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E-UPDATE

January 31, 2018

RECENT DEVELOPMENTS

DOL Rescinds Restrictive Intern Test and Adopts Federal Courts' Version

The Department of Labor has announced that it will no longer apply its restrictive test for internship status, and instead will apply the more flexible "primary beneficiary" test adopted by multiple federal appellate courts.

In *Glatt v. Fox Searchlight Pictures, Inc.*, the U.S. Court of Appeals for the Second Circuit articulated a test for internship status based on "whether the intern or the employer is the primary beneficiary of the relationship." This "primary beneficiary" test has three considerations: (1) what does the intern receive in exchange for his work; and (2) what is the economic reality of the relationship between the intern and the employer; and (3) an acknowledgement "that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship[,] because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment (though such benefits may be a product of experience on the job)."

The Second Circuit identified a non-exhaustive list of considerations that should be taken into account in applying this test:

- 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.
- The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- 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.
- 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.

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The analysis of these and any other relevant considerations requires the weighing and balancing of all of the circumstances, and no one factor is dispositive. The Second Circuit emphasized the "flexibility" of this approach, and the fact that the "touchstone" of the analysis is the "economic reality" of the relationship. The Second Circuit further explained that the focus should be "about an internship program as a whole rather than the experience of a specific intern."

The Second Circuit's test was adopted by the Eleventh Circuit in the case of *Schumann v. Collier Anesthesia, PA,* and by the Ninth Circuit in *Benjamin v. B & H Education, Inc.*, as we discussed in our December 2017 E-Update. And the DOL, referencing the *Benjamin* case, has now adopted it as well. As a result, employers may be more willing to offer unpaid internships without fear of violating the DOL's prior overly restrictive test.

DOL and EEOC Annual Penalty Increases

The Department of Labor and the Equal Employment Opportunity Commission have announced their annual penalty increases. Due to the passage of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, federal agencies must issue regulations annually to adjust for inflation the maximum civil penalties that they can impose.

The DOL's announced increases for 2018 include the following:

- **Fair Labor Standards Act.** For repeated or willful violations of the FLSA's minimum wage or overtime requirements, the maximum monetary penalty will increase from $1,925 to $1,964. Penalties for violation of the FLSA's child labor restrictions will increase from a maximum of $12,278 per under-18 worker to $12,529, while violations resulting in the child's death will increase from a maximum of $55,808 to $56,947, which may be doubled for repeated or willful violations.
- **Employee Polygraph Protection Act.** The penalty for violations of EPPA increases from $20,111 to $20,521.
- **Family and Medical Leave Act.** The penalty for failing to comply with the posting requirement increases from $166 to $169.
- **Occupational Safety and Health Act.** The maximum penalty for posting, other-than-serious, serious, and failure-to-abate violations increases from $12,675 to $12,934. The maximum penalty for willful and repeat violations increases from $126,749 to $129,336.

The EEOC has increased the 2018 penalty for violation of the notice-posting requirements in **Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act**, and **the Genetic Information Non-Discrimination Act** from $534 to $545.

TAKE NOTE

Prince George's County's Newly Enacted Safe Leave Law Is Likely Preempted. In December 2017, Prince George's County passed a law requiring employers to provide paid domestic violence leave to employees, effective May 24, 2018. The Earned Sick and Safe (ESS) Leave Act, (the title is confusing because it does not actually provide for sick leave), however, has now likely been preempted by the subsequent enactment of the Maryland Healthy Working Families Act.

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The state law expressly preempts any local law that was passed after January 1, 2017. Because the Prince George's County law did not meet that deadline, it is likely preempted. In any case, the state law provides for greater leave rights than the county law did.

Title VII Does Not Require Employer To Provide Reason for Firing Upon Termination. The U.S. Court of Appeals for the Eighth Circuit stated that, "Title VII does not impose a legal obligation to provide an employee an articulated basis for dismissal at the time of firing, and an employer is certainly not bound as a matter of law to whatever reasons might have been provided."

