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OF COUNSEL – WINTER 2006
the newsletter of

NORTHEASTERN UNIVERSITY
OFFICE OF THE UNIVERSITY COUNSEL

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Immigration Issues

Green Card Policy

The University will support permanent residency petitions (green cards) for tenure track faculty on the first anniversary of their employment with Northeastern. Green cards for other academic research-based appointments may be considered on a case-by-case basis and must be approved by the Office of the Provost. U.S. Citizenship and Immigration Services (USCIS) regulations do not allow green card petitions to be filed by an employer on the basis of outstanding researcher for post-doctoral and other positions that are *grant funded*.

Offers of employment may NOT promise permanent residency. Also, employees may not seek employment-based visas through private channels: all must go through the University. No University funds may be used to pay private counsel legal bills directly or through reimbursement of the employee.

Immigrant Visa Availability

The State Department has advised that employment-based immigrant visas are currently not available in the category of EB3 (professional and skilled workers) for all countries, and are limited in the other employment-based categories of EB1 and EB2 (extraordinary ability and outstanding professor/researcher, and advanced degree professionals) for nationals of India and China. Pending applications to adjust status (I-485s) in the category of EB3 are backlogged with priority dates ranging from January 1998 to March 2001, depending upon the country. Individuals who are seeking green cards through these categories may not submit an application (I-485) until the priority date on their approved I-140 is reached. Similarly, individuals for whom an I-140 and I-485 has been submitted by the University and whose country of origin is India or China, should expect delays in processing the I-485. Following are commonly raised questions and responses regarding green card terminology:

Question 1:
What is a "visa number"?

Answer:
Each year, the United States makes available a specific number of visas. Each country is allotted a certain amount of slots, known as visa numbers. Securing a visa number is like taking your place in line. Whether a visa number is available depends on the country from which the applicant comes, the demand for visas in the relevant category and the rate at which green card applications are being processed by the government.

Question 2:
What is a "priority date"?

Answer:
Visa numbers are assigned chronologically according to the date the immigration petition or application for permanent labor certification was received. This date is known as the priority date and establishes a "first come, first served" policy.

Question 3:
What is "visa number retrogression"?

Answer:
When the US Department of State determines that there are more qualified applicants than visa numbers, a backlog of visa applications develops. The Department of State then sets a cut-off date as to the last priority date eligible for a visa number. Applicants with priority dates after the cut-off have to then wait in line until their numbers again become current. This is known as retrogression.

Question 4:
If my application to adjust status (get a green card) has been pending for a long time, is it still subject to the current numbers and the retrogression?

Answer:
Yes. All pending applications are subject to the retrogression and the availability of visas. There is no way to predict when the categories will free up, but concerned individuals can check the Visa Bulletin found at www.State.gov to determine the current priority dates for various categories. Processing times for applications that have been assigned a priority date can be checked at www.USCIS.gov at the link for processing times for the Vermont Service Center.

Temporary Visas: Hiring of H1B Employees

H1B visas, which are available to those in specialty occupations with specific degree and experience credentials, are employer-specific. In order to hire a candidate who currently has H1B status elsewhere, or who needs H1B status at Northeastern, a petition must be filed *before* the candidate can start and may need full approval before the candidate may start. *Please allow a minimum of four weeks before a petition must be filed and four months if full approval is required*. Please call Deanna Jantzen (ext. 2157) to learn more about hiring chronologies before committing to a start date.

Blogging

Depending on your rapport with the Internet, you may be familiar with one of the newer trends of the cyber world: the blog. Short for weblog, a blog, in its most common form, is a Web site that contains an online personal journal with reflections, comments and often hyperlinks provided by the writer. People blog about politics, their lives, their jobs and whatever else seems interesting to them. In higher education, professors sometimes use blogs to post class information and discussion.

Students, who tend to be the most internet-savvy of the University community, need to also be reminded of the issues arising when they post personal information on the Internet. Employers, for instance, increasingly search the Web for anything appearing in relation to a candidate's

name. A history of online activity that a student never meant for eyes other than friends' is easily accessible via Google or any other search engine. Impeccable performances at an interview can be easily overshadowed by personal, perhaps not wholly flattering rants posted on a blog or sites such as www.facebook.com, www.friendster.com, or www.myspace.com, on which users post profiles and comment on others' profiles.

Also, despite the fact that blogs are often educational and productive, they can also lead to problems for employers and employees, especially if an employee is devoting time to a blog during the workday and/or disclosing what may be deemed private or confidential information relative to the employer. Remember that use of Northeastern's information systems are intended for the University community's academic and administrative work. Following are some commonly raised general questions and responses about blogging:

Question 1:
Can I get fired for blogging at work?

