Managing Risk

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Intern-al Affairs

With the jobless rate for people ages 20 to 24 still higher than 10 percent, many college students might be willing to trade their time for an unpaid learning experience. But there is a legal difference between an employee and an intern. Knowing the difference can help you avoid breaking the law.

The Fair Labor Standards Act (FLSA) governs working conditions and wages for employees in the private sector and in federal, state, and local governments. Workers covered by the FLSA are entitled to a federal minimum wage of not less than $7.25 per hour; many states and cities require higher minimum wages.

Last year, the large employers surveyed by the National Association of Colleges and Employers reported they paid their bachelor's-degree level interns an average of $14.05 to $17.94 per hour. They paid interns at the master's degree level an average of $22.21 to $23.06. Yet an estimated 47 percent of interns received no pay, including at some for-profit companies.

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Risk Tip

The Supreme Court's ruling in *Tibble v. Edison* International will bring greater scrutiny to 401(k) plan fees.

In May, the court ruled for plaintiffs in the case. Plaintiffs claimed that administrators of Edison's retirement plan breached their fiduciary duties by offering plan participants retail-class mutual funds, when identical institution-class mutual funds were available at lower cost. The district court where the case originated had granted summary judgment for Edison. It reasoned that the plaintiffs' claim was time-barred under ERISA, the Employee Retirement Income Security Act. ERISA requires plan participants to file lawsuits for breach of fiduciary duties within six years of when the breach occurred.

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Employee = Paid. Intern = Unpaid (maybe)

If the intern is not an employee, though, the FLSA would not apply…nor would minimum wage requirements. So what separates an intern from an employee?

A legitimate internship is primarily a learning experience for the intern, not an opportunity for employers to gain cheap or temporary labor. The U.S. Department of Labor lists the circumstances under which an intern can work at a for-profit organization's internship or training program for no pay:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that 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 internship meets all of the criteria above, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern. Some employers (or schools) pay interns a stipend for living expenses or lodging during their internship. That does not count as wages and does not create an employment relationship.

What Other Laws Apply to Interns?

Federal job discrimination laws that apply to employees and job applicants would not apply to individuals whose positions meet the Department of Labor's criteria for unpaid internships. These people are not considered employees, so federal employment laws would not apply. However, employers should know that some states, including Oregon and New York, have laws that specifically protect interns from job-related harassment and discrimination.

If your paid interns qualify as regular employees, federal and state non-discrimination laws in hiring and supervision will apply. As a matter of good business sense, though, employers should avoid discriminatory actions against unpaid interns as well as employees.

What about injuries? Since interns are often young and relatively inexperienced, they have a higher potential for injury. To avoid problems, make sure the education they receive includes basic safety training.

Some states specifically exclude interns from coverage under their workers' compensation statutes. In states that are silent on the issue, workers' compensation boards and courts will often decide an intern's status based on his/her contributions to the organization. Whether you call workers employees or interns, their duties and what they gain from the position are what matters. If your intern qualifies as an employee, workers' compensation might apply. Coverage for those who meet the FLSA criteria for interns remains a gray area.

Any employment relationship can create the potential for liability and loss. For information on minimizing your organization's exposure to risk, please contact us. ■

The Supreme Court looked at the question of whether fiduciaries have a duty to monitor investments on an ongoing basis, if the initial investment was made more than six years earlier. After hearing arguments, the court agreed that plan fiduciaries have an ongoing monitoring responsibility.

The ruling expands the scope of a plan sponsor's fiduciary duty toward participants. Stakes for employers that sponsor retirement plans are high. Lockheed Martin recently settled a case involving fees in retirement accounts for $62 million, which plaintiffs' attorneys called the largest ever in a lawsuit over retirement plan fees.

Will Medical Marijuana Send Your Employment Policies up in Smoke?

Twenty-two states and the District of Columbia now allow the medical use of marijuana. Colorado, Oregon and Washington have also legalized its recreational use and possession. How will this affect your employment policies?

