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Employment Law Outlook

Fall 2012

UNPAID INTERNSHIPS: EMPLOYERS BEWARE

William M. Furr

Several high-profile employers have recently been sued by groups of interns alleging that the wage and hour laws required the employers to pay them for the time spent volunteering/working at the employer's business. These interns have sued for back wages under the Fair Labor Standards Act and state wage and hour statutes.

In order for a company to use unpaid interns, the U.S. Department of Labor takes the position that the internship must meet all of the following six criteria. If these criteria are not met, the employer must pay the intern at least the minimum wage for such work.

1. The internship is similar to training which would be given in an educational environment;
2. The internship is for the benefit of the intern (i.e. not the employer);
3. The intern does not displace regular employees;
4. The employer derives no immediate advantage from the activities of the intern;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

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Overwhelmed by the Headlines?

Join our Employment Law Update!

Thursday, October 18, 2012
8:00am – 12:00pm
Norfolk Airport Hilton

Register at:
www.willcoxsavage.com by October 11
Approved for 3.5 hours HRCI Credit

NLRB RESTRICTS INVESTIGATORY CONFIDENTIALITY

William E. Rachels, Jr.

On July 30, 2012, in a two-to-one decision, the National Labor Relations Board (NLRB) restricted the ability of employers to request that employees not discuss the subject of an ongoing investigation with their co-workers. Such a request is probably made more often than not. Therefore, if it is not reversed on an appeal or otherwise changed, the decision has significant ramifications for both nonunion as well as unionized employers subject to the National Labor Relations Act. *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navaro,* Case 28-CA-023438.

The human resources consultant had routinely asked employees making a complaint not to discuss the matter with their coworkers while the company's investigation was ongoing. The administrative law judge (ALJ) found that such request was justified by the employer's concern with protecting the integrity of investigations. However, the Board reversed the ALJ on this point. The Board, citing its 2011 Decision in *Hyundai America Shipping Agency*, noted that to justify a prohibition on employee discussion of ongoing investigations, an employee must show that its legitimate business justification outweighs employees' Section 7 rights to act for mutual aid and protection. It found that the employer's "generalized concern" with protecting the integrity of its investigations is insufficient to outweigh employees' protected Section 7 rights.

The Board held that to minimize the impact on Section 7 rights, it was the employer's burden "to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up." This suggests that prior to making the request for confidentiality, the employer must determine that it is necessary based upon one of those specified reasons. It is also noteworthy that the two-member majority of the Board panel made no distinction between a "suggestion" and an "order." It found that those terms were equal to one another with regard to the likely reaction of employees due to the potential for discipline for noncompliance.

We can expect that this position of the Board will produce further developments. While challenges to such "suggestions" may be somewhat remote, in the interim the conservative approach would be to include such a statement of protecting the integrity of the investigation when so proceeding.■

SOCIAL MEDIA POLICIES MAY VIOLATE EMPLOYEES' RIGHTS TO VENT

Susan R. Blackman

The Acting General Counsel of the National Labor Relations Board (NLRB) has issued multiple memos addressing employees' rights in social media communications. The memos, and the NLRB opinions that led to them, outline broad protections for employees when using social media. The General Counsel's position is that any communication to a coworker complaining about the terms or conditions of employment may constitute protected activity under the National Labor Relations Act (NLRA).

Under Section 7 of the NLRA, employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. If an employee posts online comments complaining to coworkers about wages or conditions of employment, or encouraging fellow workers to push for improvements in these areas, such comments would likely be considered protected activity under the NLRA. Before disciplining an employee for any comments about the workplace, the employer should consider whether any of the employee's comments are legally protected.

The NLRB will scrutinize employers' social media policies to ensure that they do not discourage employees from exercising their rights.

Furthermore, the General Counsel has made it clear that the NLRB will scrutinize employers' social media policies to ensure that they do not discourage employees from exercising their rights. For example, the memos state that a policy prohibiting online comments that are "disparaging or defamatory" are overbroad because they might discourage an employee from complaining to a coworker about a supervisor who treats employees badly. For more information about these developments, attend our firm's Employment Law Update seminar on October 18.■

2014 - PAY THE PENALTY OR OFFER HEALTH COVERAGE?

