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Heads Up: Traps Associated with Hiring Unpaid Interns

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Heads Up



With the economy's ebbs more frequent than its flows during the past decade, private sector employers have tightened their financial belts, leading to a chronically elevated unemployment rate. As an outgrowth of the tough market, job seekers are often willing to fill gaps between jobs by working as unpaid interns. Employers welcome the additional help without any corresponding expense. The interns covet the experience, networking and resume building.

This match between the interests of the private employer and the unpaid intern, however, has raised important legal issues which highlight the often blurred line between the "intern" and "employee" classifications. In fact, this rise in internships has spurred additional scrutiny by the Department of Labor (DOL) with respect to employers' compliance with the Fair Labor Standards Act (FLSA), and has resulted in increased litigation by interns against employers for failing to pay minimum wage. Given the serious consequences of violating federal law and the Massachusetts wage laws, the importance of employers' implementation of strict guidelines to ensure compliant intern programs is paramount.

Recent Case Law Relating to Unpaid Interns

The growing wave of intern lawsuits has led to some important decisions addressing whether interns must be treated as employees. A number of courts have held that employers have misclassified employees as interns and therefore violated wage laws by failing to pay minimum wage.

The success of intern plaintiffs was exemplified most recently in the June 11, 2013 decision from the Southern District of New York in Glatt v. Fox Searchlight Pictures, Inc., No. 11-cv-6784, 2013 WL 2495140 (S.D.N.Y. 2013). There, the court granted summary judgment for plaintiffs, finding that the production company defendant misclassified interns and failed to pay minimum wage. Plaintiffs were employees, and not interns, because they “worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training,” and the benefits they obtained resulted from “simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer.” Further, the interns “received nothing approximating the education they would receive in an academic setting or vocational school.”

A well-designed intern program, however, can lead to a different outcome. Two instructive recent decisions have held that intern plaintiffs were not employees. In Demayo v. Palms West Hosp., Ltd. Partnership, No. 11-81211, 2013 WL 264691 (S.D. Fla. Jan. 23, 2013), the court determined that an unpaid extern working at defendant hospital was not an employee, as she was required to complete the externship and associated surgeries as a prerequisite to graduation, she understood that the externship would not result in employment, there was no corresponding staff reduction, and the employer monitored her work. Similarly, in Kaplan v. Code Blue Billing & Coding, Inc., 504 Fed. Appx. 831 (11th Cir. 2013), the court held that the intern plaintiffs were not employees, as they did not displace regular employees, they performed work towards a formal degree program, and defendant supervised and trained plaintiffs in a manner which required it to take time away from the business.

Structuring a Compliant Internship Program

The most critical factor addressed by courts and the DOL in creating a compliant program is whether the intern or the private sector employer obtains the primary benefit from the internship. If the intern primarily benefits, the non-payment of wages is proper. If the employer primarily benefits, the intern is an employee entitled to minimum wage. For an internship program to be compliant, the employer should be able to demonstrate that:

- Interns do not perform essential functions of the business which provide a benefit to the employer.
- Without the intern, the employer would not need to hire another employee to fulfill the functions served by the intern.
- The intern does not have the same or similar job responsibilities as those of a regular employee.

- The intern's work is tied to an educational program where it is a requirement of graduation or where an intern receives academic credit. Put another way, the internship is similar to training provided in an educational setting.
- The training received during the internship is transferable to future employment at a broad range of employers.
- The employer does not derive an immediate advantage from the internship and, at times, its operations are impeded. For example, an employer spends time training or educating an intern in lieu of promoting its business objectives, thus benefiting the intern, and "impeding" the operation of the employer's business.
- There is no promise to the intern of future employment.

Massachusetts-Specific Practice Points

In order to ensure compliance with the Massachusetts wage laws when classifying interns, Massachusetts employers should take into consideration specific practice points.

1. **Beware of Treble Damages.** The failure to pay the minimum wage triggers a mandatory recovery of treble damages and attorneys' fees under Massachusetts law. Thus, if an employee is misclassified as an unpaid intern, recovery against the employer will be significant, and the anticipated financial benefits of bringing on an unpaid intern are long lost.
2. **Extraterritoriality: Out of State Interns Are Not Necessarily Out of Mind.** Not only does the Wage Act apply to Massachusetts employers and its local employees, but in certain circumstances it also applies to employees of Massachusetts companies working outside Massachusetts. In the May 2013 case of Taylor v. Eastern Connection Operating, Inc., 465 Mass. 191 (2013), an out-of-state independent contractor sued his Massachusetts-based employer, claiming that he had been misclassified and that he was an employee within the meaning of the Wage Act. The SJC held that the Wage Act could apply to this employee so long as (a) there was a written contract between the parties providing that any legal action shall be brought in Massachusetts and shall apply Massachusetts law, and (b) Massachusetts law "is not contrary to a fundamental policy of the jurisdiction where the individuals live and work." The Massachusetts Appeals Court confirmed these principles in June 2013 in Dow v. Casale, 83 Mass. App. Ct. 751 (2013). There, the court held that a Florida-based employee of a Massachusetts company had sufficient Massachusetts contacts to pursue a claim under the Wage Act where Massachusetts had the most significant relationship to the employment relationship.
3. **Parties Cannot Agree to A Deal that Violates Wage Laws.** The Wage Act prohibits an employer from entering into a special contract with an employee exempting the employer's compliance with the Wage Act. The SJC's broad view of the prohibition on special contracts to evade Wage Act obligations was reiterated in the June 2013 decision in DePianti v. Jan-Pro Franchising Int'l Inc., 465

Mass. 607 (2013). Accordingly, where an individual misclassified as an intern is entitled to minimum wage, an agreement exempting compliance with the Wage Act is unenforceable.

CONCLUSION

Challenges to unpaid internships are on the rise nationwide. The consequences of failure to pay minimum wage to an “intern” who is determined to be an employee are particularly steep in Massachusetts. With careful attention to the developing law in this area, it is nonetheless possible to design a compliant internship program.

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