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September 2012

ALERT

Back-to-School Tune-Up: Changes in National and New York State Law, and a Primer on Internships

By Bennett Pine

As the workplace tempo picks up post-Labor Day, please take note of two changes in law and one emerging litigation threat, outlined below.

NLRB: Employer Policy Instructing Investigation Witnesses to "Keep Quiet" is Prohibited

An August 2012 ruling by the National Labor Relations Board requires employers to reexamine their common practice of instructing witnesses in ongoing workplace investigations not to discuss the matter with others until the investigation is completed.

In *Banner Health System*, the board held that an employer's standard post-interview instruction not to discuss the ongoing investigation with co-workers violated employee rights under Section 7 of the National Labor Relations Act to engage in "protected concerted activity for the purpose of collective bargaining or other mutual aid or protection."

In its decision, the board majority concluded that, in order to "justify a prohibition on discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights." While finding that protecting the integrity of the investigation, standing alone, didn't provide sufficient basis for interfering with employees' Section 7 rights, the NLRB suggested that the following "business justifications" could suffice, including

> instances where an investigation witness needs protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is need to prevent a cover-up, none of which was present in *Banner*.

In view of the *Banner* decision, we suggest that employers must examine their policies regarding confidentiality on a case-by-case basis. Blanket confidentiality restrictions, without regard to the specific facts presented, would likely be found to lack the necessary "business justification" required by the NLRB.

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Permissible Scope of Wage Deductions to Expand in New York

New York State Labor Law has, for many years, prohibited deductions from an employee's wages unless they were (i) required by law, (ii) authorized in writing by the employee and (iii) for the employee's benefit. From a historical perspective, this provision was enacted to prevent deductions from employee pay for "breakage" or account shortages. The list of deductions that were permitted by Section 193 of the New York State Labor Law was expressly limited to things such as payments for insurance premiums, pension, health or welfare benefits and contributions to charitable organizations. As a result, employers were reluctant to be placed in the unenviable position of being in "technical" violation of law when making deductions from wages or salary for inadvertent overpayments, salary or vacation pay advances, employer loans and similar items.

A new law signed by Governor Cuomo on September 7, 2012, greatly expands an employer's ability to make authorized deductions from employees' wages under the amendment to Section 193 of the New York State Labor Law.

The new bill allows an employer to make wage deductions related to the recovery of an overpayment of wages where the overpayment is due to a mathematical or other clerical error by the employer, as well as repayment of salary advances. These deductions, however, must be made pursuant to regulations that will be issued by the Commissioner of the Department of Labor governing the timing, frequency, duration and methods of repayment; limitations on the periodic amount of such repayment; and notice requirements and employer requirements to implement a dispute procedure.

In addition, employers would be permitted to take deductions out of the paychecks of employees who consent in writing to events sponsored by charitable organizations; discounted passes for mass transit or parking; gym membership dues; cafeteria, vending machine and pharmacy purchases made at the employer's place of business; tuition and fees for educational institutions; and day care expenses.

It will take effect 30 days after it is enacted.

The Time For Employers to Revisit Internship Policies is Now

Recent news reports are replete with wage and hour suits filed by former unpaid interns against high-profile employers such as Fox Entertainment Group, the Charlie Rose Show and Hearst

Corporation. At the same time, recent college graduates unable to find paid employment, and college and professional students seeking "experience" and a path to a future job offer are increasingly willing to work for free in order to get a "foot in the door" making the prospects of an unpaid internship mutually attractive.

As a result, employers should be attuned to the federal laws governing internship as a means of avoiding potential liability.

The U.S. Department of Labor has identified six criteria to be satisfied in determining whether an unpaid internship program passes muster under the Fair Labor Standards Act. The criteria include:

- the internship, even though it contains actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- the internship experience is primarily for the benefit of the intern;
- the intern does not displace regular employees and works under close supervision of existing staff;
- the employer derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded;
- the intern is not necessarily entitled to a job at the conclusion of the internship; and
- the employer and the intern understand that the intern is not entitled to wages.

Including an instructional or classroom training aspect in the internship program is generally regarded as an essential component of any internship program and may assist employers in establishing the educational focus and legitimacy of their internship program.

In any event, an employer — even well intentioned — may unwittingly assume a potential liability in terms of wages, overtime and benefits by engaging unpaid interns unless steps are taken to ensure compliance with Department of Labor regulations.

Practice Hint: Paying interns the minimum wage, and severely restricting overtime, can help ensure legal compliance, while capping employer investment.

Conclusion

The three employment law developments outlined above certainly provide a "back to school" lesson for employers. If you have any questions or require further information, please feel free to contact the author.