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Ideas & Trends

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INSIDE

INTERNSHIPS

Case reminds employers to be careful using interns

A federal judge in the Southern District of New York recently granted conditional certification of a potential nation-wide class of approximately 3,000 current and former unpaid interns for Warner Music Group. These unpaid interns allege that they were employees of Warner who were entitled to minimum wage and overtime pay under the Fair Labor Standards Act (FLSA) because they completed some of the same work as paid employees; did not receive academic credit for their internship; and received little to no supervision. The interns emphasized the internship benefits to Warner (and downplayed the benefits of the internship received by the interns) by using Warner's own internship position posting, which provided:

"Every intern is assigned a special project that will both assist them in increasing their understanding of how each department operations ***and aid the department in addressing a business need.****"*

As to conditionally certifying the class of unpaid interns, the court found that the interns had met the "low burden" required to show that they were subject to a centralized policy that violated the FLSA. Accordingly, they may proceed as a class in court seeking to obtain wages for the time spent during their internships.

Although the court's decision involved the issue of nation-wide conditional certification in FLSA actions, and did not yet rule on the merits of the interns' claims, this case is a stark reminder to employers of the stringent standard to qualify interns as unpaid interns under the FLSA, particularly with respect to for-profit employers.

Wolters Kluwer Law & Business interviewed Bracewell & Giuliani partner Leslie Selig Byrd and attorney Amber Dodds regarding the implications of the case. The interview is reprinted below.

Question: Can you review for us the difference between an intern and an employee?

Answer: Under the Fair Labor Standards Act (FLSA), an employee is "any individual employed by an employer." "Employed" is defined to mean "suffer[ed] or permit[ted] to work." These definitions are intentionally broad and are designed to encompass most workers, with few exceptions, *e.g.,* "true" independent contractors, certain workers specifically excluded from coverage, "true" trainees.

Interns are not defined by the FLSA. An "intern" may or may not be an "employee." Employers often classify unpaid interns under the "trainee exemption"—a concept created by United States Supreme Court case law—which allows certain interns or

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trainees not to be paid for the time spent during the internship. Summarizing, the trainee exemption is applicable to an individual who participates in activities for his/her own benefit (as opposed to the employer's benefit) under the aid or instruction of the employer.

Applying the FLSA definition, to qualify, the intern must not be an "employee" "suffered or permitted" to work.

To distinguish, employees are individuals who work primarily for the benefit of the employer; non-employee interns are individuals who participate in employer activities for the intern's benefit. The United States Department of Labor (DOL), which enforces the FLSA, has developed a six-part test to determine whether an intern qualifies for the trainee exemption and need not be paid. According to the DOL, interns are presumed to be employees, unless they meet each of these six criteria:

- the internship is similar to the training that the intern would receive in an educational environment;
- the internship experience is for the benefit of the intern;
- the intern does not displace regular employees and works under close supervision of regular employees;
- the employer does not obtain an immediate advantage from the intern's activities;
- the intern is not necessarily entitled to job following the internship; and
- the employer and the intern understand that the intern is not entitled to wages for time spent in the internship.

Question: To what do you attribute the difficulty in distinguishing between intern and employee?

Answer: Based upon the increasing number of FLSA collective actions challenging the non-employee status of interns, we would say that the line between intern and employee is blurring. Interestingly, the trainee exemption was first introduced by the Supreme Court in 1947. Since that time, the DOL has developed the criteria mentioned earlier for determining whether individuals are employees or non-employee interns. Specific DOL opinion letters and factsheets directly address the criteria for determining whether individuals are interns or employees. Further, courts have interpreted these criteria against a wide variety of factual circumstances. In other words, we have numerous and specific guidelines to test the appropriateness of the intern classification. Yet, even with the guidelines, the potential for a mistaken classification occurs because each internship has unique facts and the guidelines must be applied on a case-by-case basis.

