SEWARD & KISSEL LLP

Employment Law Newsletter

Winter 2010

This edition of Seward & Kissel's Employment Law Newsletter discusses three topics:

- The recent extension of both the duration and eligibility periods of the federal subsidy for COBRA premiums which was initially put in place in 2009 as part of the American Recovery and Reinvestment Act of 2009 (the "ARRA").
- The recently enacted requirements imposed by the New York State Department of Labor with respect to providing new hires with written notice of their rate of pay, dates of pay, and (if applicable) overtime rate of pay.
- The laws regulating unpaid interns and a discussion of the risks regarding these arrangements. In sum, most unpaid interns are improperly classified as interns and are actually employees entitled to earn at least minimum wage.

Extension of Eligibility and Maximum Duration Periods of Federal Subsidy for COBRA Premiums

On December 19, 2009, President Obama signed the Department of Defense Appropriations Act of 2010 (the "Act"). The Act extends both the duration and eligibility periods of the provisions originally enacted by the ARRA, including a federal subsidy of up to 65% of insurance premiums for certain terminated employees and their eligible beneficiaries under COBRA and enlarges the maximum duration period of this federal subsidy. For a detailed discussion of the operation of the federal subsidy under the ARRA, please refer to our client alert memorandum dated February 24, 2009.

Extension of Eligibility Period Through February 28, 2010

To be eligible for the federal COBRA subsidy, an individual must qualify as an "assistance eligible individual" (an "AEI"). The ARRA defines an AEI as any qualified beneficiary who: (i) at any time from September 1, 2008 through December 31, 2009, is eligible for COBRA continuation coverage (including any state law that provides comparable continuation coverage (e.g., "mini-COBRA" laws)); (ii) qualifies for COBRA due to involuntary termination of the covered employee's employment during this period (other than for gross misconduct); and (iii) elects COBRA continuation coverage. The Act now extends the eligibility period through February 28, 2010. The Act also revised the condition in (i) above to clarify that it is the qualifying event (and not the COBRA eligibility) that must occur between September 1, 2008 and February 28, 2010. Thus, individuals who are involuntarily terminated prior to February 28, 2010 and who are eligible for and elect COBRA coverage may still be eligible for the federal COBRA subsidy.

Extension of Maximum Duration Period to Fifteen Months

The Act also extends the maximum duration period for the federal COBRA subsidy from nine (9) to fifteen (15) months, or for an additional six (6) months.

Retroactive Relief

The Act grants retroactive relief to an AEI who had exhausted the original nine-month period prior to the enactment of the Act. Such an AEI may elect to retroactively pay the subsidized (i.e., reduced) COBRA premiums for the period of coverage during his or her "transition period". The "transition period" is any period of coverage: (i) that begins before December 19, 2009; and (ii) to which the federal COBRA subsidy applies as a result of the Act's six-month extension. To take advantage of this relief, an AEI must: (i) have been covered under the COBRA continuation coverage to which the premium relates for the period of coverage immediately before the "transition period"; and (ii) pay the subsidized COBRA premiums for the transition period, through the date of such payment, by no later than February 17, 2010, or, if later, thirty (30) days after the notification of the changes under the Act are provided to an AEI. An AEI

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taking advantage of this retroactive payment provision shall be treated as having timely paid the premiums for COBRA continuation purposes.

In addition, if an AEI has paid full COBRA premiums for the period of coverage during such individual's transition period, he or she shall be entitled to a credit or refund in the amount and manner set forth in the ARRA.

Notice Requirements

In the case of an individual who is an AEI at any time on or after October 31, 2009, or who experiences a qualifying event relating to COBRA continuation coverage on or after such date, the administrator (or other entity) must provide, by no later than February 17, 2010, an additional notification with information relating to the amendments made by the Act. If a qualifying event occurs after December 19, 2009, the administrator must provide this additional notification consistent with the timing of notifications set forth in the ARRA.

Additionally, in the case of an AEI eligible for the retroactive relief, or who had paid the full premiums during his or her transition period, the administrator (or other entity) shall provide, within the first sixty (60) days of such AEI's transition period, an additional notification with information regarding the amendments made by the Act, including the information regarding the retroactive payments.

Action Steps

Employers should contact their medical plan provider or third party administrator to determine who will be responsible for providing these notices.

New Requirement Regarding Newly Hired Employees in New York

Effective October 26, 2009, under New York Labor Law §195(1), all New York employers are required to provide new employees with written notice of their pay rate, pay day, and, if they are non-exempt employees, their overtime rate of pay. Employers must also obtain the new employee's written acknowledgment that they have received the requisite notice.

Format of the Notice and Acknowledgement

The new law states that the acknowledgment must conform to requirements established by the New York State Department of Labor (the "NY DOL"). Sample forms which comply with these requirements are available on the NY DOL's website on the Employment Laws/Labor Standards page (Forms 54 – 59 depending upon what type of employee (i.e. exempt, non-exempt salaried, non-exempt hourly)). The form for exempt employees may be found at: www.labor.state.ny.us/**forms**docs/wp/**LS59**.pdf. Alternatively, employers also have the option of either: (i) drafting their own written notice; or (ii) simply incorporating these requirements into offer letters and/or employment agreements. In either case, provided that such notice or language adheres to the NY DOL's requirements as described above.

