

Unpaid Interns: Potential Pitfall for the Unwary Employer

by Terry C. Davis tcd@shuttleworthlaw.com

As the old saying goes, "If it sounds too good to be true, it probably is." In today's economy, nothing is more tempting than free labor. And eager young college students are willing to go to great lengths to get their foot in the door to obtain that increasingly elusive first job. So, what's an employer to do if a college student contacts it and asks to volunteer as a student intern?

The Department of Labor (DOL) announced in April 2010 that it will step up enforcement efforts against employers that offer unpaid internships. This announcement coincided with a New York Times article raising the issue of abuses of unpaid internships.

As an employer, it's important to understand the distinction between "employees" and "interns." The wage and hour laws only apply to "employees" and not "interns." In order to be an "intern" – and therefore not subject to wage and hour laws - the following six criteria must be met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment.
2. The internship experience is for the benefit of the intern.



3. The intern does not displace regular employees, but works under close supervision of existing staff.
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the internship.

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Of the six criteria, the first is probably most critical – you should coordinate with the school if possible to set up a schedule and objectives for the internship. In order to clearly show criteria number six, it is advisable to have a written agreement in place prior to the start of the internship.

The danger for the employer include liability for minimum wage and overtime pay for hours worked by the intern, as well as possible impacts on benefit plans due to the improper exclusion of the "employee" intern.

The bottom line for employers is that you must tread carefully, and accept an unpaid intern only if you can clearly meet the six criteria. If in doubt, contact an employment lawyer in Shuttleworth's Employment Law Practice Group for consultation prior to accepting the intern. ♦

Veteran's Day—The right to a day off

by Mark P.A. Hudson
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On April 27, Governor Culver signed a bill into law giving Iowa veterans the right to take off Veteran's Day each year, codified at Iowa Code Section 91A.5A. The law requires employers to provide each employee who is a veteran, as defined by Iowa Code Section 35.1, with holiday time off for Veteran's Day, November 11th if the employee would otherwise be required

to work on that day. Importantly, employers have the discretion of providing paid or unpaid time off, "unless providing time off impact public health or safety or would cause the employer to experience significant economic or operational disruption." An employee must provide the employer with at least one month's prior written notice of the employee's intent to take time off for the Veteran's

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Day and must also provide the employer with a Federal Certificate of Release or Discharge from active duty, or such similar Federal documents, for purposes of determining the employees eligibility for the benefit provided under this law.

The employer must then, at least ten (10) days prior to Veteran's Day, notify the employee if the employee should be provided paid or unpaid time off on Veteran's Day. If the employer determines that the employer is unable to provide

time off for Veteran's Day for all employees who request time off, the employer should deny time off to the minimum number of employees needed by the employer to protect public health and safety or to maintain minimal operational capacity, as applicable. If you have any questions regarding Iowa's new Veteran's Day law, please contact an employment lawyer in Shuttleworth's Employment Law Practice Group. ♦

Limited time opportunity to correct 409A Plan failures

by Gary J. Streit & Cynthia M. Boyle

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In January of this year, the IRS issued Notice 2010-6, providing correction procedures and relief for nonqualified deferred compensation plans failing to satisfy the requirements of Internal Revenue Code § 409A. The Notice explains how employers can correct these plans and avoid the severe tax consequences that apply to nonqualified deferred compensation plans failing to satisfy the § 409A requirements.

Background

Section 409A contains a set of requirements for employers compensating employees under nonqualified deferred compensation plans. These requirements restrict the timing of payments, acceleration of benefits, and deferral of benefits under nonqualified deferred compensation plans. Under § 409A, failure to satisfy these requirements in either operation or form will result in substantial tax penalties to the employee. These penalties include gross income inclusion for the amounts of compensation deferred in the current year as well as previous years, an additional 20% excise tax on that amount, and interest, at the current underpayment rate plus 1 percent, on the underpayments that would have accumulated on the amount now includible in gross income if it had been initially includible in gross income. In 2007, the IRS issued the final regulations under § 409A, including regulations providing transition relief and guidance on amending plans that would otherwise fail under § 409A. In late 2008, the IRS issued Notice 2008-113, which extended relief from penalties for plans failing to satisfy the operational requirements of § 409A as long as the employer amends the plan in accordance with that Notice. This year the IRS issued Notice 2010-6, which provides correction procedures and relief from tax penalties for nonqualified

deferred compensation plans that fail to comply in form with the requirements of § 409A.

Types of Plan Failures Covered by Notice 2010-6

The following plan failures may qualify for relief under Notice 2010-6:

- Ambiguous plan terms
- Permissible plan terms defined in a way that is impermissible under the regulations to § 409A
- Payment periods that are impermissible because the period between the payment event and payment date exceeds the 90 days allowed under the regulations to § 409A or because the payment period is dependent upon the service provider completing additional employment-related activities
- Payments that are dependent on payment events or subject to payment schedules that are impermissible under the regulations to § 409A
- Payment plans relating to specified employees that do not contain a six-month delay of payment
- Impermissible deferral election provisions

Eligibility for Relief Under Notice 2010-6

Notice 2010-6 breaks the eligibility requirements for a valid correction into three different categories. First, the employer and employee must comply with a list of general requirements for all document failure corrections under Notice 2010-6. Next, the employer and employee must comply with the requirements established for the specific type of failure that they are attempting to correct. Finally, the employer and employee must comply with the information reporting and income inclusion requirements under the Notice.