Cher E. Wynkoop and Corina V. San-Marina

Starting in 2014, large employers (employers with 50 or more "full-time equivalent employees" during a preceding calendar year) will be required to either offer group health plan coverage to full-time employees (with a limited exemption for "seasonal employees") or pay an assessment in the nature of a nondeductible excise tax ("play or pay" penalty). Penalties are determined with reference to "full-time" employees, defined as employees who work 30 or more hours per week.

In determining whether to offer coverage or pay the excise tax, an employer will need to compare the cost of offering health coverage to the amount of excise tax, which is determined differently under a two-pronged test depending on whether an employer offers coverage to *all* of its full-time employees. For purposes of determining the amount of excise tax, an employer will need to determine the number of full-time employees whose household income is between 138% and 400% of the federal poverty level (FPL) and who will be eligible for premium tax credits for health coverage purchased through an Exchange ("subsidy eligible employee"). For 2012, 400% of the FPL is $44,680 for a single person and $92,200 for a family of four.

"No coverage" prong: A large employer who fails to offer coverage to all of its full-time employees and employs at least one subsidy eligible employee, will be subject to an annualized penalty of $2,000, determined and assessed monthly, multiplied by the number of full-time employees in excess of 30, including those who are not subsidy eligible.

Example: Let's assume that in 2014 an employer has 200 full-time employees, 50 part-time employees who work at least 30 hours per week (considered full-time employees for purposes of determining the excise tax starting in 2014) and 50 part-time employees who work less than 30 hours per week. The part-time employees are not eligible for health coverage under the employer's group health plan. Also, let's assume that the employer has at least one subsidy eligible employee. The employer will have to pay an annual penalty equal to $2,000 * (250-30) = $440,000.

"Coverage" prong: A large employer who offers coverage to all of its full-time employees, will be subject to an annualized penalty of $3,000, which is determined and assessed monthly, multiplied by the number of subsidy eligible employees. For purposes of this penalty, a subsidy eligible employee, in addition to meeting the FPL threshold, must also be offered employer coverage that is either "*unaffordable*," or that consists of a plan under which the plan's share of the total allowed cost of benefits is less than 60% and the subsidy eligible employee *declines to enroll* in the employer's plan.

Health care coverage is "unaffordable" if the premium required to be paid by the employee is more than 9.5% of the employee's household income.

For these purposes, coverage is "unaffordable" if the premium required to be paid by the employee is more than 9.5% of the employee's household income (employer can use the employee's current W 2 wages from the employer instead of the employee's household income under a safe harbor provided by the IRS). The penalty under this "coverage" prong cannot exceed the penalty that the employer would have paid had it offered no coverage, described above.

Example: Let's assume that in 2014 an employer has 200 full-time employees, 50 part-time employees who work at least 30 hours per week (considered full-time employees for purposes of determining the excise tax starting in 2014) and 50 part-time employees who work less than 30 hours per week. All employees are eligible for health coverage under the employer's group health plan. Also, let's assume that 50 of the full-time employees are subsidy eligible employees and decline employer coverage. The employer will have to pay a penalty equal to $3,000 * 50 = $150,000.

Employer Planning Issues

- Employers must make an assessment of their "at risk" population which may trigger the "play or pay" penalties, the subsidy eligible employees.
- Employers must assess the maximum cost for minimum essential coverage that may be charged to at risk employees.
- Employers must assess whether their health plans meet minimum essential benefits and a 60% value criteria.
- Employers must "do the math" to determine whether offering employer-sponsored health insurance will be an economically viable choice in light of health care reform "pay or play" rules as well as whether such offerings will continue to be considered a market competitive advantage.■

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Several states, including New York and California, have adopted their own tests to determine whether interns should be paid or not. Employers who use interns should review their programs to make sure that they comply with all state and federal requirements.

If an employer is in doubt as to whether interns should be paid or not, we recommend erring on the side of paying the interns. Paying an intern minimum wage avoids the risk of having to defend a costly and time-consuming lawsuit. While it is entirely possible that internships can be structured as permissible unpaid internships under the Fair Labor Standards Act, it is important for all employers to make sure that their program complies with the Department of Labor's strict criteria.■

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