The distinction between employees and non-employee interns is made more difficult by the ever-evolving nature of a highly competitive workforce. The reality of our highly competitive workforce is that the demand for internships (paid or unpaid) by those eager to enter the job market and gain the experience of an internship may blur the line on the benefit question—whether the internship for the benefit of the intern or the employer.

"Depending upon the ultimate outcome of these and other lawsuits, companies may choose to eliminate unpaid internship programs. Others may elect to avoid potential risks by paying the interns minimum wage and limiting their working hours."

Whether or not the line is in fact becoming more "blurred," with increased communication through technology and social media, more interns are being informed of potential wage-and-hour violations related to their internships—thus the dramatic increase in FLSA collective actions challenging this classification.

Question: What do you expect to be the impact of the *Warner* case on current use of intern practices?

Answer: The *Warner* case, as well as similar ongoing class action lawsuits against other internship providers such as Hearst Corporation and Viacom, will have a significant effect on companies with internship programs. Depending upon

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Managing Editor
Heidi J. Henson, J.D.

Contributing Editors
David Stephanides, J.D.
Tulay Turan, J.D.

Newsletter Design:
Publishing Production & Design Services

Newsletter Layout:
Chris Tankiewicz

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the ultimate outcome of these and other lawsuits, companies may choose to eliminate unpaid internship programs. Others may elect to avoid potential risks by paying the interns minimum wage and limiting their working hours.

At minimum, employers will be advised to carefully and candidly evaluate their programs and make significant changes as needed. This includes, for example, reviewing internship position postings to confirm that the focus is on the benefits to the intern for participation; confirming that the interns are closely supervised and mentored; and ensuring valuable experiences that directly benefit the intern.

We expect many employers may limit unpaid internships to those interns who are receiving academic credit for their internship. Employers may collaborate even more closely with educational institutions to help develop educational requirements for interns that will be included in internships. For example, employers may partner with educational institutions that provide classes that correlate with the internship by requiring internship experience journals and other internship-related projects. Although academic credit for internship work is not expressly required to maintain non-employee intern rather than employee status, the provision of academic credit focuses the internship on the beneficial experiences for the intern.

Question: What can employers do to minimize the risk of misclassifying interns?

Answer: The potential risk for employers of misclassifying interns is significant, especially in view of both the stringent standard to qualify as an unpaid intern and the lenient standard for conditional certification of a collective class under the FLSA. The most risk adverse position is for employers to pay minimum wage and overtime pay to their interns. If companies choose to continue to provide unpaid internships, they should refocus their internship program around benefits to the intern. The critical theme is to orient the internship around the benefits provided to the intern rather than the business operations of the company.

Employers should evaluate each internship or internship program on a case-by-case basis to determine whether the interns are entitled to minimum wage and overtime under the FLSA.

At a minimum, we advise employers to follow the DOL guidelines:

1. Establish a specific duration for the internship prior to the beginning of the internship and clearly articulate that the internship is not paid.
2. Do not use interns to increase the workforce during a period of increased workload—if the employer would have hired additional employees or required existing employees to work longer hours to perform the work that interns are performing, then the interns must be paid minimum wage and overtime.
3. Design internship programs with the benefits to the interns in mind. The internship should provide interns with skills that can be used in multiple employment settings, rather than skills that are specific to the employer's business.
4. Structure the internship around the academic experience of the intern, not the regular business operation of the employer.
5. Provide interns with the opportunity to shadow and learn rather than directing them to perform the routine work of the employer's business.
6. Closely supervise and mentor interns.
7. Coordinate the program with an educational institution.
8. Assure that the intern will receive academic credit or that the internship fulfills a requirement of his or her program. ■

EQUAL EMPLOYMENT

Expert provides lessons for the Autism-friendly workplace

Autism statistics are staggering. The Centers for Disease Control estimates that one in 68 children in America is somewhere on the autism spectrum—five times more likely in boys than girls. Yet only 53 percent of young adults with autism are gainfully employed. Those with autism have some amazing gifts, talents and ideas, says Patty Pacelli, author of *Six-Word Lessons for Autism Friendly Workplaces* and an expert in the field of autism, that can materially contribute to a more effective and successful workplace. Unfortunately, many leaders don't know how to create an environment where an autistic employee can thrive and drive real bottom-line results, she said, participating in an Interview with Wolters Kluwer Law & Business.