In *Rooney v. Rock-Tenn Converting Co.*, the employee was told that he was being terminated for poor interactions with co-workers. During litigation, the employer expanded the reasons to also include poor performance and customer complaints, and the employee argued that these later-added explanations were evidence of pretext for discrimination. The Eighth Circuit explained that an employer may later elaborate on its original explanation for an employment decision. Employers should note, however, that, as the Eighth Circuit pointed out, a "substantial shift" in explanation may be evidence of pretext.

Employer Must Provide Reasons That Do, Not Could, Explain Pay Discrepancy Under the Equal Pay Act. The U.S. Court of Appeals for the Fourth Circuit joined the Third and Tenth Circuits in holding that an employer seeking to defend a claim under the Equal Pay Act must offer evidence that not just could, but actually does in fact, explain the pay discrepancy.

The Equal Pay Act prohibits the payment of different wages to individuals of opposite sexes for equal work on jobs requiring equal skill, effort, and responsibility, which are performed under similar working conditions, unless the employer is able to establish that the pay differential is due to one of the following: (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; or (4) a disparity based on any factor other than gender. In *EEOC v. Maryland Insurance Administration*, the Fourth Circuit found that the burden on the employer to make this showing is heavier than under Title VII, which only requires the employer to offer a legitimate nondiscriminatory reason for its action but not have to prove that it was *in fact* motivated by that reason.

Employer Need Not Completely Eliminate Religious Conflict. The U.S. Court of Appeals for the 10th Circuit rejected the EEOC's position that, under Title VII, an employer must provide an accommodation that completely eliminates any conflict between an employee's religious needs and work requirements. At the same time, the Tenth Circuit noted that, depending on the circumstances, an employer may be required to be more active in facilitating an accommodation.

In *Tabura v. Kellog USA*, the Tenth Circuit noted that, while an employer is required to provide a reasonable accommodation, it is not required to provide a "total" accommodation "that spares the employee any cost whatsoever," as that would not be reasonable. The Tenth Circuit also found that a "neutral" policy, providing days off to any employee whatsoever, could be a reasonable accommodation, depending on the circumstances, contrary to the EEOC's position that such policy could never be such an accommodation.

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In the present case, however, the Tenth Circuit found that permitting the employees to use vacation and other paid time off, as well as allowing them to swap shifts, to avoid working Saturdays, may not have been reasonable, given that the paid time off was not sufficient to cover all Saturdays and it was difficult to find swappers. The Tenth Circuit suggested that the employer might have been required to take a more active role in facilitating swaps. These are questions that will have to be answered by the jury.

OTHER NEWS AND EVENTS

Fiona W. Ong has been named an Acritas Star in an independent global report that recognizes stand-out lawyers according to client nominations. Acritas, a leading research firm, created the Acritas Stars Database and Report based on the results of a survey of general counsel and other senior leaders at legal departments around the world. Participants were asked to name outstanding lawyers with whom they had worked. The database was created in response to requests from general counsel for an online source to find highly recommended local counsel and specialists.

Stephen D. Shawe and Mark J. Swerdlin assisted an electrical supply company in an NLRB election campaign. The employees overwhelmingly rejected union representation by a vote of 48-21.

Fiona W. Ong was quoted in a January 27, 2018 article by Holden Wilen, "Md. business owners under pressure to comply with new sick leave law," that ran in both the Baltimore Business Journal and the Washington Business Journal. Fiona commented on the need for employers to review their policies to ensure compliance with the requirements of the law.

Mark J. Swerdlin was a panel speaker in a roundtable discussion on "What's Next in Wage & Hour Litigation," presented by the ABA Litigation Section's Employment & Labor Relations Committee on January 18, 2018. The discussion explored hot topics and emerging trends in wage-hour litigation.

