EPSTEIN BECKER GREEN

Take 5 Newsletter: EEOC Update; Intern Wage and Hour Claims; NLRB Quorum; Unemployment Discrimination; Social Media Passwords

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The April 2013 issue of Take 5 *was written by* ***David W. Garland****, Chair of Epstein Becker Green's Labor and Employment Steering Committee and a Member of the Firm in the New York and Newark offices.*

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1. EEOC Releases Letter Addressing Wellness Programs and Reasonable Accommodation Obligations

In a letter issued recently by the Equal Employment Opportunity Commission ("EEOC"), Peggy Mastroianni, the agency's Legal Counsel, responded to questions posed by an employer regarding wellness programs and the need for the employer to provide a reasonable accommodation in that context. The letter offers insight on the EEOC's position in an area receiving considerable attention lately: the application of Title I of the Americans with Disabilities Act ("Title I") to the Affordable Care Act's incentives for the utilization and development of wellness programs.

Health plans encouraging employees to lead healthier lives and reduce their risk of disease qualify as wellness programs, according to the EEOC. Because employees must disclose the presence of certain health conditions in order to qualify for such plans, this type of inquiry constitutes a disability inquiry. Title I, however, strictly limits when employers are permitted to make

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disability-related inquiries or require medical examinations. Such inquiries and medical exams are permitted only if the corresponding wellness program is voluntary.

As a threshold matter, the EEOC did not take a position in its letter on whether a reward for participation, such as waiver of an annual deductible, amounts to a requirement to participate or whether the withholding of a reward would constitute a penalty, thus rendering a program involuntary.

On the subject of reasonable accommodation, the EEOC's letter explained that, if a wellness program is voluntary and an employer requires that participants meet certain health outcomes or engage in specific activities to earn rewards or stay in the program, then the employer "must provide reasonable accommodations, absent undue hardship, to those individuals who are unable to meet the outcomes or engage in specific activities due to disability." For example, if a wellness plan required a participant to take his or her required medications more than 80 percent of the time and an employee could not meet that requirement because of a disability, then the employer would be required to provide a reasonable accommodation to allow the employee to participate in the plan and still earn the available reward.

Additionally, the EEOC's letter stated that, if a disabled person in a wellness program is unable to meet the plan's requirements because of a disability and is provided with reasonable accommodations, then "it would not be unlawful to remove an employee from the 'higher benefit' plan for failing to meet requirements, as long as he or she remained eligible to participate in the employer's standard benefit plan." Therefore, a disabled individual might still be removed from a wellness program for failure to meet its requirements, as long as he or she was provided with a reasonable accommodation and could still participate in a standard benefit plan.

The EEOC's letter provides some helpful guidance on wellness programs and persons with disabilities. During the implementation and expansion of wellness programs, it is important to consider the application of Title I and reasonable accommodations in order to avoid liability for disability discrimination.

2. Paying Interns May Not Be Enough to Stave Off Wage and Hour Claims

While unpaid internships have increasingly been the focus of class and collective actions brought under state and federal wage and hour laws, a lawsuit filed by a paid Hamilton College athletic department non-student intern (*Kozik v. Hamilton College*) may signal the start of a new line of cases.

In September 2011, former unpaid interns sued Fox Searchlight Pictures, Inc. ("Fox"), alleging that Fox had violated federal and state wage and hour laws by failing to pay its interns for work that they claimed was more aptly suited for paid employees. Since the Fox lawsuit, other unpaid interns have caught wind of the potential for a payday and have followed suit—literally, as evidenced by the complaints filed by former unpaid interns in February 2012 against the Hearst Corporation, in March 2012 against "The Charlie Rose Show," in July 2012 against Dana Lorenz and her company Fenton Fallon, and in February 2013 against the Elite Model Management Corp.

While the Hamilton College complaint differs in that it brings paid interns into the fold—the gist of the allegations is largely the same. The putative collective and class action alleges that although athletic department interns were paid a flat-fee stipend, their long hours (allegedly as high as 100 hours per week) relegated their effective compensation to well below the minimum wage. The complaint further alleges that interns never received any overtime or spread-of-hours pay and that Hamilton College intentionally misclassified them as exempt from such compensation in violation of state and federal laws even though athletic department interns often performed many of the same tasks as full-time employees.

As these complaints demonstrate, companies utilizing intern services must tread carefully. The U.S. Department of Labor ("DOL") uses the following six-factor test to determine whether a worker is actually an "intern" under the Fair Labor Standards Act ("FLSA"), or if he or she should instead be classified as an "employee" who must be paid in accordance with minimum wage and overtime laws:

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; and

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

If the above factors are met, then the intern is not entitled to minimum wage or overtime under the FLSA. Many states, however, have their own wage and hour laws with additional factors to consider in determining whether a worker is an "intern" or an "employee." New York, for example, uses an 11-factor test and California, since April 2010, has employed a six-factor test—similar to the one used by the DOL. Accordingly, employers must carefully examine their internship program's practices and policies to protect themselves from future wage and hour liability.