"As leaders, it is not about giving autistic individuals simple jobs because they feel sorry for them or to meet some diversity goal, it's about hiring them because they truly meet a need in their business and possess the skills needed to excel in their job," Pacelli said. "We've seen first-hand how an autism-friendly workplace contributes to a more effective and balanced workplace. It is incumbent on to-

day's leaders to create an environment where employers and autistic employees not just survive, but thrive."

Pacelli said autistic individuals can bring enormous creativity to the workplace. "Autistic people's minds are wired differently, and their imaginations can be extreme. Managers should take advantage of this when looking for creative ideas or new ways to solve problems. If they give autistic team members opportunities to share their ideas, those ideas can lead to brilliant new concepts."

Not only should employers be aware of autistic employees' strengths, they should also learn about some of their challenges, and what to expect and how to accommodate them for better productivity:

- **Let the applicant demonstrate his or her skills.** Offering a practice activity at the interview, such as proofing a sample document for an editing position, may be the best way for someone with autism to demonstrate his abilities, and can help employers make a more accurate hiring decision. It can be hard for autistic people to "sell themselves" and put their skills and attributes into words, even if they are excellent candidates.
- **Accommodations help employer and employee succeed.** In the ideal scenario, giving autistic employees accommodations would help the company run more effectively while enabling autistic employees to be productive, leading to better products and services and more profit. All parties should work together to allow autistic employees to be productive without sacrificing the work environment for others.
- **Options for accommodations make a difference.** Specifically, give all onboarding employees a survey or menu of options, asking their preferences for things like sound, light, physical work space, type of communication desired, methods for performance appraisals and more. This allows autistic employees to simply state their preferences along with everyone else, without feeling different or singled out.

"As leaders, creating an environment where high-functioning autistic employees can thrive is more than demonstrating social responsibility and diversity," said Pacelli. "It also yields the business results that leaders need to not just survive, but thrive." ■

Source: *In addition to the interview with Wolters Kluwer Law & Business, portions of this article were excerpted from the book, Six-Word Lessons for Autism Friendly Workplaces by Patty Pacelli. For additional information about the author or to purchase the book, visit www.autismfriendlyworkplace.com.*

HR QUIZ

Must a group health plan offer participants a second chance at a reward for quitting smoking?

Q Issue: *Your group health plan charges participants a tobacco premium surcharge but also provides an opportunity to avoid the surcharge if, at the time of enrollment or annual re-enrollment, the participant agrees to participate in (and subsequently completes within the plan year) a tobacco cessation educational program. One of the participants, a tobacco user, initially declined the opportunity to participate in the tobacco cessation program, but would like to join in the middle of the plan year. Is the plan required to provide the opportunity to avoid the surcharge or provide another reward to the individual for that plan year?*

A Answer: No, if a participant is provided a reasonable opportunity to enroll in the tobacco cessation program at the beginning of the plan year and qualify for the reward (i.e., avoiding the tobacco premium surcharge) under the program, the plan is not required (but is permitted) to provide another opportunity to avoid the tobacco premium surcharge until renewal or reenrollment for coverage for the next plan year. Nothing, however, prevents a plan or issuer from allowing rewards (including prorated rewards) for mid-year enrollment in a wellness program for that plan year.

Standard for obtaining a reward. If a qualified plan participant's doctor advises that an outcome-based wellness program's standard for obtaining a reward is medically inappropriate for the participant, the plan must provide a reward for satisfying a reasonable alternative standard that accommodates the recommendations of the doctor. Sample language, found in ERISA Reg. §2590.702(f)(6), may be used to satisfy the requirement to provide notice of the availability of a reasonable alternative standard. This language may be modified if it includes all required content found in paragraphs (f)(3)(v) or (f)(4)(v) of the regulations.

