

LAW OFFICE OF LORI A. GOLDSTEIN, LLC

CLIENT BULLETIN Summer 2013

SUMMERTIME: INTERNSHIPS AND COMPANY SOCIAL EVENTS

Internships – Paid or Unpaid and other Legal Compliance Issues

Internships have been a popular way for college and high school students to gain valuable work experience and connections. Due to the recession, now many college graduates and other unemployed folks are finding the only work available through internships, many unpaid.

Even employers aware of wage and hour regulations can be confused about how to comply, and litigation by interns is increasing. **Unpaid interns file the bulk of claims**, including recent high profile litigation against the Hearst Corporation and PBS, claiming that they should have been paid for the type of work performed. But even **paid interns are filing class actions for misclassification** (as exempt from minimum wage and overtime pay.)

The federal Fair Labor Standards Act (FLSA), which regulates overtime pay and minimum wages, requires any employer who “suffers or permits” an individual to work to pay that individual at least the minimum wage. The Department of Labor has created a **six-part test for unpaid internship exemptions**. The internship must meet *all* six parts of the test in order to qualify for the exemption:

1. Internship similar to training in an educational environment, even if actual company operations are included;
2. Experience is for intern’s benefit;
3. Intern does not displace regular employees, and works under close staff supervision;
4. Employer obtains no immediate advantage from intern activities, and sometimes operations may be impeded;
5. No guarantee of job mandated after internship; and
6. Both understand that intern is not entitled to wages.

Interns are not required to be students, and academic credit from a high school or college is not required, and is often insufficient “compensation.” Employers can’t have interns perform work that an employee would otherwise do. Because employees cannot waive FLSA rights, **courts usually won’t enforce signed waivers** in which employees agree not to be paid overtime or receive minimum wage.

Practical Tips: Paying interns will reduce legal risk; monitoring their hours to avoid overtime can save costs. Or, consider hiring entry-level workers at minimum wage. If you prefer an unpaid internship, make sure to follow the six steps under applicable state law. A **written agreement between the company and the intern**, specifying the educational component, confirming the internship will be unpaid, and stating that the internship is not a guarantee of future employment, can also help support a valid relationship.

Summertime Fun... Or Blues? Firm Parties and Recreational Events

Summer is associated with relaxation and celebration. Many companies have summer parties, picnics, outings, softball games and team leagues. Employers and employees should be aware of two important related issues. First, these events can cause **legal blues for employers, due to employee (and guest) intoxication** and other conduct. Second, **workers compensation** does not cover purely voluntary activities. Employers can take steps to significantly reduce and possibly avoid potential liability in these situations.

There are several legal bases upon which employers may be considered liable or exempt from liability for the conduct of employees who are over-served at a company party or event. Because **applicable state laws can differ, check those for your location**. Also, ask the company's general liability insurer about coverage and risk, such as for accidents on company property for all attendees, including employees' family members and other guests. Importantly, these laws are frequently designated as the exclusive remedy for property damage and personal injury claims relating to the consumption of alcohol.

Under **common law**, a seller or provider of alcohol - such as an employer - is not liable for damage caused by persons who become intoxicated as a result. The presumption is that drinking, not giving or selling, caused the injury.

But there may be exceptions to common law, such as **state "dram shop" laws** that prohibit the sale, gift or delivery of alcohol to persons under 21. They also may provide injured persons with a legal claim only against commercial sellers. Others recognize a duty of reasonable care to the public for "social hosts" (including employers) not in the business of selling alcohol.

Some **social host statutes, including in Illinois, find liability only if adults knowingly and willfully serve alcohol to minors**. The Drug or Alcohol Impaired Minor Responsibility Act holds adults 18 and older "who willfully supply alcohol beverages or illegal drugs" to minors (under 18) liable for injuries or deaths resulting from their impairment. The law covers both the intoxicated minor and any third parties, applicable to an adult host "who sells, gives, or delivers" illegal drugs or alcohol.

Workers Compensation Laws

State workers compensation laws are relevant both to company parties (usually involving alcohol) as well as recreational activities where participation may be mandatory. Think about required company-bonding experiences like zip-lining, rafting, or softball leagues. Workers compensation covers **injuries and illnesses of employees "arising out or in the course of employment."** This can be extended to employer-sponsored social events, including summer or holiday parties.

Significantly, some state workers compensation laws **exclude** injuries and illnesses occurring from participation in **voluntary social events**. But, this exclusion can be a mixed blessing. Workers' compensation "exclusivity" means that workers compensation benefits are the sole and exclusive remedy for all workplace illnesses and injuries. When there is an exception for voluntary social events, a **negligence action against an employer** for injury or illness related to a party or softball game may not be barred under the worker's compensation law of the state.