3. House Committee Votes Out Bill Prohibiting NLRB from Acting Without a Quorum

On March 20, 2013, the House Committee on Education and the Workforce sent H.R. 1120, entitled "Preventing Greater Uncertainty in Labor-Management Relations Act," to the House of Representatives. The legislation prohibits the National Labor Relations Board ("NLRB" or "Board") from (1) taking any actions that require a three-member quorum, and (2) implementing, administering, or enforcing any Board decisions rendered on or after January 4, 2012, the date that President Obama made three "recess" appointments to the NLRB. The NLRB would be prohibited from engaging in the above actions until it has at least three Senate-confirmed Board members or the U.S. Supreme Court resolves the constitutionality of President Obama's recess appointments.

This legislation is one of the latest developments in the controversy over President Obama's recess appointments. On January 25, 2013, the U.S. Court of Appeals for the District of Columbia Circuit held in *Noel Canning v. NLRB* that President Obama violated the U.S. Constitution when he bypassed the Senate and made the recess appointments. In the opinion, Chief Judge David Sentelle, writing for the D.C. Circuit, said that "[a]llowing the president to define the scope of his own appointments power would eviscerate the Constitution's separation of powers." The NLRB announced on March 12, 2013, that it will seek U.S. Supreme Court review of the D.C. Circuit's January decision. The Board's petition to the Supreme Court must be filed by April 25, 2013.

For more information on some of the Board's decisions issued since January 4, 2012, see the Epstein Becker Green *Act Now* Advisories entitled "The NLRB Is Looking at Confidentiality, Non-Disclosure, and Non-Disparagement Provisions in Your Agreements" and "Requiring Confidentiality During HR Investigations May Violate National Labor Relations Act" and blog posts entitled "NLRB Weighs in on Employee Facebook Posting That Ended in Termination" and "Labor Laws vs. Common Sense — NLRB Continues Targeting Non-Union Employers and Common Sense. "

4. New York City Human Rights Law Expanded to Prohibit "Unemployment" Discrimination

Earlier this month, the New York City Council enacted a bill prohibiting discrimination based on an individual's unemployment status. The law will become effective on June 11, 2013.

The new law modifies the New York City Human Rights Law to forbid an individual's unemployment status from forming the basis of any "employment decision with regard to hiring, compensation, or the terms, conditions, or privileges of employment." The new law also restricts what may permissibly be included in an advertisement for a job vacancy within New York City. Going forward, job advertisements cannot indicate that being currently employed is a requirement for the job, nor can the advertisement state that the employer will not consider individuals for employment based on their unemployment status. The terms "unemployed" or "unemployment" are defined as "not having a job, being available for work, and seeking employment."

This new law will apply to both large and small businesses alike—specifically, all non-public sector employers with four or more employees or independent contractors and all employment agencies and their agents. There are some carve-outs to the new law's prohibitions. For instance, an employer may still consider an applicant's employment status where there is a "substantially job-related reason for doing so." An employer is also still permitted to inquire into the circumstances surrounding an application's separation from prior employment. Additionally, employers may still base employment decisions on, or post advertisements mentioning, "substantially job-related qualifications," including "a current and valid professional or occupational license; a certificate, registration, permit or other credential; a minimum level of education or training; or a minimum level of professional, occupational or field experience." There are also no restrictions on an employer's limiting an applicant pool to applicants currently working for that employer, or setting compensation or terms and conditions of employment based upon an individual's actual amount of experience.

With passage of the new law, New York City joins New Jersey, Oregon, and Washington, D.C., as adopting employment law protections for the unemployed. The New York City law is unique, however, because it is the first in the country to provide a private right of action for potential plaintiffs. Since New York City's unemployment rate hovers around 9 percent, New York City employers should take steps to ensure that they are in compliance with the new law.

5. New Jersey May Become the Latest State Law Banning Employers from Requesting Social Media Passwords

The battle against employers' demands for employees' social media information continues. On March 21, 2013, the New Jersey Legislature approved a bill that would ban employers from requiring the disclosure of employee or applicant passwords for social media accounts as a condition of employment—and from even asking employees if they maintain such accounts.

Despite these limitations, the law does not prevent an employer from:

- maintaining policies governing the use of the employer's electronic equipment, including policies regarding Internet use, social networking site use, and electronic mail use;
- monitoring an employee's work email account or the usage of the employer's electronic equipment; or
- accessing information about employees and job applicants that is in the public domain and not password protected.

If signed into law by Governor Chris Christie, New Jersey would join California, Illinois, Maryland, and Michigan, which have already enacted similar laws. Comparable legislation is pending in many other states and in Congress. Accordingly, employers should expect additional developments, as legislation in this area shows no signs of slowing down.

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