Answer:
Yes. Companies have fired employees when their blogs are unrelated to work and employees have used work hours to write in their blogs. Separation may also be found to be appropriate when employees post private and/or confidential information on their blogs related to their employers, colleagues and/or others connected to their place of employment.

Question 2:
Can I be reprimanded or even fired for blogging about my fellow employees, even if I'm not blogging at work?

Answer:
Northeastern has a responsibility to protect its employees from illegal harassment occurring in the work environment, even if it's in the form of online text. So if your blog contains comments that could be considered harassment of a colleague, you could potentially face the same penalties as you would have faced had you harassed the fellow employee on campus, since the alleged harassment is due to a workplace relationship.

Question 3:
Doesn't the First Amendment protect my freedom of expression in the form of blogging?

Answer:
It depends. Northeastern is a private institution so it is not subject to the same First Amendment requirements that a government employer is. The University reserves the right to monitor its employees' online communications via the University's network, including e-mail. And, in any event, illegal forms of speech are not subject to First Amendment protections.

Question 4:
In general, what is the University's policy on using the network?

Answer:
The information systems of Northeastern University are intended for the use of authorized members of the Northeastern community in the conduct of their *academic and administrative work*. Any unauthorized, inappropriate, illegal or illegitimate use of the University's computing resources, or failure to comply with the Northeastern University Appropriate Use Policy will

subject the violator to disciplinary action by the University including but not limited to termination from employment.

You can find the full text of the Northeastern University Appropriate Use Policy at http://www.help.neu.edu/aupContent.html.

Gaming on University Grounds

Many gambling or its synonym, "gaming", activities are illegal under federal, state and city laws. The Commonwealth of Massachusetts deems it a crime to play cards, dice or any other game for money or other property valued at $5 or more or to bet on the sides or hands of those playing, when in a public place or on private property upon which an individual is a trespasser (Mass. Gen. Laws ch. 271, § 2). It also deems lotteries, defined as games of chance in which contestants pay money or something else of value for the opportunity to win prizes, illegal (Mass. Gen. Laws ch. 271 § 7).

As indicated in the Student Handbook, Northeastern University does not permit card playing of any kind in classrooms unless it is a regularly scheduled activity of an organization recognized officially by the Office of Student Activities. Students may not gamble, play pyramid games, conduct raffles or sell lottery tickets on University property. Social card games only are permitted in residence halls and the Curry Student Center.

There are certain exceptions. For instance, door prizes, for which there is no exchange of money, are permitted as long as everyone has an equal chance of winning and the chance is open to all attending the event. Casino or other game events are also permitted in designated areas as part of properly scheduled events, in strict accordance with regulations issued by the Office of the Vice President of Student Affairs and city and state laws. Please direct questions to the Campus Activities Office located in Room 228 Curry Student Center, ext. 2642.

Independent Contractors

Please be reminded that the law regarding independent contractors changed in July, 2004, effectively giving more individuals employee rather than independent contractor status. Under Mass. Gen. Law ch. 149, § 148B (the Massachusetts Independent Contractor Law), an individual is considered an employee *unless* he or she satisfies the following three requirements:

(1) "The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
(2) The service is performed outside the usual course of the business of the employer; and,
(3) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service provided."

In other words, to be considered an independent contractor under Massachusetts law, the individual must perform services which are outside of Northeastern's usual sphere of business and must make him or herself available to the general public for those services as well. This means that an individual is considered an employee, not an independent contractor, if the functions he or she performs are similar to those performed by regular employees. There must also be a written document explicitly stating that the individual is free from Northeastern's "control and direction."

If the Commonwealth determines that an individual should have been categorized as an employee, not as an independent contractor, an employer could be ordered to pay retroactive taxes for benefits on the individual's behalf. The additional penalties for non-compliance include

fines of up to $50,000, criminal penalties including imprisonment, and debarment from contracting work. The law also provides for **individual liability.**

Example:
Independent Contractor: A computer programmer who sets her own hours and whose technique is not only unique but also completely uninfluenced by any representative of the University, and whose services are also available to those outside the University.

Employee: An electrician whose hours and method are set by a University employee and whose work is also done by University-employed maintenance personnel. The University directs the electrician, determines how the electrician should complete the project and how long the electrician should spend on that project.

Should you have any questions or need information concerning the classification of any personnel or potential personnel, please contact the Office of Human Resources Management, ext. 2230.

Contracts

The Office of the University Counsel processes between 2,500 and 3,000 contracts each year, making it an important legal issue with which to be familiar. Northeastern's policy on contract review and processing must be adhered to by the entire University community.

Here are "The Rules":

1. Do not sign contracts yourself. A contract is any document that obligates or commits the University to doing something in exchange for another party's agreement to do something else. The Office of the University Counsel has a variety of template/draft agreements available with pre-approved language. Please contact Janet Faulkner to secure an appropriate document.

