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EMPLOYMENT LAW ALERT

March 2012

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For further information, please contact these Employment Law Group members:

Jeffrey M. Schlossberg
Chair
(516) 663-6554
jschlossberg@rmfpc.com

Douglas J. Good
(516) 663-6630
dgood@rmfpc.com

Joseph R. Harbeson
(516) 663-6545
jharbeson@rmfpc.com

Kimberly Malerba
(516) 663-6679
kmalerba@rmfpc.com

Another Unpaid Intern Sues; This Time Against Charlie Rose. Are You Next?

By: Jeffrey M. Schlossberg

In what seems like a wave of claims being filed by unpaid interns, a former intern of TV's Charlie Rose show has commenced a class action suit for unpaid wages. The plaintiff alleges that she worked 25 hours per week for the TV show and did not receive training or wages. Notably, this intern worked for Charlie Rose for several months in 2007. However, New York law permits claims to go back six years. This lawsuit comes on the heels of two other such cases - one filed against Hearst Publications involving Harper's Bazaar magazine, and one against Fox Searchlight Pictures, involving the Academy Award winning movie, "The Black Swan." In many industries, particularly entertainment and publishing, the common belief is that unpaid interns are simply the way of the world. However, as evidenced by the Charlie Rose case, where the internship occurred in 2007, plaintiffs' attorneys are now taking advantage of a law that has been on the books for decades. Of course, companies like Fox Searchlight and Hearst may have the budget to withstand these claims. Most companies cannot. Thus, as you consider your plans for the summer season, it is worthwhile for us to review the regulations governing interns.

The United States Department of Labor has developed a six-factor test to determine whether an individual can be an unpaid intern as opposed to an "employee." An employee is required to be paid minimum wage and overtime. The criteria for an unpaid intern are set out in a Department of Labor Fact Sheet that can be viewed by clicking here.

Not all of the factors necessarily need to be present for a student to be a lawful unpaid intern. The central focus should be on whether the student is the primary beneficiary of the arrangement. If the company is considered the primary beneficiary it is likely the student will be an "employee" and covered by the wage and hour laws. Here are some tips employers

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should consider if the goal is to conduct an unpaid internship:

1. Focus on exposing the intern to a career field and offer a mentoring experience. The focus should not be on producing goods or delivering services.
2. Ensure that interns are not substituting for regular workers. Rather, interns should be provided with job shadowing opportunities to learn functions and operations under close supervision and should perform minimal work.
3. Request documentation from the educational institution that confirms the internship is approved as educationally relevant and that the student will be entitled to receive credit for the internship.
4. Confirm in writing the intern's understanding that the internship is unpaid.

With the summer approaching fast and students looking for summer positions, employers must be cognizant of the serious implications that can arise in the event of a complaint or an audit from the Department of Labor. In addition to the potential for exposure resulting from a violation of the minimum wage and overtime laws, including double damages and attorneys' fees, there may also be implications concerning discrimination laws, tax issues, workers' compensation coverage, employee benefits and unemployment insurance. Therefore, when considering an internship program, employers should keep in mind that while an internship can be an excellent experience for both the employer and the intern, a violation of the wage and hour laws brings significant financial exposure. However, if structured properly with some advance planning, an internship can be rewarding for all and legally sound.

Is Accommodation Required When Employee Can Work 40 Hours?

By: Kimberly B. Malerba

Last month, a United States appellate court was confronted with the question of whether an employee meets the definition of disabled under the Americans With Disabilities Act where he was able to work 40 hours per week, but could not work required overtime hours. In this case, the employee worked a 40-hour week plus additional overtime shifts prior to the onset of the medical condition. After a period of leave, the employee requested an accommodation that would have limited him to working only 40 hours but not the additional overtime. The company refused the request asserting that if he could work 40 hours he was not "disabled" under the law and thus did not have to permit him to return to work. Once he was able to resume the overtime work, the company returned him to his position.

During this period, however, the employee filed a claim with the EEOC alleging that the company had failed to provide him with a reasonable accommodation. The EEOC agreed. Ultimately, the courts disagreed with the EEOC concluding that a person who can

work 40 hours per week is not eligible for accommodation under the ADA.

Based on this case one could conclude that while the definition of "disability" under the ADA is fairly broad (as is the definition under New York State law), there are limits to the ADA's reach. However, employers should not necessarily take comfort in that conclusion. It is important to remember that each situation involving potential accommodations for mental or physical illness must be reviewed carefully considering the facts of that particular circumstance. While the outcome here was favorable to the employer, employers must still remember that the "interactive process" is central to managing accommodation issues. Managers should be trained that at the first recognition of an applicant's or employee's need for accommodation, all options should be considered along with the legal implications of each decision. Remember, an ounce of prevention is worth a pound of cure.

NLRB Notice of Rights to be Posted April 30

The requirement that employers post the NLRB-issued employee rights poster, once delayed until April 30, will be delayed no more. Accordingly, as of April 30, all employers are required to post the appropriate poster in a conspicuous place alongside the myriad other posters. Information on the poster and a copy that you can print out is available on the NLRB's website, accessible by clicking here.

Please let us know if we can be of assistance on these or any other employment law issues.

RMF
RUSKINMOSCOUFALTISCHEK P.C.
Smart Counsel. Straight Talk.
East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
516.663.6600
www.rmfpc.com