LAW OFFICE OF LORI A. GOLDSTEIN, LLC

CLIENT BULLETIN WINTER 2018

Unpaid Intern Rules Change (Again)

Lately it feels like watching a tennis match when it comes to the law on unpaid interns. In January, the Department of Labor revamped the standards for unpaid interns, reversing a 2010 rule and **returning to pre-2010 standards**. Employers will again find it easier to justify unpaid interns.

In 2010, DOL reversed a long-standing pro-employer rule, essentially requiring for-profit employers to pay interns, *unless* they could meet *several factors.* For example, the internship must be for the benefit of the intern, the intern does not replace regular employees and works under close supervision, and the employer and intern understand that the intern is not entitled to wages.

But in the last few years, several federal courts have adopted a **"primary beneficiary" test**, which **focuses on the economic reality** of the intern-employer relationship.

New DOL Test

Based on the recent court decisions, the DOL updated its policy with a 7-factor test. Most importantly, unlike the previous standard, an employer **need not prove all of these elements**, no single factor is determinative, and whether an intern should be paid depends on the facts of a particular case. The 7 factors are:

1. The extent to which the intern and the employer clearly **understand** that there is **no expectation of compensation**. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides **training similar to that given in an educational environment**, including clinical and other hands-on training.
3. The extent to which the internship is **tied to the intern's formal education program** by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the **academic calendar**.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with **beneficial learning**.
6. The extent to which the intern's work **complements, rather than displaces**, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted **without entitlement to a paid job at the conclusion** of the internship.

The 2018 test significantly changes whether employers that offer positions to students and interns actually need to pay these individuals. It would be prudent to consider revisiting how your company classifies certain workers to assess compliance.

Iceland Mandates Equal Pay

Speaking of pay, Iceland has formally required employers to pay women equal to men, becoming the **first nation** to do so. Thanks to the nation's parliament (almost 50% women), companies with more than 25 employees will need a **government certificate verifying that they pay both genders equally or face a fine.**

Like the U.S., while Iceland has had equal pay laws on the books for years, the gender pay gap has only gradually reduced. Proponents reasoned that unless the law is applied more forcefully, the imbalance may never end.

EEOC 2017 Case Statistics – Charges Drop, Retaliation Claims Most Popular

The EEOC experienced a decrease in charges filed in FY 2017 (ending in September 2017.) 84,254 is the lowest the EEOC has seen in 10 years, and reflects an **8 percent drop** from last year.

Retaliation continues to be the most frequent charge filed, found in almost half (48.8 %) of charges. Consistent with past years, the second leading cause of discrimination charges were race claims (33.9%.) This was followed closely by claims based on disability (31.9%) and gender (30.4%, although that may increase this year in the wage of the sexual harassment focus.) Age discrimination made up 20.8% percent of all charges filed, national origin 9.8%, and religion 4.1%.

Voluntary settlements and litigation at led to $398 million for victims in the private sector and state and local government workplaces, $84 million less than FY 2016. But EEOC filed more than double the amount of merit lawsuits - 184 last year, compared to 86 the previous year.

Update on Sexual Harassment

Many corporate HR departments and company executives have braced for the possibility that workplace misconduct **allegations** and subsequent **investigations may rise** as victims of harassment feel more empowered to speak up. Since the fallout which began with Harvey Weinstein last October, developments have included:

-Time magazine recognized the silence Breakers (sexual harassment victim complainants) as the 2017 “Person of the Year.”

- Not only did accused politicians step down from their seats and lose elections, but last November, **many women** including Latinas, a lesbian, and a transgender woman, **won seats. The Fortune 500 lists 32 female CEOs – the highest ever**.

- Female chefs in Chicago sounded off about long-time sexual harassment and discrimination in the restaurant industry.

- Casino mogul Steve Wynn, **co-founder and CEO of Wynn Resorts**, resigned from the company in the face of allegations of sexual harassment. He also left the role of RNC Finance Chair a couple weeks earlier.

Companies should be taking meaningful steps to limit instances of future wrongdoing. Key is instilling and fostering a **positive company culture of civil and ethical behavior from the top down**. There is an obvious inconsistency between promoting an ethical workplace yet tolerating uncivil behavior at the highest ranks. An environment where management either ignores or allows inappropriate behavior is ripe for harassment and other misconduct claims.

Business leaders need to ensure **accountability.** Employees need to know that when they raise misconduct allegations, management will listen and take action. Managers have an important role in ensuring the company's compliance with legal requirements and avoidance of risk.