2. There are only **three individuals** authorized by the Board of Trustees to sign agreements on behalf of the University: President Richard M. Freeland, Senior Vice President Laurence F. Mucciolo and Treasurer William Kneeland.

   NOTE: Signing a contract *yourself* will subject you to individual responsibility and liability for that contract.

3. Contracts with terms longer than one year must be approved by the Board of Trustees.

4. In order to have one of these three sign your contract, a hard copy of the agreement must *first* be delivered to the Office of the University Counsel at 115 Churchill Hall for review.

5. Contracts to be reviewed must be either hand-delivered or sent by campus mail to Karen Brown, Office of the University Counsel, 115 Churchill Hall. Do not send contracts via e-mail. A hard copy of a contracts must be logged into a tracking system and no contract can be reviewed until that has been done.

6. Review will be for legal compliance and for compliance with applicable University policies. For instance, as just one example, vendor contracts are reviewed to make sure

they comply with the University's insurance requirements. Contracts are not reviewed for content. You must read and understand the terms of your contract.

7. After the contract has been reviewed and initialed by the Office of the University Counsel, it will be sent to one of the authorized parties for signature.

8. The project, event or other subject matter of the contract cannot begin until the contract is signed by all parties.

9. After signature, you will be notified that your contract is ready for pick-up. That notification will come from the office of the individual who signed the contract. We do not track the status of a contract once it leaves this Office.

10. While some agreements may be a page or two, the majority of documents exceed five pages and many are over twenty pages. In 2004, between 2,500 and 3,000 contracts came through our office. On average, that means a minimum of nine contracts a day are reviewed by this office and often more, to meet this demand. Contract law is only an aspect of the legal business handled by the Office of University Counsel. The Office represents the University in all of its varied legal matters.

    Consequently, given the sheer volume of contracts at the University, it is imperative that you allow a minimum of 10 working days for review and processing. That means *at least two weeks* after our Office has received the contract. While in the past, the Office of the University Counsel has been able to make exceptions to this time requirement, based upon the number of agreements, no such exceptions can be made without the specific approval of the Vice President and University Counsel.

11. The two-week minimum requirement is necessary to ensure the University's agreements are properly logged, reviewed and tracked. However, the complexity of some contractual relationships or other legal issues related to a particular contract may extend the review period. Therefore, you should submit your agreement as far in advance of the event or the anticipated effective date of the agreement as possible.

12. FAILURE TO TIMELY SUBMIT A CONTRACT FOR REVIEW OR FAILURE TO SUBMIT A CONTRACT AT ALL MAY RESULT IN CANCELLATION OF THE EVENT OR THE WORK TO BE PERFORMED AND MAY RESULT IN PERSONAL RESPONSIBILITY.

    NOTE AGAIN: SIGNING AN AGREEMENT ON YOUR OWN CAN ALSO RESULT IN PERSONAL LIABILITY AS WELL AS DISCIPLINARY ACTION.

Classpacs

Please read the attached NU-Announcement originally published November 28, 2005.

'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 students J. Karen Hong and Courtney Heeren. 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, 115 Churchill Hall, x2157.

MEMORANDUM

To: University Faculty Members

From: Vincent J. Lembo, Vice President and University Counsel
Professor Gerald Herman, University Copyright Officer

Re: Gnomon Copy Coursepacks Litigations

Date: November 28, 2005

As you may have read in the newspapers, two copyright infringement lawsuits have been filed in Massachusetts by several publishers. One of the defendants is Gnomon Copy.

According to the November 15, 2005 report on *Businesswire.com*, "[t]he publishers allege that Gnomon routinely duplicated and distributed copyrighted materials in the form of print coursepacks (compilations of excerpted materials) used at **Northeastern University** without obtaining copyright permission from the publishers…" (emphasis added). While we do not pass judgment on the veracity of this statement, we remind everyone of the importance of complying with federal copyright laws.

We emphasize to members of the faculty that when they authorize the publication of course materials for classroom use, they are responsible for obtaining, or insuring that their copy shop obtains, the necessary permissions to reproduce any copyrighted materials included in the coursepack. Failure to do so may result in personal liability.

NU Reprographics at Northeastern University offers a service to Northeastern University faculty members for the preparation of coursepacks. As part of this service, Reprographics routinely obtains the necessary permission to use any copyrighted material included in each coursepack. The cost of obtaining such permissions is pro-rated into the price of the coursepack when it is sold to students through the Northeastern University Bookstore.

In light of this pending litigation, we again encourage those faculty members who wish to assemble anthologies for their courses to utilize the NU Reprographics service for the preparation of such materials. For further information regarding this service, please contact Bill Corrigan at x4705 or visit Reprographics in the basement of either the Forsyth Building or the Ell Building.

For further information regarding copyright compliance, please contact Professor Gerald Herman, University Copyright Office, at x4041.