Courts rely heavily on specific facts to decide whether particular activities were voluntary. Important factors include whether **attendees were paid to attend**, whether **alternative**

optional activities were available, and whether there were **repercussions for not participating** (such as being forced to use PTO to be paid for that day.)

Employment policies are also reviewed by courts, and companies should make sure that theirs specifically **limits the acceptable employee actions** when on company premises, when on-duty, off-duty, and on breaks.

Also notable, a 2011 amendment to the Illinois Workers Compensation Act **bars intoxicated employees from recovering for work-related accidental injuries if their intoxication is the proximate cause of the injury.** In addition, a blood alcohol level of .08% or greater, or any level of unlawful use of controlled substance, constitutes a rebuttable presumption that the employee was intoxicated at the time of injury. Refusing to submit to drug and alcohol testing results in the same rebuttable presumption.

“Blues” Prevention Measures

Because of the risk and negative publicity employers face relating to intoxicated employees and guests, and the gray area of voluntary vs. mandatory firm events, employers hosting social events should consider the following “blues prevention” measures.

- **Cancel Firm Social Events**
- **Ban Alcohol**
- **Restrict Alcohol Consumption**

Rather than a completely dry event, consider significantly limiting alcohol intake. Examples include providing employees with a limited number of drink tickets, or reducing the time that alcohol is served, e.g., one hour before a meal and one hour after.

- **Exercise “Reasonable Care”**

All employers, regardless of location, should take extra precautions, such as the following, to establish the exercise of “reasonable care” and lack of negligence.

- Hold the event **off company premises** to eliminate any implication that work is being conducted before, during or after the event.
- **Restrict attendance** to employees (and family) only, and do not invite customers or vendors who would turn it into a business rather than social event.
- Make clear to employees that their **participation is voluntary, and document** that fact in writing by including such a statement in any party announcement and communications to employees regarding the event. Consider having employees **sign a release** and indemnification confirming voluntary participation.
- Advise employees that they are **relieved of duty** during the hours the party is to take place and that they are free to attend or not in their sole discretion. They also may be told that they are free to leave the party whenever they wish.

- Hold the event during the day and for a limited period of time. Employees are less likely to overindulge if the event takes place at lunchtime, rather than after work.
- Serve foods high in protein and carbohydrates, continuously during the party.
- **Send “moderation” memos** and reminders to employees that they will be expected to behave in a responsible and sensible manner during the event.
- Assign supervisors to **monitor employee behavior** at the event and to identify and counsel those employees who appear to be drinking too much. Strict supervision is also required to make sure that minors aren't served alcohol.
- Ask for volunteer “designated drivers” who will agree not to consume alcoholic beverages and will provide rides to anyone who may have consumed too much. Beware, however, unless this is a totally voluntary act, it could be considered related to work and any injury sustained by the driver could be covered under applicable workers' compensation law.
- If the event is held in a hotel, arrangements can be made to offer overnight hotel accommodations to those employees who are unable to make it home safely.
- Offer to pay taxi fare for employees who are unable to drive.
- **Establish and distribute policies** clarifying the company's position about the consumption of alcohol during company-sponsored events.
- **Review anti-harassment policies** to make sure they are current and remind employees that their conduct must conform to the policy during such events.
- Card/monitor underage employees.
- Check insurance coverage and obtain “special events” coverage if necessary.

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DISABILITY LAW NEWS

The Equal Employment Opportunity Commission recently updated its Americans with Disabilities Act (ADA) guidance on hiring and employing individuals with cancer, diabetes, epilepsy and intellectual disabilities. Based on the ADA Amendments Act, the four Q & A-style documents can be found at the EEOC's website.

The EEOC's focus has not changed: avoiding inappropriate medical inquiries, maintaining confidentiality and accommodating disabled employees. Accommodation examples are provided for employees with intellectual disabilities. These included: providing someone to read or interpret application materials; demonstrating rather than describing tasks; modifying tests, training materials and policy manuals; replacing a written test with a hands-on interview; giving instructions at a slower pace; allowing additional training time; using charts, pictures or colors; providing a tape recorder for the employee to record directions; providing a job coach; and providing supplemental training.

This bulletin is intended to provide clients and others with general information and is not intended to provide specific legal advice or opinions. For assistance with topics addressed in this bulletin or other workplace issues, please contact Lori Goldstein at (847) 624-6640 or lori.a.goldstein@gmail.com. Visit www.lorigoldsteinlaw.com for information about the Law Office of Lori A. Goldstein, LLC.

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