Steps for Employers to Take

Employers should review each new position to determine whether the position is exempt or non-exempt from the overtime requirements of the wage laws. If the position is non-exempt, the employee must be paid overtime at the rate of at least 1.5 times the hourly rate of pay for all hours worked in excess of forty (40) in one week. If the position is exempt, overtime pay is not required. In order for a position to be considered exempt, the position must fit into one of the exemptions expressly set forth in the regulations promulgated by the United States Department of Labor ("US DOL"). These exemptions include: the bona fide executive, administrative, professional and outside sales employee exemptions, among others. As set forth in the US DOL's regulations, to qualify as exempt, a position must meet certain tests regarding the job duties of the position and the employee must be paid on a salary basis at the rate of not less than $455 per week. Job titles do not determine exempt status.

The notice and acknowledgement described above should be given to new employees at the time of hire, prior to their commencing work. A signed copy of the form, letter, or agreement containing the requisite language must be maintained in the employee's personnel file for at least six (6) years.

Unpaid Internships and the Fair Labor Standards Act

With the continuing high unemployment rate and slow economic growth, unpaid internships have become a popular means for individuals to gain experience in a new field, as well as a cost-efficient means for an employer to gauge a potential future employee. However, many employers may be unaware that unpaid interns, like employees, are regulated by wage and hour laws.

Minimum Wage and Overtime Requirements

All employers are required to abide by state and/or federal minimum wage and overtime requirements. If properly classified as an intern, the individual will fall outside of the scope of these wage laws. If, however, an intern is deemed to be an employee, wage laws will apply and that person must be compensated in accordance with applicable minimum wage and overtime requirements.

Employee or Intern?

The key question that an employer must answer when seeking to bring an intern on board for a training program is whether the individual qualifies as an intern or whether he or she is an "employee" within the meaning of federal and state law.

The US DOL has issued a six-part test to answer this question. In order to meet the test, and thereby be properly qualified as an "intern", each of the following criteria must be met:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is primarily for the benefit of the intern, not the employer;
3. The intern does not displace any regular employees, and works under close supervision;
4. There is no immediate advantage to the employer from the activities of the intern, and on occasion the employer's operations may actually be impeded;
5. The intern is not entitled to a job at the conclusion of the training period; and
6. The employer and the intern understand that the intern shall not be entitled to wages for the time spent training.

Interns in an office environment are often asked to perform work that would otherwise be performed by a paid employee, such as research, report writing and the like. Also, the interns are sometimes assigned to perform such day-to-day tasks as getting coffee or lunch, making copies, answering telephones, or sorting documents. Please note that these tasks do not satisfy the six part test and should not be performed by interns. These responsibilities require that the staff person be classified as an employee and paid the minimum wage and overtime in accordance with applicable laws.

Minimizing Risk

Adopt a Formal Internship Program

If an employer wishes to hire unpaid interns, it is helpful to adopt a formalized, written program. The US DOL has explained that an internship program should be a planned program of job training and work experience for the intern which is coordinated with a school-like learning component and structured to expose the intern to all aspects of an industry while promoting the development of broad, transferable skills. Further, courts have found it important to have a written agreement to the effect that interns have no expectation or guarantee of employment upon completion of the training. Designating a mentor or program manager is also recommended. Limiting the hours worked by interns as well as the total number of interns is also helpful in meeting the requirements of the six part test. For example, an employer can more readily prove that the internship is for the intern's own benefit if the intern only works a few hours a week, rather than eight hours a day, five days a week. Similarly, by limiting the total number of interns an employer has, the employer will be better able to show that the interns are being properly and closely supervised.

Paid "Interns"

Many of the pitfalls described above can be avoided by creating a part-time paid position as a temporary employee. The employee can gain industry knowledge, much the same as he or she would as an intern, but the employee would also be able to engage in the day-to-day tasks that would be prohibited as an intern because they are considered for the employer's benefit.

The temporary employee would be covered by the same laws and regulations as regular employees. As such, the employer would be subject to regular payroll taxes, but it would also have the benefit of the laws that govern the employment relationship, such as the protection of workers' compensation should an employee be injured while on the employer's premises.

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Conclusion

While unpaid interns appear to be an attractive means to give someone an opportunity at "no cost" to the employer, employers must keep in mind that a determination that an unpaid intern is in fact an employee has possible negative consequences. Penalties and fees associated with workers' compensation, unemployment insurance and federal and state taxes may all be implicated if an intern is found to be an employee.

As a preventative measure, employers should carefully review their internship programs to make sure that they are compliant with applicable law in order to avoid the risks associated with misclassification.

SEWARD & KISSEL LLP

If you have any questions or comments about this Newsletter, please feel free to contact any of the attorneys in our Litigation Group listed below via telephone at (212) 574-1200 or via e-mail generally by typing in the attorney's last name **@sewkis.com**.

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