Source: *FAQs about Affordable Care Act Implementation (Part XVIII) and Mental Health Parity Implementation, January 9, 2014, http://www.dol.gov/ebsa/faqs/faq-aca18.html.*

SAFETY

The role of distracted-driving policies in a BYOD workplace

More and more employers are adopting BYOD policies. BYOD, which stands for "Bring Your Own Device," eliminates the need for employers to give employees a smartphone or tablet for work-related purposes. Instead, the employee brings his or her own device and uses it for both work and personal purposes.

Although BYOD policies are popular, they are not risk free. One of the (many) dangers of employee use of mobile technology is the potential for distracted driving. Regardless of who owns the device, employers may face liability for an employee who harms a third party due to the employee's negligent use of a smartphone while driving.

Many cities and municipalities now prohibit drivers from operating a vehicle and using a cellphone unless they use hands-free device. Although this is a great start, it may not be enough to prevent liability for employers. The U.S. Department of Labor, for example, takes a very firm stance on this issue, stating: Employers have a responsibility and **legal obligation** to have a clear, unequivocal, and enforced policy against texting while driving. While attorney Molly DiBianca, associate at Young, Conaway, Stargatt & Taylor, LLP, is not entirely sure that she agrees with that statement, stating "I don't know of any "legal obligation" to have a distracted-driving policy," she does think that employers should have a distracted-driving policy.

The good news is that the federal government has provided a sample distracted-driving policy for employers to use. The policy is short and to the point and it makes clear that employees are prohibited from using a hand-held cellphone or smartphone while operating a vehicle.

If you don't have a distracted-driving policy, consider whether this sample policy, provided by the National Highway Safety Transportation Administration, isn't worth implementing. Even if it's just a starting point, employers are well advised to have something in place to prevent employees from endangering themselves or others while operating a vehicle. The NHSTA offers additional resources to employers who want to take further steps to prevent distracted driving by employers.

And, remember, just because it's the employee's own device does not mean that the employer won't be held liable. A BYOD workplace is not a defense to a claim of negligence for harm caused by an employee in the course and scope of his or her employment. ■

Source: *The Role of a Distracted-Driving Policy in a BYOD Workplace, posted May 12, 2014, on the Delaware Employment Law Blog by Molly DiBianca, associate at Young, Conaway, Stargatt & Taylor, LLP.*

EMPLOYEE HANDBOOKS

Recent NLRB developments on the employee handbook front

Union and nonunion employers alike have had to keep a watchful eye on the NLRB in recent years. The agency has begun to forage on new turf — the ubiquitous employee handbook — as it seeks to unearth violations of employees' protected rights under the NLRA. The Board has challenged a number of common handbook provisions, resulting in disparate holdings, even under quite similar facts, and leaving confusion and consternation in its wake. Here's a look at the latest developments on that front.

ALJ ignores GC. In late April, an NLRB law judge struck down a communications policy embodied in Kroger Co. of Michigan's handbook. The challenged provision required employees, whenever they published "work-related information" online and identified themselves as Kroger employees, to include a disclaimer stating "the postings on this site are my own and do not necessarily represent the postings, strategies, or opinion of the Kroger Co. family of stores." According to the ALJ, this requirement was a tedious enough burden on employees that it would dissuade them from exercising their protected statutory rights online. It was overbroad, the ALJ said, in that it applied to all manner of online communications in which work-related information was discussed, including Facebook postings.

Unfortunately for Kroger, it mattered little that, in drafting its policy, the company used language that was approved by the NLRB acting general counsel Lafe Solomon in a 2012 report on social media cases. The ALJ was unpersuaded by the GC guidance (which lacked precedential value). The ALJ also rejected Kroger's argument that another regional director had settled charges against an employer by allowing it to maintain a policy nearly identical to the one here. "It simply does not matter what position a Regional Director took in a different case three years ago in order to settle that case," the law judge said.