Americans with Disabilities Act: In an informal opinion, the Equal Employment Opportunity Commission said "…the ADA does not protect individuals who are currently engaging in the illegal use of drugs…" Federal law still classifies marijuana as a Schedule I illegal drug. Even in states that allow marijuana use, federal employment laws, such as the Americans with Disabilities Act, would not apply to protect marijuana users.

Refusing to hire or otherwise discriminating against medical marijuana users remains a gray area unless state law specifically prohibits it. Connecticut and Arizona protect medical marijuana users from employment discrimination. However, the EEOC considers past drug addiction a protected disability, so employers should avoid questions about past addiction to illegal drugs or participation in a rehabilitation program.

Zero-tolerance policies: Generally, employers can prohibit the medical use of marijuana by on-duty employees. If you decide to implement a drug-testing program, remember that laws designed to protect workers' civil rights could affect your workplace drug

policies. These laws include the Civil Rights Act of 1964 and the Americans with Disabilities Act. These statutes limit how far an employer can go in investigating and disciplining employee drug use.

Many states and U.S. territories have their own laws and regulations dictating when and how workplace drug testing should be carried out. Some also require state and local contractors to develop drug-free workplace policies similar to those under the federal Drug-Free Workplace Act. No one set of rules and regulations applies throughout the country. Some states, such as Louisiana, allow drug testing in virtually every type of business and in both the public and private sectors. Others, such as Maine, restrict who can be tested, how they can be tested, and

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what kinds of rehabilitation and disciplinary options can result from a positive test.

Employers can take several simple steps to avoid legal problems with their drug testing policy:

- Consult an employment lawyer whenever you introduce a new drug-free workplace policy or change an existing policy.
- Make sure your drug-free workplace policy clearly stipulates penalties for violations. If your policy includes drug testing, spell out exactly who will be tested, when they will be tested, and what will happen to employees who test positive.
- Make sure every employee receives and signs a written copy of your drug-free workplace policy. Verbal agreements and unsigned agreements have little legal standing.
- Make sure that you, and all your supervisors, receive proper training in how to detect and respond to workplace drug and alcohol abuse.
- Maintain detailed and objective records documenting the performance problems of all your employees. Such records often provide a basis for referring workers to employee assistance programs.
- Never take disciplinary action against a worker or accuse a worker of a policy violation simply because that employee is acting impaired. Instead, try to clarify the reasons for the employee's impairment. If drug testing is a part of your workplace policy, obtain a positive test result before taking any action.
- Never accuse or confront an employee in front of coworkers. Instead, try to stage all discussions someplace private, with another manager present to serve as a witness.
- Never single out an individual employee or particular group of employees for special treatment — whether it is rehabilitation or punishment. Inconsistencies in policy enforcement may lead to discrimination charges.
- Try to get to know your employees as much as possible. This may help you more quickly identify workers who are in trouble or developing substance abuse problems.
- Most important, try to involve workers at all levels of your organization in developing and implementing your drug-free workplace policy. This will reduce misunderstandings about the reasons for a drug-free workplace program and help ensure that policies and procedures are fair to everyone.

The U.S. Department of Labor's (DOL) Working Partners for an Alcohol and Drug-Free Workplace Web site provides employers with free resources and tools to help establish and maintain drug-free workplace policies. And we recommend having a local employment attorney review your policy before implementation. For more suggestions on improving workplace safety, please contact us.

Minimize Risks to Young Workers

This summer, millions of teenagers will be taking jobs either for the summer or as the start of their permanent integration into the workforce. Here's what you need to know to protect them.

Last summer, more than half of Americans from ages 16 to 24 years old held jobs, up 2.1 million from the year before. As the economy continues to recover, we expect to see more jobs become available for younger people. These workers can bring energy and enthusiasm to businesses. But they also present a unique set of safety and compliance challenges that every employer should be familiar with.

When hiring workers younger than age 18, employers must keep in mind that state laws place restrictions on the type of work they can do and the number of hours they can work in an effort to protect them.

Teenagers need this protection. It's not just typical teenage behavior that puts them at risk, though that also plays a factor. According to the National Institute for Occupational Safety and Health (NIOSH), young workers carry a greater risk of occupational injury because of their limited job knowledge, training and skill. Physically they are not fully devel-

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oped and may be more susceptible to chemical and other exposures at work.

