

EMPLOYMENT UPDATE: WHAT YOU NEED TO KNOW ABOUT TELECOMMUTING AND UNPAID INTERNS

By Jeffrey Elkin, Joanne Vorpahl and Susan Cates

This year has seen two important employment-related issues garner significant media attention. In April 2013, Yahoo! Inc. (“Yahoo”) made headlines when its CEO officially discontinued the company’s telecommuting policy and required all employees to report for work in their respective offices. Other companies, including Best Buy, followed. Several months later, Fox Searchlight Pictures found itself in an unwelcome spotlight after being found to have violated federal and state labor laws by failing to pay production interns on the film, “Black Swan,” prompting the filing of numerous similar lawsuits. For in-house counsel, what lessons do these events present?

I. Telecommuting: What You Need to Know If Your Employees Work From Home

Until Yahoo did away with its telecommuting policy, having employees work from home seemed like a “win-win” situation. With Telecommuting, employees enjoy the freedom and flexibility afforded by working outside of the office, they save time and money by avoiding a daily commute, and many claim that fewer interruptions at home lead to increased productivity. On the flip side, employers are able to reduce overhead costs, decrease office space, and lessen their “carbon footprint.”

Yet, as the Yahoo announcement revealed, there are also disadvantages to allowing employees to telecommute. The company realized that it needed a “spirit of collaboration” to improve productivity issues. Yahoo felt this could only be accomplished if employees are in the actual workplace. When employees work from home, it is virtually certain there is less interaction and brainstorming among them. Depending on the type of work the employees are performing, this may have a negative effect on the quality of the employees’ work product.

In addition to possible productivity issues, various legal issues may arise when an employer allows an employee to work from home. Employment statutes that may be implicated when companies permit telecommuting include:

- **Title VII:** Not providing all similarly situated employees the same opportunity to work from home could lead to discrimination claims.
- **Workers’ Compensation:** If an employee is injured at home while working, the injury may be covered by workers’ compensation. However, it may be difficult for an employer to determine whether the accident was work-related, and the employer doesn’t have the same ability to inspect or monitor the employee’s home work space.
- **Fair Labor Standards Act (“FLSA”):** Nonexempt employees must be paid for all hours worked. Yet, an employer may have a harder time tracking an employee’s hours and enforcing overtime policies when the employee is working from home.

- **Americans With Disabilities Act (“ADA”):** Employees sometimes request that they be permitted to work from home as a reasonable accommodation under the ADA. If the employer has a practice of allowing employees to work from home, it may be difficult for the employer to refuse to allow an employee who claims to have a disability to also work from home.

II. Tips for Making It Work When Your Employees Work From Home

Many employers offer telecommuting on an informal basis, but the absence of a formal policy can lead to inconsistent application and, as mentioned above, may expose an employer to litigation, particularly discrimination lawsuits. Developing and maintaining a formal telecommuting policy will go a long way in helping employers avoid such claims. Here are some tips you should consider when drafting your company’s telecommuting policies:

- Define the eligibility requirements for working from home. Employers that permit telecommuting must do so in a non-discriminatory manner. Eligibility can be defined by objective criteria such as position, title, or length of service with the company. It cannot be based on an employee’s protective class such as gender.
- Set working hours for telecommuting employees or provide other requirements for the employees’ work availability. Employers may want to specify certain times when employees need to be available to respond to emails or participate in conference calls.
- It may be helpful to require a weekly or monthly in-office meeting or conference call with the employee’s group or supervisor.
- Take steps to protect the company’s confidential information and intellectual property. Employers may want to require that all company-related business be conducted on devices/hardware issued (and owned) by the company. Alternatively, employers could require the registration of personal devices with the company’s IT department to ensure the security settings and installed software comply with company practice.
- Subject to contrary state law, employers can monitor employees’ computer use and emails so long as the employees are advised in advance. Therefore, employers should warn employees in the telecommuting policy that they will monitor their computer and email activity.
- Reserve the right to revoke the telecommuting policy at the company’s sole discretion at any time.

Another issue to consider is whether to establish requirements regarding the actual home office utilized by a telecommuting employee. For example, some employers require telecommuting employees to have a dedicated office area in their home. Some employers even perform inspections of the home offices. Employers might also implement ergonomic procedures to ensure that the telecommuting employee’s workstation is ergonomically correct to avoid

potential workers' compensation claims arising from an employee sitting at a desk for too many hours. While these policies may work for some companies, they put additional burdens and obligations on the employer and may defeat some of the benefits of allowing telecommuting.