In another recent decision, an ALJ invalidated several overly broad handbook rules and found the employer's attempt to

repudiate them was insufficient. One faulty provision was an "inappropriate conduct" rule that barred disclosure of confidential company, customer, and employee information, including confidential information maintained in personnel files. This clause would lead employees to reasonably believe they were restricted from being openly critical of the employer's treatment of its workers and from discussing wages, benefits, and related information with coworkers or union reps, the ALJ found.

Another rule directed employees to refrain from posting certain information and comments on the Internet. It was not restricted to confidential or even company information; it didn't distinguish between protecting information about customers or company business (restrictions that would conceivably be lawful) and the sharing of other information; and thus it was inherently overbroad. Also problematic: It prohibited the posting of any information without the company's prior approval.

Division of Advice OK's at-will statements. The Division of Advice found nothing unlawful in a handbook provision that prohibited anyone other than the company's senior vice president from modifying employees' at-will employment status, or its express statement that "[n]o statement, act, series of events or pattern of conduct can change this at-will [employment] relationship." The employees would not reasonably construe the policy to prohibit Sec. 7 activity, according to a recent advice memo. Taken in context, it was clear the at-will statement wasn't aimed at employees' protected conduct under the Act but rather, was meant to guard against lawsuits based on the contention that the handbook was an enforceable employment contract, according to the Division of Advice. Therefore, the clause did not conflict with potential attempts by employees to unionize.

This latest directive was good news for employers in light of ongoing concerns in recent years that the Board was levying a direct attack on at-will employment clauses. The controversy first erupted in February 2012, when a regional director filed a complaint contending that an at-will provision maintained by the Hyatt Hotels violated Sec. 7 rights. The problem, according to the complaint, was that employees had to acknowledge receipt of the provision, which essentially forced them to affirm that their at-will status could not be changed — leading them to reasonably believe they could never unionize. The at-will policy in question here, though, did not require employees to effectively waive their right to participate in future Section 7 activity.

Since that time, the General Counsel's office has issued advice memoranda on several at-will employment clauses, deeming them lawful, and ALJs have considered and condoned numerous at-will provisions brought before them. The agency's position (once seen as murky, at best, and as "a ruse" by at least one management lawyer) appears to have crystallized: At-will provisions are lawful as long as they don't require employees to acknowledge their at-will status is unchangeable (and, consequently, that efforts to unionize thus would be futile). It should be noted, though, that in a February 2014 directive to regional directors, the General Counsel's office mandated that all cases involving at-will provisions in employer handbooks must be submitted to the Division of Advice (unless they are otherwise resolved through extant advice memoranda) — signaling that careful scrutiny of such provisions may continue.

Board rejects numerous handbook policies. The fervor surrounding the NLRB's scrutiny of employee handbooks arose while the agency was hampered by challenges to the legitimacy of Board members' (and, to a lesser extent, the acting general counsel's) appointments. Thus, the NLRB's jurisprudence on the issue could be readily called into question. However, the Senate-sanctioned, five-member NLRB has now begun to field handbook cases that have percolated up from the regions, and its members have recently found a number of provisions unlawful on their face:

- A "standards of behavior" policy prohibiting "negative comment about our fellow team members" (including managers) and engaging in "negativity or gossip," and requiring employees to "represent [the Respondent] in the community in a positive and professional manner in every opportunity" (*Hills and Dales General Hospital*)
- A bus company's rules barring disclosure of "any company information," including wage and benefit information; prohibiting employees from making statements about work-related accidents to anyone but the police or company management; prohibiting "false statements" about the company; barring participation in outside activities that would be "detrimental" to the company's image, "discourteous or inappropriate attitude or behavior to passengers, coworkers, or the public," and prohibiting employees from engaging in "disorderly conduct during working hours" (*First Transit, Inc*)
- A social media policy in an employee handbook, which required that employees' contacts with parents, school representatives, and school officials be "appropriate," and also included a provision subjecting employees to potential discipline for publicly sharing "unfavorable" information "related to the company or any of its employees." (*Durham School Services*)

In addition, an employer last month agreed to rescind its nationwide social media policy to resolve an NLRB complaint alleging the policy interfered with employees' rights to discuss terms and conditions of employment on social media. Under the terms of its settlement with the Board, the employer will mail notices advising employees that they will not be prohibited from using social media to discuss their terms and conditions of employment.