For example, a **manager** aware of possible harassment through observation or complaint **MUST relay** the information **to HR**, regardless if the victim complains "in confidence." A **manager's knowledge is imputed to the employer**. While employers are liable for co-worker (non-supervisor) harassment if the employer knew or should have known about the harassment and failed to take prompt, remedial action, an employer can't use that defense if the manager knew.

Liability for supervisor harassment is another employer risk. Under federal law, if supervisor harassment leads to a **tangible adverse action** (e.g. demotion, denial of promotion, or termination), the employer is automatically liable ("**strict liability**.") Federal law narrowly defines "supervisor" – the complainant's **direct supervisor** that **exercises control/authority over complainant.**

Illinois law (which applies to employers with 1 or more employee) imposes a **greater risk.** An employer has **strict liability** for a supervisory employee's harassment of an employee, not only for an **adverse action,** but also for **"hostile environment" harassment.** Plus, Illinois broadly defines "supervisor" to include **any supervisor,** even in a **different department** and with **no supervisory authority** over the victim. Finally, supervisors can be individually liable for harassment in Illinois.

What Should Employers Be Doing?

Putting in place an anti-harassment, discrimination and retaliation policy and a clear complaint mechanism is obvious, but that's only the first step. The company must actually **enforce and do so consistently**. That means **treating wrongdoers equally, regardless of their role** in the organization. It also means that the employer should check in periodically with the employee who complained. **Hold supervisors accountable** for failing to report misconduct complaints or handling allegations in a way that is inconsistent with company values.

Manager and staff training is also essential. Managers should be trained in legal obligations/employee rights, managers' role and risk, how to handle complaints or observed troubling incidents, and "confidentiality." Staff should also be trained on the zero-tolerance policy and procedures, and company guidelines on open door, healthy, welcoming work environment, and treating each other w/respect. I regularly provide such training for my clients; please contact me if interested.

Supreme Court May Decide Whether Extended Leave After FMLA is an ADA Reasonable Accommodation

In my Client Bulletin last fall, I wrote about the landmark case of Severson v. Heartland Woodcraft, Inc., recently decided by our 7th Circuit. The controversial appeals court ruling held that "a multi-month leave of absence is beyond the scope of a reasonable accommodation" under the Americans with Disabilities Act (ADA). Employers who have generally extended leave beyond the 12-week Family and Medical Leave Act (FMLA) leave are revisiting the process. The U.S. Supreme Court received a petition on January 18 to hear the case; the justices will decide whether to do so at a future conference.

Paid Sick Leave 2018 and FMLA

The Chicago and Cook County Paid Sick Leave (PSL) laws have been in force since July 1. Employers are still figuring out the administrative aspects of tracking accruals, **revising their PTO and sick leave policies**, and deciding how to handle **carryover from 2017 to 2018**, including for FMLA purposes.

The ordinances have **special rules for use and carryover of PSL for FMLA** purposes. Generally, employees covered by FMLA may use a maximum of 40 hours of accrued regular PSL during a benefit year, plus 20 hours of PSL for FMLA purposes. In addition, an employer must allow an FMLA employee to carry over ½ of her unused PSL - up to 20 hours - into the next year, plus up to 40 additional hours to be used exclusively for FMLA purposes.

Please join me for an *HR Certificate Program* on FMLA & ADA Compliance, which I will conduct in Des Plaines on Feb. 26-28, 2018. This three-day program includes 15 information-packed sessions that provide complete coverage of all aspects of FMLA and ADA compliance and best practices.

To see the Agenda or venue info, or to enroll, go to http://hrtrainingcenter.com/showSEDetails.asp?TCID=1218468&RID=1019849

Announcements

✓ *I am a proud recipient of the **Super Lawyers Illinois award for 2018** (3rd consecutive year.)*

✓ *I work with **both employers and employees** on workplace matters, compliance, contracts, training, and dispute resolution.*

✓ ***Career Resource Center is here for you!** As a proud CRC Board member, I can't say enough about the wonderful career transition services offered by CRC, a nonprofit celebrating almost 30 years of success. We are here for newly RIF'd employees, graduates, individuals returning to the workforce, those seeking a change of employment or career, and employees who need a boost in their career transition search. Stop by for a tour, try out a workshop, or join for a year. Volunteers and donors always welcome too! **careerresourcecenter.org***