RECENT DEVELOPMENTS IN LABOR LAW

Summer Interns: Paid or Unpaid?

With the summer season approaching (and with significant media attention in recent weeks), the question of whether a business entity may take on an intern—for the summer or during any other period—without paying that intern at least minimum wage for all hours during which the intern is in the entity's office or other workplace premises, has seen renewed interest. While some may conclude that the scarcity of available positions for college students and others seeking new employment or a career change is license to utilize "interns" as a source of cheap or free labor, the circumstances in which an internship may be unpaid remain extremely limited. In order to satisfy the criteria considered by both federal and state agencies in determining whether a true internship arrangement exists, one must generally satisfy all six of the criteria listed below in order to qualify:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in a vocational school;

2. The training is for the benefit of the trainee;

3. The trainees do not displace regular employees, but work under close observation;

4. The employer that provides the training derives no immediate advantage from the activities of the trainees and, on occasion, the employer's operations are actually impeded;

5. The trainees are not necessarily entitled to employment at the completion of the training period;

6. The employer and the trainees each understand that the trainees are not entitled to wages for the time spent in training.

These six criteria are derived from a U.S. Supreme Court opinion construing the Fair Labor Standards Act and dating back more than 60 years, but are still considered the benchmark for determining the viability and legality of an unpaid internship program.

In synthesizing these criteria in connection with the goals of colleges to provide students with hands-on learning experiences, many college programs provide college credit for participation in internship programs in which students' practical learning experiences are an important means of alternative learning. Often, therefore, the most prevalent criterion examined in determining whether an intern may be unpaid is the question of whether or not such individual receives college credit in consideration for the internship. All of the six criteria must be satisfied in order for an unpaid internship to pass muster with the New York State Department of Labor ("NYDOL") or other examining agency. Requiring an intern to perform "incidental" "menial or other tasks which provide benefit to the employer will likely disqualify that internship from any possible "insulated" status.

The NYDOL has not to date promulgated any more definitive guidelines for those circumstances in which an internship may be unpaid unlike the new standards issued by the California Division of Labor Standards Enforcement. Although those eager to participate in an internship program sponsored by a popular company or important brand are likely not to complain about their status as unpaid during the pendency of any internship programthey are free after the program's conclusion to claim a retroactive entitlement to wages for their services because some or any of the above criteria are not squarely met.

These post-program claims are generally more prevalent in connection with programs where training is sparse or where managers demand the performance of specific job duties or responsibilities which benefit the business enterprise. In an era of ever-increasing scrutiny by agencies charged with enforcement of wage and hour laws, it is certainly advisable to ensure that any envisioned internship program comport with well settled legal standards.

Small Employers in New York City Await Further Action by the New York City Council with Respect to Potential Mandatory Sick Leave Requirements.

For the second year in a row, the New York City Council is debating the passage of legislation which would require employers of less than 20 employees to provide to its employees a form of mandatory paid sick leave calculated on the basis of one (1) hour's pay for every 30 hours worked after an employee's 90th day of employment, with the circumstances surrounding use of leave and employer notification of its availability clearly outlined. Enactment of the legislation is uncertain. We suggest that small employers located in New York City check periodically on the status of potential enactment of this legislation in budgeting for labor costs.

Compliance with Section 195(1) of the New York Labor Law is Seen as Lagging

A recent amendment to New York's Labor Law requires all employers to provide all newly-hired employees with written notice of their hourly rate of pay and of their regular pay days. Although the law went into effect more than nine months ago, many employers have yet to implement programs to ensure compliance. For employees eligible for overtime compensation, the notice must provide both the regular hourly rate and overtime (*i.e.,* 1.5 x regular hourly rate) rate of pay. Employers must provide this notice at the time of hire, which must be signed by the new hire, before he/she engages in any type of work.

The NYDOL has published a "fact sheet" for employers and employees explaining the amendment and has also published prototypical acknowledgment forms to be issued to newly-hired employees depending on the job description. Employers may create their own forms, or use and/or adapt one of the model forms on the NYDOL website. Employers must keep a copy of this signed form for a minimum of six years. In addition to providing an employee with information on his or her regular and overtime rates of pay, this form also contains a general statement regarding overtime eligibility, and explains that "almost all employees in New York must be paid overtime wages" and that only a "very limited number of specific categories of employees are covered by overtime at a lower overtime rate or not at all." Of course, while compliance with this statutory provision is mandatory, it should also be viewed by savvy

employer's as an insurance policy against an employee's later claim that he/she was promised more than was actually received.

We recommend that if they have not already done so, employers utilize one of the NYDOL forms (or a modified version thereof) immediately.

If you have any questions relating to the guidance described herein, please contact your primary attorney at Morrison Cohen LLP or any of the following:

Jeffrey P. Englander

(212) 735-8720
jenglander@morrisoncohen.com

Evan Lupion

(212) 735-8853
elupion@morrisoncohen.com