Board's handbook approach condoned. Finally, the NLRB recently secured a ruling from the Fifth Circuit enforcing its order which found a nonunion employer had unlawfully maintained an overly broad confidentiality rule that barred discussions of "personnel information" outside the company. The rule would in effect, if not expressly, prohibit employees from discussing wage information, thus chilling their protected rights. The very existence of the provision was violation enough, the appeals court agreed, even absent evidence of enforcement.

Thus, the circuit court that had slapped the NLRB's wrist in *D.R. Horton* as the agency moved to invalidate employers' mandatory arbitration agreements gave its seal of approval to the Board's rejection of a nonunion company's handbook rule in what, incidentally, had been a divided decision below. In fact, in his dissent, Member Hayes noted that the D.C. Circuit has been "particularly critical" of the Board's failure to give a fair reading to employers' confidentiality rules in their entirety and predicted that, were the case to go up before that court on review, "it will likely suffer the same rebuke." The Fifth Circuit saw it differently, however.

Drafting tips for the wary

Where does this leave employers as they strive to fashion workable handbook policies that can survive NLRB scrutiny while simultaneously meeting the organization's business needs? While it can be difficult to reconcile the various holdings in recent years, a few instructive principles emerge:

1. **Context matters.** As former Member Hayes noted, a particular handbook provision cannot be read in isolation, and the agency's rulings are rife with examples of this principle in action. However, there is little sympathy for the "in context" defense if it would expect an employee to reconcile clauses, "when read together," from far-flung pages of the handbook. An employer won't fare well with claims that a broad confidentiality rule on page 3 is meant to apply only to a provision on protecting intellectual property discussed on page 16. If a particular policy must be placed in a remote location from its "context," clearly reference and cite to the relevant provision that purportedly informs the intended meaning.
2. **Prior restraint is a no-no.** A general rule requiring employees to request permission before posting online communications constitutes unlawful interference. As Kroger Co. learned, a seemingly innocuous requirement (such as a straightforward disclaimer) may be seen as unduly cumbersome for employees in the eyes of a law judge.
3. **"Ambiguous" equals "overbroad."** While ambiguous terms are often used to afford some wiggle room in enforcing a handbook rule, "ambiguity" often equals "overbroad" in the NLRB's perusing eyes. Provide specific examples of the conduct that a particular rule is intended to proscribe (stressing, of course, that the examples are illustrative and not exhaustive). Extra points are awarded for noting exceptions — e.g., a statement that your confidentiality rule "is not intended to prohibit employees from discussing wages or any other specific terms and conditions of employment."
4. **Take "advice" with a grain of salt.** As the Kroger Co case above makes clear, reliance on the General Counsel's guidance when drafting handbook provisions isn't foolproof.
5. **No harbor is safe.** The NLRB undoubtedly has sent mixed messages in the past on the utility of including safe-harbor provisions in employee handbooks. A savings clause, in theory, should shield your organization from Board charges, provided it makes clear to employees that you have no intention of interfering with their Sec. 7 rights. But such a provision must be drafted with care. One challenged handbook included a "freedom of association" policy expressly stating that management supported the right of employees to vote for or against union representation, without interference. But the provision "focused solely on union organizational rights," the Board lamented, striking the clause because it failed to address "the broad panoply of rights protected by Section 7." Truth be told, though, it's not certain that even the most artfully drafted clause will have its intended prophylactic effect.