III. Unpaid Internships: What You Need to Know If You Have (Or Are Considering) Unpaid Interns

The second issue that garnered significant media attention this summer involved unpaid internships. And, no wonder. Corporate internships are more popular than ever, with the National Association of Colleges and Employers reporting an estimated 8.5% increase in intern hiring for 2013. Your company is likely receiving an influx of resumes from college students, recent graduates, and (even) those looking for a career change offering their services – unpaid – to gain experience and build up their resume.

This may all sound too good to be true, and, in fact, it can be. Although unpaid internships – like telecommuting – may look like a “win-win,” the U.S. Department of Labor (“DOL”) has recently concluded that many such unpaid arrangements violate wage and hour laws.

At issue is the FLSA’s broad definition of the term “employ” as including “to suffer or permit to work.” If one is “employed,” she is generally subject to the minimum wage and overtime pay requirements of the FLSA. The United States Supreme Court in 1947 first examined what it means to “employ” someone for purposes of the FLSA and concluded that the FLSA’s definition “cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.”¹

While the DOL purports to rely on this Supreme Court precedent, its Wage and Hour Division’s official position is that “[i]nternships in the ‘for profit’ sector will most often be viewed as employment. . . ,”² requiring compensation of at least the minimum wage and overtime compensation for all hours worked over forty in a workweek.

The DOL has articulated six criteria to be considered in deciding whether an internship may be unpaid or, to the contrary, is an employment relationship requiring FLSA minimum wage and overtime pay compliance. These six criteria (stated here as questions) are as follows:

- (1) Even though it includes actual operation of the employer’s facilities, is the internship similar to training that would be provided in an educational environment?
- (2) Is the internship experience for the benefit of the intern?
- (3) Does the intern work under close supervision of existing staff, while not displacing regular employees?
- (4) Does the employer derive no immediate advantage (and are its operations perhaps even impeded on occasion) by the internship training?
- (5) Is the intern not necessarily or typically entitled to a job at the end of the internship?

- (6) Do both the company and the intern understand that the intern is not entitled to wages for the time spent in the internship?

According to the DOL, if all six of these questions can be answered *affirmatively*, an employment relationship does *not* exist, and the internship may be *unpaid*. Stated otherwise, the DOL presumes employment status, unless the employer can demonstrate otherwise. While the federal circuit courts disagree over the relative importance of these factors, they engage in similar inquiries in determining who is – and who is not – an employee.

IV. Tips for Structuring Unpaid Internships

How and why have employers run afoul of these criteria? The answers are many and varied: Some employers have not adequately planned their internship programs. Some have supervisory employees who are eager to utilize the assistance of unpaid interns to perform productive work. Interns themselves are often overly eager to demonstrate their value to the organization. And the criteria themselves lack clarity.

The following are some suggestions to help keep your unpaid interns from becoming employees:

- Carefully plan your internship program with the DOL's six-factor test in mind.
- Make sure that each intern's supervisor understands that the internship is to provide "job shadowing" but not the performance of work.
- Avoid having unpaid interns perform administrative tasks which could be argued not to offer any educational benefit from the work experience.
- Offer unpaid interns valuable skills, training, and experience that benefit them, not just the company.
- Insure that unpaid interns do not displace regular company employees or perform the same tasks such employees perform.
- Set specific dates for the internship program so that the job does not appear to be a trial period for employment.
- Have interns acknowledge in writing that the internship is unpaid, the specific dates of the internship, and the internship's educational benefit.

V. Conclusion

Telecommuting and unpaid internships can provide significant benefits to companies, but also come with the potential for creating disruptive litigation. The key to success includes thoughtful planning and oversight, by in-house counsel and management. Creating a written policy is an effective first step, but equally important is that any policy be communicated, followed, and enforced. Your company will likely need to designate an (HR) officer or other employee to monitor all telecommuting employees and any unpaid interns. While some may regard this as unnecessarily intrusive, or worse, it is a worthwhile step, considering the alternative. Protecting

your company from an employment-related lawsuit, and the scrutiny, negative publicity, and reputational harm that often goes with it, is well worth the effort.

ENDNOTES

¹ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

² U.S. Department of Labor, Wage and Hour Division *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, available at www.dol.gov/whd/regs/compliance/whdfs71.pdf (last visited August 30, 2013).

Jeffrey Elkin is a partner with Porter Hedges LLP in Houston, Texas.

Joanne Vorpahl is a partner with Porter Hedges LLP in Houston, Texas.

Susan Cates is an associate with Porter Hedges LLP in Houston, Texas.