Law Office of Edward E. Sharkey LLC

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BUSINESS LAW DEVELOPMENTS

Legal updates for entrepreneurs and business owners from the Law Office of Edward E. Sharkey LLC.

Dear Friends of the Firm,

This is the May issue of our firm's coverage of legal developments important to business owners and entrepreneurs. You are receiving it because you are a client or have previously solicited legal resources from the firm. If you do not wish to receive periodic updates and analysis from the firm you can unsubscribe **here**.

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Very truly yours,

Ed

In This Issue

Unpaid Internships Creating Legal Headaches for Businesses

In today's economy, most companies are looking for ways to reduce costs. One way to do so is to hire unpaid interns. It can be a mutually beneficial relationship. However, businesses must take care to

follow the guidelines of the federal Fair Labor Standards Act as well as state labor laws when hiring unpaid interns. A recent lawsuit highlights why.

Two men who interned on the set of the Fox Searchlight film “Black Swan” filed a class action suit against Fox Searchlight Pictures in the Manhattan federal court on behalf of hundreds of unpaid interns. They are seeking back pay for the hours that they worked. On the “Black Swan” set, one of the interns was tasked with making coffee, taking and distributing lunch orders, taking out the trash, and cleaning the office. Another intern worked as an accountant who kept financial records for the production. Neither was paid for his work.

Fox is defending the claim and insists that the interns got what they signed up for, a chance to break into the industry. The lawsuit, however, alleges that Fox’s practices violate the Fair Labor Standards Act and New York labor laws.

There are standards governing this practice. The Labor Department has issued guidelines for businesses who wish to use unpaid interns. They include:

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.

Unfortunately for businesses using questionable practices, it is not an issue that will remain under the radar. The media and regulators are doing a lot to publicize the case, and already there are copycat lawsuits by interns at other companies.

If you would like more information on internship programs under the Fair Labor Standards Act click here. If you have any questions about a related matter, please feel free to contact our office.

Is Obesity a Disability?

The Americans with Disabilities Act (“ADA”) prohibits employers from discriminating against qualified individuals with disabilities. Congress amended the ADA in 2008 to expand the definition of “disability.” Under the new definition, a disability includes an impairment that substantially limits eating, sleeping, walking, standing, lifting, bending, reading, concentrating, thinking, and communicating.

Even before the amendments, the Equal Employment Opportunity Commission (“EEOC”) took the position that morbid obesity, by itself, is an impairment which qualifies as a “disability” if it affects one of the indicated activities. Federal courts did not all agree that morbid obesity qualified as a disability,

unless it was caused by an underlying medical disorder.

Since the amendments, however, courts have sided with the EEOC. In *EEOC v. Resources for Human Development, Inc.,* the EEOC sued an employer, claiming that its termination of a morbidly obese employee violated the ADA. The employer moved for judgment because the employee did not have an underlying medical disorder. The court rejected the defense, holding that severe obesity is a disability under the ADA regardless of whether it is caused by a disorder. The employer then agreed to pay $125,000 to settle the case. A similar case, *EEOC v. BAE Systems, Inc.,* is still pending. The *BAE Systems, Inc.* complaint is available online at http://tinyurl.com/8ypwkg6.

EEOC success in its claims against these employers is likely to foster more litigation against employers who terminate obese employees. Accordingly, employers should carefully assess all circumstances before taking any action against an obese employee, or any employee for that matter.

Our office continues to monitor litigation concerning enforcement of the ADA. If you have any questions relating to this or any other employment matter, please feel free to contact us.

Maryland High Court Skips Chance to Explain to Businesses Just Who is "Handicapped"

The Maryland Court of Appeals recently decided a case in which a woman with a latex allergy sued her son's school for discrimination for declining to remove latex products from the school. She claimed that her allergy qualified her as "handicapped" under Maryland disability law and that the school was discriminating against her. In a 4-3 decision, the Court of Appeals agreed, and it upheld a jury verdict against the school.

The dissenting judges questioned whether a latex allergy should qualify as a disability under the law, requiring a business to accommodate it under threat of liability. They pointed out that a parent with hay fever ought not be able to force his child's outdoor soccer league to move indoors. That a person with a food allergy ought not be able to stop a restaurant from selling that food.

Most important, however, was that the Court majority did not give guidance as to how the term “handicapped” should be defined. The law says it is someone with a condition that “**substantially limits**” a “**major life activity**.” Under federal law, the courts and legislature have established standards to guide juries in deciding when the requirements have been met. The dissenting judges in the Maryland case said that Maryland should do the same.

After all, different juries may come to vastly different conclusions about whether a condition qualifies as a “disability.” This leaves businesses without any clue as to how to measure their conduct in dealing with disability access issues. Unfortunately, the Court majority did not see it that way. The issue has been left to individual juries on a case-by-case basis.

The solution? Only the legislature can fix this, by passing a rigorous standard to be applied uniformly by the courts. That will give individuals and businesses notice of what conduct is acceptable and what is unacceptable under the law. Until then, be careful out there. It can be tough to tell what will get you sued.

Employee Leave Policies Can Help Curb FMLA Abuse

The Family and Medical Leave Act (FMLA) can make it difficult to manage employees. Some companies attempt to curb abuse by creating policies that require employees to remain near home while using leave unless they are seeking treatment or attending to a personal or family need.

The practice was recently approved by a federal court in Pennsylvania that held that termination of an employee for traveling abroad while out on FMLA leave did not violate the employee's rights. The employee was eligible for FMLA leave to recover from surgery. Under the employer's policy, paid sick leave was substituted for the unpaid leave. The policy also required the employee to remain near her home during the time that she was out of work.

Rather than do so, the employee traveled to Cancun during her leave. Because this violated the sick leave policy, the employer fired the employee. The employee sued, claiming that the termination violated the FMLA. The court summarily rejected the employee's claim. Reasoning that the employer's enforcement of the paid leave policy was (1) a legitimate reason for the termination and (2) separate from the employee's use of FMLA leave, the court held that it was not unlawful to terminate the employment.

Although the FMLA did not preclude the employer from applying its policy in this case, employers must be wary of rigidly applying leave policies in all circumstances. The EEOC has made it clear that, in its opinion, inflexibly applying leave policies, without regard to the particular circumstances of each employee, may violate the Americans with Disability Act's requirement that employers reasonably accommodate qualified individuals with disabilities. In some cases, flexibility in applying the leave policy may be a reasonable accommodation required by the ADA.

Employers have asked the EEOC for more guidance concerning leave policies under the ADA. The EEOC has yet to issue such guidance, which is said to be pending. At this point, the best practice for any employer is to treat a request to be excused from all or part of an attendance policy as a request for reasonable accommodation. This includes analyzing the particular circumstances of each employee's case to determine whether he or she has a disability, whether he or she is qualified, and the reasonableness of the requested accommodation.

ABOUT US

The Law Office of Edward E. Sharkey LLC is a firm of dedicated business and trial lawyers in Bethesda, Maryland, who concentrate on business law and civil litigation. Other areas of practice include pension, securities, negligence/professional liability, and construction law.

specific situation. If you need legal advice concerning a business or ligation matter, please seek legal counsel or contact us for a consultation - (301) 657-8184.

In This Issue

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