Facing a handbook charge

Finally, a few points to keep in mind when confronted with an NLRB enforcement action over an employee handbook provision:

- **Repudiate like you mean it.** The NLRB expects employers to be emphatic when attempting to repudiate a problematic handbook policy. Quietly stripping the offending provision isn't likely to placate the agency in enforcement proceedings. An employer must be timely and unambiguous in disclaiming the faulty language, and upfront in notifying employees of the change.
- **"Tend to chill" is the test.** An argument that none of your employees have actually interpreted your handbook provision as restricting their rights under the NLRA will be dead on arrival. Alas, that's the frustrating nature of grappling with the NLRB. But the test is whether your handbook rule theoretically "would reasonably tend to chill" employees in the exercise of their rights, not whether it's actually done so.
- **The rule's the thing.** Similarly, whether your organization has actually enforced a challenged handbook provision in a discriminatory or heavy-handed manner is irrelevant. Again, the "reasonably tend to chill" test applies. There need not be an aggrieved employee for the Board to take issue with the rule on its face.
- **Your case is unprecedented.** Handbook cases remain relatively uncharted territory, and the Board's law judges and regional directors are reaching independent deci-

sions on a fairly blank slate. Don't stake your litigation strategy on the presumption that your (arguably) identical facts will result in a similar outcome.

It ain't over til it's over. Employee handbook complaints typically arise in relation to an employee's (or union's) filing of an unfair labor practice complaint — very often in response to an unrelated gripe, at which point the agency will ask to see your handbook. So even if you manage to peacefully resolve the underlying dispute with your employee, that doesn't mean you've squared things with the Board. ■

Source: *"Recent NLRB developments on the employee handbook front" was written by Lisa Milam-Perez, J.D. and originally published in the May 13, 2014 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

HIRING PRACTICES

Expert says offer letters still have a place in hiring practices

Even in this age of technology and innovation, old school business best practices apply when hiring new employees, including this one: Get it in writing. Employment attorney, Keith Clouse, provides the following guidelines to for crafting effective offer letters:

1. **Be specific, and be thorough.** The offer letter provides details about the essential duties of the position. For example, if the job requires direct customer contact, that's important for a potential employee to know—especially if he's an introvert and hates talking to people. In many cases, I've heard employees complain with comments like, "You never told me I'd have to do XYZ." An offer letter that describes specific job duties, and can even include the actual job description, will help nip that complaint in the bud. We've also seen other litigation issues that involve compensation plans for commissioned salespeople. We advise employers to be sure to tell the employee that he or she will be paid in accordance with the company's compensation plan—and attach a copy of the plan to the offer letter. Also state that the company reserves the right to modify the comp plan at the company's discretion.
2. **Check out agreements with competitors.** If the company is hiring an employee from a competitor, the letter should ask the employee to confirm that he or she isn't bound by any non-compete or non-solicit agreements that could prohibit or limit the proposed employment. The employer should also instruct the employee not to bring any information from former employers, specifically including confidential information or trade secrets.
3. **Stick to the plan.** In the interview process, a verbal offer is the start of the employment phase—an act that begins the important employer/employee relationship—and indicates that a candidate will accept the position, thereby saving you time and effort crafting an offer letter for someone who's not a viable prospect. The pre-letter verbal discussion allows the company to tailor the offer letter to include any specific terms that have been negotiated between the company and the candidate. If any terms have changed after the verbal agreement, the formal offer letter should contain language that it supersedes any verbal conversations or employment terms that may have been discussed (as should any subsequent employment arrangement).

"Even in this age of technology and innovation, old school business best practices apply when hiring new employees, including this one: Get it in writing."

4. **Just the facts.** The offer letter should stick to the facts of the job and not make any projections for the future. To that end, be sure to include an at-will statement. Most of the time, an offer letter mentions an annual salary, but without the at-will disclaimer employees often take the position that their employment is guaranteed for at least one year. This assumption can have serious implications if there is a separation of employment. Although case law has largely rejected that argument, the battle can be avoided by the simple insertion of one sentence. Also avoid making any promissory statements such as "job security," "we're a family company," or "in the future." And, eliminate any phrases that create any guarantee for discretionary bonuses: don't promise raises, bonuses, or other perks if those aren't guaranteed.

