process will make your jobs easier and will provide a streamlined and efficient way to handle information requests. If you have additional questions, please contact the Office of the University Counsel at x2157.

Contracts

As many of you know, The Office of the University Counsel processes between 2,500 and 3,000 contracts each year. In order to streamline this process and return completed contracts to all of you more quickly and efficiently, we have created a contract cover sheet which is attached to this newsletter. We ask that you please fill out the attached cover sheet for every contract that you submit to the University Counsel's Office. In providing us with brief answers to a few questions, you can help save time and money for the University.

When completing the cover sheet, please be prepared to provide the following information: 1) whether the submitted contract is for a term of more than one year, 2) whether the contract is based on a Northeastern template, and 3) whether Northeastern has a preexisting relationship with the contracting party. This information will help us decide whether board approval is needed for the contract, and will reduce unnecessary efforts in locating preexisting agreements. Thank you for your cooperation on this matter.

University Emails

There is no doubt that emails have taken on an essential role in the conduct of University business. While such a system obviously provides countless benefits in terms of facilitating communication between departments and individuals, please be advised that such communications can have serious legal effects. The following are some of the current problems that may arise in conjunction with email communications between staff and faculty on campus.

Emails Can Create Binding Contracts

Under the Uniform Electronic Transactions Act (UETA), adopted in Massachusetts in 2003, and the Electronic Signatures in Global and National Commerce Act ("E-Sign"), passed by Congress in 2000, communications exchanged through email cannot be denied legal effect simply because the communicator's signature was provided electronically. In other words, including your name at the bottom of an email can be equivalent to signing it on a piece of paper, and can lead to mistakenly creating an unintended contract which binds the University.

In a 2001 decision, *Shattuck v. Klotzback*, the Massachusetts Superior Court found that information sent via email from one party to another can create or alter a binding legal contract. In *Shattuck*, a series of email communications were exchanged between the owner of a home and potential buyers. According to the court, the parties had formed an agreement as to the essential terms of the contract to sell the property. Because all emails included the parties' names at their conclusion, the writings were sufficient to create binding legal duties. The *Shattuck* case has serious implications for how organizations such as Northeastern conduct business. Please be aware when sending emails that you do not include any language that could potentially be construed as negotiating or amending terms of a contract. Remember, even "unsigned" documents can be given legal effect.

Emails can Lead to Claims for Defamation and Harrassment

In addition to the problems associated with contracts, emails can also serve as a basis for libel and harassment claims. These claims can be enforced against the University as an entity as well as the individual who sent the email.

Libel occurs when an individual publishes false information about another in writing, where such information causes damage to that person's reputation. Recent court decisions have shown that the sending of defamatory information across the Internet via email can form the basis of a libel claim. These decisions come in a time where more and more people are using electronic media to offer opinions and viewpoints on a variety of topics. Please remember to be professional and courteous in emails sent from your Northeastern account. While it is clear the First Amendment protects your right to free speech, it is important to avoid using insensitive language or personal attacks in emails as well as in chat rooms, blogs¹, or other Internet sites.

Also, please do not include private or personal information in University emails sent from your Northeastern account. While the message may only be intended for its recipient's eyes only, it is very possible that other people may see it. Sexual content in University emails is strictly prohibited. As a reminder, the University reserves the right to monitor its employees' emails on the University's network. It is the responsibility of every employee to adhere to the Northeastern University Appropriate Use Policy in regards to information systems use. This policy prohibits the use of the University network for unlawful purposes, such as defamation or harassment.

Emails are Admissible in Court as Evidence

In this new era of electronic communication, emails have become an extremely useful tool in litigation. Email communications create lasting records can be used as evidence if they meet the same standards for admissibility as other non-electronic documents. With this in mind, you should treat every email you send as a document which could potentially appear in court. As Northeastern employees, it is your role to portray the University, along with its faculty and staff, in the best possible light and to use sound judgment when communicating via email.

REMEMBER - ANYTHING YOU INCLUDE IN AN EMAIL CAN BECOME THE SUBJECT OF LITIGATION!!!

Summer Camps / Minors on Campus

Summer will be here soon, and Northeastern will be home to several youth camps. While these programs add an exciting element to the campus during the summer months, it is important to be aware of potential liability issues regarding minors on campus. For more information on this topic, please come to our brown bag lunch series this summer, beginning ??????

'Of Counsel' has been prepared as a general summary of important legal developments in higher education. It is not intended as individual legal advice. This edition of 'Of Counsel' was prepared with the assistance of NU Law School student Erin Baggeroer. Should you have any questions or need information concerning a specific situation or any of the content of this advisory, please contact the Office of University Counsel, 155 Churchill Hall, x2157.

¹ "blogging" was discussed in the previous issue of 'Of Counsel.'