TOP TIP: Complying With Maryland's New Earned Sick and Safe Leave Law

The Maryland Healthy Working Families Act, which requires employers with 15 or more employees to provide paid sick and safe leave (SSL) and those with under 15 employees to provide unpaid leave, is currently scheduled to take effect on February 11, 2018. Accordingly, employers with Maryland employees need to take steps to ensure that they will be in compliance with the law on that date. Here is a checklist of action items:

- Prepare or obtain a **notice**, which must contain statutorily-required information, to provide to employees. The notice can be provided to employees by posting it in a location where other such employment notices are displayed. It can also be contained in a handbook or on a Company intranet available to all employees.
- Determine what "**year**" to use for SSL purposes – calendar, fiscal, anniversary or otherwise.
- Make sure that **all employees scheduled to work 12 or more hours a week** are receiving SSL, unless they fall within one of the statutory exemptions.

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- Decide whether to **grant** SSL as a block at the beginning of the year, or to have employees **earn** it over the year at 1 hour of SSL for every 30 hours worked, up to a maximum of 40 hours.
- If you choose an accrual method, ensure that you are **tracking hours worked** for all your employees, including those that are not paid an hourly wage or salary (e.g. commission-only, piece-rate, etc.). Decide if you want to apply the special accrual rules for workweeks in which the employees fail to work the specified minimum number of hours.
- Also if you are using an accrual method, allow up to 40 hours of earned, unused SSL to **carry over** to the next year.
- Ensure that **paystubs** will reflect the amount of earned sick and safe leave available to the employee. We suggest that you actually label it "sick" or "SSL" to be clear.
- **Track the actual hours of SSL taken** by each employee. You must do this even for employees whose hours you do not usually track. You must retain these records for at least 3 years.
- Revise any **no-fault attendance policies** so that SSL absences are not counted as occurrences or violations.
- If you have 15 or more employees, **revise an existing policy or develop a new policy** to provide paid leave for SSL purposes. You can do one of the following:
    - have an SSL policy – either alone or in addition to a vacation policy,
    - convert a sick leave policy to an SSL policy,
    - use your Paid Time Off (PTO) policy to cover SSL as well,
    - convert a vacation policy to a PTO policy that will also cover SSL, or
    - create a separate SSL policy that "taps" any existing paid leave policies, like vacation, personal, or PTO (and also creates a separate "bank" of accrued leave for extremely part time employees who likely will not otherwise already have any accrued, available leave).
- If you are using an already-existing sick leave or PTO policy to cover SSL, make sure that your policy complies with the **technical requirements** of the law.
- If you have a collective bargaining agreement that you entered into prior to June 1, 2017, you do not have to worry about complying with the law as to those employees covered by the CBA until the end of the contract term – but you must comply with the law as to **employees who are not covered by the CBA** as soon as the law takes effect.
- **Train** your managers on how to apply the law.

Although this checklist will help you to comply, this law is fraught with complications. We strongly advise that you have counsel review your draft policy and "game plan" before you conclude you have done all that is required. The penalties for non-compliance are severe. If you need assistance, as always, please let us know.

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RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- More on Maryland Earned Sick and Safe Leave – Enforcement Delay and Collective Bargaining Agreements, by Fiona W. Ong, January 23, 2018.
- EEOC, NLRB and DOL Shutdown Contingency Plans – The 2018 Edition, by Fiona W. Ong, January 19, 2018.
- Fabricated Texts? Something Else for Employers to Be Aware of…, by Fiona W. Ong, January 18, 2018 (Selected as a "noteworthy" blog post by the Employment Law Daily).
- Maryland Paid Sick and Safe Leave Is Now Law, by Fiona W. Ong, January 12, 2018.
- The ADA Under Attorney General Sessions, by Shelby S. Skeabeck, January 11, 2018 (Selected as a "noteworthy" blog post by the Employment Law Daily).
- The Federal Government Is Challenging State Legalization of Marijuana – What Does This Mean for Employers?, by Fiona W. Ong, January 4, 2018 (Selected as a "noteworthy" blog post by the Employment Law Daily).

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