To ensure your offer letter includes all of the necessary components, start with a checklist. A template also creates consistency and can help avoid a claim that employees are being treated differently, which is often a key element in a discrimination claim. Consistent practices regarding offer letters can provide an employer with evidence that it treats all employees equally. ■

Source: *Clouse Dunn.*

HR NOTEBOOK

CPI for all items increases 0.3% in April

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.3 percent in April on a seasonally adjusted basis, the U.S. Bureau of Labor Statistics (BLS) reported May 15. Over the last 12 months, the all items index increased 2.0 percent before seasonal adjustment.

The indexes for gasoline, shelter, and food all rose in April and contributed to the seasonally adjusted all items increase. The gasoline index rose 2.3 percent; this led to the first increase in the energy index since January, despite declines in the electricity and fuel oil indexes. The food index rose 0.4 percent for the third month in a row, as the index for meats rose sharply.

The index for all items less food and energy rose 0.2 percent in April, with most of its major components posting increases, including shelter (+0.2%), medical care (+0.3%), airline fares (+2.6%), new vehicles (+0.3%), used cars and trucks (+0.5%), and recreation (+0.2%). The indexes for apparel, household furnishings and operations, and personal care were all unchanged in April.

Real average hourly earnings fall 0.3 percent in April

Real average hourly earnings for all employees decreased 0.3 percent from March to April, seasonally adjusted, the BLS reported May 15. This decrease stems from unchanged average hourly earnings combined with a 0.3 percent increase in the Consumer Price Index for All Urban Consumers (CPI-U). Real average weekly earnings fell 0.3 percent over the month due to the 0.3 percent decrease in real average hourly earnings combined with an unchanged average workweek.

Real average hourly earnings fell 0.1 percent, seasonally adjusted, from April 2013 to April 2014. The decrease in real average hourly earnings, combined with a 0.3 percent increase in the average workweek, resulted in a 0.2 percent increase in real average weekly earnings over this period.

Unemployment rate falls to 6.3% in April

Total nonfarm payroll employment rose by 288,000, and the unemployment rate fell by 0.4 percentage point to 6.3 percent in April, the U.S. Bureau of Labor Statistics reported May 2. Employment gains were widespread, led by job growth in professional and business services (+75,000), retail trade (+35,000), food services and drinking places (+33,000), and construction (+32,000). Employment gains were also seen in health care (+19,000), other services (+15,000) and mining (+10,000). Employment in other major industries, including manufacturing, transportation and warehousing, information, financial activities, and government, changed little over the month.

Money woes affecting workers, according to SHRM survey

A lack of money to cover expenses is affecting employees at their organizations, 41 percent of human resources professionals reported in a new survey from the Society for Human Resource Management (SHRM), and almost as many HR representatives said employees are faced with more financial challenges today than early in the recession.

Medical expenses are the most common personal financial challenge affecting employees, 42 percent of HR professionals said in the Financial Wellness in the Workplace survey. This represents a 7 percentage point increase from 2011.

Almost one-quarter of respondents said their employees are more financially challenged than even a year ago. Almost two-thirds said employees have been more likely to request a loan from a defined contribution savings plan in the past 12 months compared to previous years.

The result of these challenges? Seventy percent said personal financial challenges have an impact (large or some) on overall employee performance, notably causing stress and affecting the ability to focus on work.

Fifty-seven percent of respondents in the survey said their organizations provided financial education to their employees. The most common types were retirement planning (offered by 79 percent of the respondents who provided financial education), financial counseling/resources though an employee assistance program (75 percent) and financial investment planning (56 percent).

But one-quarter of respondents said their organizations faced obstacles in providing financial education for their employees. The greatest challenges were cost (cited by 33 percent of respondents) and lack of interest from staff (28 percent).

What prevents organizations from offering their employees financial education: Cost (24 percent) and lack of staff resources (22 percent). ■