Every year, about 67 teenage workers die of work injuries, and NIOSH estimates that 230,000 teenagers suffer from nonfatal occupational injuries.

Prior to hiring any worker younger than 18, you should check both federal and state labor law. State laws vary and should be checked individually.

The main federal law governing underage (and other) workers is the Fair Labor Standards Act, which applies to virtually all employers and businesses except small farms and a few others. This law bans workers younger than 18 from performing a wide variety of hazardous jobs, including:

- manufacturing or storing explosives
- driving a motor vehicle and being an outside helper on a motor vehicle
- coal or other mining
- logging and sawmilling
- operating most power-driven equipment
- those involving any exposure to radioactive substances or ionizing radiations
- manufacturing brick, tile and related products
- operating any power-driven circular saws, band saws or guillotine shears
- wrecking, demolition or ship-breaking operations
- roofing and work performed on or near roofs, including installing or working on antennas and roof-top appliances, or
- excavation operations.

Many states add other restrictions. For instance, in California no one under 18 is allowed to handle, serve or sell alcohol; operate meat slicers, or work as an outside helper on a motor vehicle. Californian workers under the age of 16 may not wash cars, load or unload trucks, work on a ladder or scaffold or work after 9 p.m. (7 p.m. from Labor Day to May 31).

The Labor Occupational Health Program at the University of California, Berkeley has performed extensive research into mitigating the dangers facing youth workers. The program's experts list a number of best practices from the field that help keep youngsters safe.

- Assign a mentor: A California zoo assigns each new teen worker a "buddy" or mentor. This can even be a more experienced teen worker who answers questions, helps give hands-on training and offers safety tips.
- Role-playing: A retail clothing chain with many young employees uses role-playing regularly at monthly safety meetings. Young workers enact specific health and safety problems and develop solutions.
- Age by color: A convenience store chain outfits young employees with different colored uniforms based on age. This lets the supervisors know at a glance who is not allowed to operate the electric meat slicer.
- Track hours: A fast food chain employing some 8,000 young workers in five states developed a computerized tracking system to ensure that teens aren't scheduled for too many hours during school weeks.
- Add responsibility: A major grocery chain includes teen workers on the safety committee that conducts safety inspections, reviews employee injuries and makes suggestions for prevention.

Finally, don't assume that workers out of their teens have much job experience. Youth unemployment rates have been unusually high for many of the past years, so even workers in their early 20s might not have much work experience. Take extra care to ensure these workers know any safety precautions required for the job, and when possible, pair them with an experienced mentor.

For more suggestions on improving workplace safety, please contact us.

The Prohibited Acts Doctrine

Under the workers' compensation bargain, the employer agrees to compensate an employee for any work-related injury or illness...unless the employee was engaged in a "prohibited act" at the time of injury.

A prohibited act is an act that the employer expressly prohibits—such as consuming alcohol or using other intoxicants while on the job or on the employer's premises. When an employee conducts this act, the employee is considered to be outside the scope of employment, and therefore not protected by the employer's workers' compensation.

Sometimes it's clear when the prohibited acts doctrine applies—as when a delivery employee is intoxicated and has a car wreck while on his scheduled delivery route. At other times, whether the doctrine applies or not can be a gray area. For example, if an employee on a weeklong business trip has an alcoholic drink, then trips and breaks her ankle, does the prohibited acts doctrine apply? That could depend on the circumstances—did the injury occur after normal work hours? Did the event occur while the employee was dining with a business associate? In order to apply, the prohibited act should also have a causal connection to the injury. In other words, even if the employee was engaging in a prohibited act, if it had no bearing on the injury (the injury would have occurred regardless), the doctrine might not apply.

When you have a workers' compensation claim that could involve prohibited acts, it's important to get all the facts. A claims adjuster will want copies of any policies, manuals or employment contracts specifying the prohibited act, along with documentation of the incident.

For more information on handling difficult workers' compensation claims, please contact us. ■

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