Fenwick Employment Brief

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DLSE CLARIFIES, RELAXES REQUIREMENTS FOR UNPAID INTERNS

The California Department of Labor Standards Enforcement's strict (and somewhat inconsistent) requirements regarding unpaid interns made it difficult for California businesses to employ them. However, on April 7, 2010, the DLSE's Acting Chief Counsel issued an opinion letter which reflects relaxed requirements, and gives clearer guidance for companies who seek to hire unpaid interns. (The opinion letter can be found at: http://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf.)

Only "employees" are entitled to the benefits and protections of federal and state wage and hour laws, including minimum wage and overtime. Under the federal Fair Labor Standards Act ("FLSA"), trainees and interns are not considered employees if they meet six specific criteria:

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

2. the training is for the benefit of the trainees or students;

3. the trainees or students do not displace regular employees, but work under their close supervision;

4. the employer derives no immediate advantage from the activities of the trainees or students, and on occasion the employer's operations may be actually impeded;

5. the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

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

In the past, the DLSE took the position that unpaid trainees and interns not only had to meet these six FLSA criteria, but also needed to meet five additional criteria (*e.g.*, a prohibition on employee benefits, very generalized rather than company-specific training and hiring through a separate screening process). More recently, the DLSE alternatively used an "economic realities" test with six factors which differed in part from the FLSA criteria.

Citing a desire to harmonize its interpretation of "employee" with the FLSA, the recent DLSE opinion letter indicates that the six FLSA criteria and their interpretive decisions now govern the employment of unpaid interns in California. This opinion letter was written in response to an inquiry from a non-profit organization that placed students in its program with companies to develop the students' technical skills in information technology. In opining that the interns placed through the program were exempt from minimum wage requirements, the DLSE made several key determinations:

1. **Interns are no longer prohibited from occasionally and incidentally performing work done by other employees.** Previously, the DLSE sometimes took the position that any work performed by an intern which could be performed by a regular employee would defeat the unpaid status of the worker. However, the DLSE retreated from this stance and stated that occasional and incidental "regular" work will not necessarily preclude a finding of intern status, provided that the intern is the true recipient of benefits from the training and does not effectively displace other workers.

2. **Interns necessarily require close, extensive supervision.** The more loosely supervised the worker, the more likely an employment relationship exists. Direct and extensive

supervision of interns is important to establish intern status, and may also help to offset any benefit or perceived advantages the business receives by the activities performed by the interns.

3. **Businesses should derive no immediate benefit from the interns.** Where a company derives an immediate benefit from a worker, an employment relationship is more likely to exist. On the other hand, a benefit to the company that develops over a period of time will not defeat the exemption, and the benefit can be offset by the time and costs of supervision of the intern and training fees paid by the company.

While this new guidance does not have the effect of law, it does provide clearer and more meaningful insight as to how the DLSE will enforce the law, and will be welcomed by both businesses that seek to hire interns and those individuals seeking to find necessary experience and training through internships.

NEWS BITES

Employee Did Not Waive Attorney-Client Privilege By Using Company Laptop To Send E-Mails Through Personal E-Mail Account

Finding that an employee had a reasonable expectation of privacy in e-mails sent to and from her attorney on her company laptop, the New Jersey Supreme Court in *Stengart v. Loving Care Agency, Inc.* held that the attorney-client privilege continued to protect such communications. The employee in *Stengart* had used her company-issued laptop to exchange e-mails with her attorney through her personal Yahoo e-mail account, and later filed a discrimination lawsuit against her former employer. The former employer retrieved the e-mails through a forensic expert, and claimed that the employee waived any privilege by using a company laptop to send and receive the e-mails. The New Jersey Supreme Court disagreed, and determined that due to the strong public policies underlying the attorney-client privilege, the communications remained protected from review by the employer. The court also noted that even if the company had explicitly informed the employee through its policy that the laptop could not be used for personal purposes and that it would retrieve and read all attorney-client communications, the policy would not be enforceable as to communications sent through personal, password-protected e-mail accounts.

Employee Fired For Planning To File For Bankruptcy Can Pursue Retaliation Claim

The bankruptcy code prohibits an employer from discriminating against or terminating an employee for filing or having filed for bankruptcy protection. A federal court in Wisconsin has extended this retaliation protection to an employee who *intended* to file for bankruptcy (and later did so). In *Robinette v. WESTConsin Credit Union*, the plaintiff claimed that she was fired after she told her supervisor that she was going to file for bankruptcy, allegedly because her bankruptcy would not make the credit union employer "look good." The court held that the plaintiff could proceed with a claim for retaliation in violation of the bankruptcy code even though she had not yet filed a bankruptcy petition at the time of her termination, because not allowing her to proceed on the claim would frustrate the purpose of the statute. In allowing the plaintiff to pursue her claim, the court disagreed with the conclusion of the Ninth Circuit Court of Appeals (which has jurisdiction over California, Washington and other western states) that there is no retaliation protection for employees before they actually file a bankruptcy petition.

Lay Evidence May Be Used To Prove "Incapacity" Under FMLA

Under the Family and Medical Leave Act ("FMLA"), an employee is entitled to protected leave if he or she has a "serious health condition," which includes a period of incapacity of three or more consecutive calendar days, coupled with either two or more physician visits or at least one visit and a continuing regimen of treatment. In *Schaar v. Lehigh Valley Health Services, Inc.*, the Third Circuit Court of Appeals (Philadelphia) clarified that lay evidence can supplement medical evidence to establish a qualifying incapacity. The plaintiff in *Schaar* had a medical note that stated that she would be incapacitated due to illness for two days, but the plaintiff asserted that she spent two additional days in bed with pain, fever and vomiting.

The court held that plaintiff's assertion of prolonged incapacity, together with the medical evidence showing the incapacity was due to the health condition, was sufficient to present a triable issue of fact on the FMLA interference claim. California and Washington employers should note that the Ninth Circuit Court of Appeals (San Francisco) has held that lay evidence by itself is sufficient to establish a triable issue of incapacity.

Supreme Court To Decide Whether Oral Complaints Are Protected Activity Under FLSA

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Seventh Circuit Court of Appeals (Chicago) held that an employee's oral complaints about his employer's time-keeping practices were not activities protected under the anti-retaliation provision of the FLSA. The court held that retaliation against an employee for having "filed a complaint" regarding FLSA violations necessarily requires the employee to have submitted some form of written document. In contrast, other courts of appeals (including the Ninth Circuit Court of Appeals) have held the opposite – that oral complaints are protected under the FLSA. To resolve the conflict, the United States Supreme Court granted certiorari to determine whether an oral complaint is protected conduct under the FLSA's anti-retaliation provision. This decision may also impact the interpretation of the anti-retaliation provisions of the Sarbanes-Oxley Act and other laws with anti-retaliation provisions.

Reminder: Fenwick & West Breakfast Briefing On Hiring Smartly

On May 5, 2010, the Fenwick & West Employment Practices Group will present an interactive Breakfast Briefing: "The Job Market Is Back: How Employers Can Effectively Catch The Upturn By Hiring Lawfully and Smartly." If you wish to register for the event, please contact Randall Johnson at rjohnson@fenwick.com.