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Relief Provided by Notice 2010-6

Notice 2010-6 provides several types of significant tax relief. First, the notice explains how employers can amend their nonqualified deferred compensation plans to cure certain plan failures and avoid tax penalties going forward. Additionally, the Notice provides that the current income inclusion and additional tax penalties will not apply to certain corrections made under the Notice if the corrections do not affect plan payments for one year following the date of correction. The Notice also provides transition relief by treating certain document corrections made prior to December 31, 2010 as if they were made on January 1, 2009. Finally, the Notice provides additional transition relief

by excusing income inclusion as a condition of relief for certain corrections if the corrections are made prior to December 31, 2010.

Conclusion

Notice 2010-6 provides additional time and procedures for employers to bring previously non-compliant nonqualified deferred compensation plans in line with the requirements of § 409A. Employers administering such plans should take this opportunity to review their plans and determine whether it would be in the best interest of the employer and its employees to make plan amendments under Notice 2010-6 before the end of this year. ♦

Financial Reform: Increased whistleblower protection

by Sam E. Jones sej@shuttleworthlaw.com

President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”) into law on July 21, 2010. The DFA received a great deal of national attention because it represented a portion of President Obama’s long awaited attempt to reform the financial sector. However, the effect of the DFA goes far beyond the boundaries of Wall Street. Specifically, the DFA expands employer’s liability for taking adverse action against whistleblowers. The portion of the DFA relating to whistleblower liability includes the following specific provisions:

I. Increased Financial Incentives to Whistleblowers

Section 922 of DFA Title IX amends The Security and Exchange Act of 1934 to provide new monetary incentives for individuals reporting wrongdoing to the SEC. The Act applies the same incentives and protections to individuals submitting reports to the Commodity Futures Trading Commission (“CFTC”). Individuals who contribute original information that leads to recoveries of monetary sanctions of \$1,000,000 or more are eligible to receive awards ranging from 10% – 30% of the sanction amount.

II. Clear Anti-Retaliation Provisions

Employees that provide information that leads to sanctions under the DFA are shielded from adverse action by their employer. Employers are forbidden from discharging, demoting, suspending, threatening, harassing (directly or indirectly) or otherwise discriminating against the whistleblower. A whistleblower who has been the subject of

adverse action by their employer has standing to bring a civil action against the employer. The damages in such an action can include:

- Reinstatement;
- Double back pay plus interest; and
- Attorneys' fees and litigation costs.

Those provisions represent a significant expansion of the whistleblower protections previously made available to employees of offending corporations.

Additionally, the DFA amends the False Claims Act’s (“FCA”) anti-retaliation provisions. The DFA expands the definition of “protected conduct” under the FCA. The new definition includes “lawful acts done by the employee... in furtherance of an action under this section....” Under this new definition, the FCA’s anti-retaliation provisions

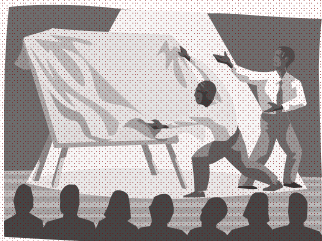
extend protection to whistleblowers who report actions by their employers that are in violation of the DFA’s consumer protection provisions.

Conclusion

The significant increase in incentives provided to whistleblowers under the DFA is almost certain to lead to a higher number of reports made by employees to federal agencies. Additionally, the DFA’s new protections for whistleblowers make it essential that employers proceed with extreme caution when dealing with employees that have made reports to outside entities. An experienced employment lawyer should be consulted prior to taking any action against an employee that has attempted to act as a “whistleblower.” ♦

“... the DFA expands employer’s liability for taking adverse action against whistleblowers.”

Shuttleworth & Ingersoll's Employment Law Practice Group Annual Employment Law Seminar



Thursday, October 21, 2010
8:30—1:00

Lunch served at Noon
Elmcrest Country Club
Cedar Rapids, Iowa

Topics to include:

- ⊗ Health Care Reform
- ⊗ Workers' Compensation Update
- ⊗ Same Sex Marriage – Benefit and Tax Implications
- ⊗ Social Media and Privacy Issues
- ⊗ Ask The Experts
- ⊗ The danger of "Regarded As" Disability Claims
- ⊗ No-Compete Agreements
- ⊗ ERISA Preemption

To register, go to <http://tiny.cc/SIEmployLawSeminar>
and click the "Register" button

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Upcoming Speaking Engagements



October 8

Employer's Obligation Under the New Health Care Act

ISBA Teleconference
Presented by Mark P.A. Hudson
<http://tiny.cc/HealthReformTeleconf>



October 11

Jury Selection, Openings & Closings

ISBA Nuts & Bolts Seminar
Coralville, Iowa
Presented by Tricia Hoffman-Simanek
<http://tiny.cc/JurySelection>



October 26

Ethics Issues in Employment Litigation

ISBA Labor & Employment Seminar
Des Moines, Iowa
Presented by Mark P.A. Hudson
<http://tiny.cc/EthicsEmployLaw>



November 16

Employment Law Update

Great River Human Resources Association
Davenport, Iowa
Presented by Mark P.A. Hudson