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The Beginnings of a New Trend? New Jersey Proposes to Protect Unpaid Interns From Employment Discrimination

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On December 5, 2013, the New Jersey State Senate introduced S-3064 to protect unpaid interns from employment discrimination by amending the Law Against Discrimination ("LAD"), the Conscientious Employee Protection Act ("CEPA"), and the Worker Freedom from Employer Intimidation Act ("WFEIA"). New Jersey's employment discrimination laws are already among the most expansive in the country. So should this new bill become law, unpaid interns would enjoy many of the same rights and remedies currently afforded to employees.

Similar protections for interns have been proposed or passed elsewhere. Oregon is the first (and only) state to have enacted such legislation. Further, the New York State Senate has introduced similar legislation, while a California assemblywoman recently announced plans to do the same.[1] This alert discusses this emerging trend with a particular focus on New Jersey's proposed law.

The New Jersey Bill

Among other things, New Jersey's bill would make it illegal under the LAD for employers to discriminate or retaliate against unpaid interns on the basis of their statutorily protected characteristics.[2] The proposal also would grant unpaid interns standing under CEPA,[3] which protects employee whistleblowers from retaliation by employers, and the WFEIA, which protects employees from workplace intimidation relating to religious and political matters. As a result of these amendments, unpaid interns could seek a range of legal or equitable relief, including compensatory and punitive damages, reinstatement, and attorney's fees.

The New Jersey bill expressly defines an unpaid intern as an individual who performs work for an employer, for the purpose of training, where:

- the employer is not committed to hiring the individual as an employee or in any other compensated capacity at the conclusion of the training period;
- the employer and the individual agree in writing that the individual is not entitled to any compensation for the work performed; and
- any work performed by the individual:
  - supplements employer training given in an educational environment intended to enhance the employability of the individual;
  - provides experience for the benefit of the individual; and
  - does not displace employees of the employer.

Takeaway

If the New Jersey bill becomes law, New Jersey employers will have to take immediate steps to ensure compliance so as to avoid the risk of litigation and substantial penalties. Preparation should include a comprehensive review of all workplace discrimination and retaliation policies. As part of that review, employers should consider adding language to their policies to cover unpaid interns. Moreover, managers, supervisors and employees involved in company internship programs should receive the same EEO training administered to workers who supervise paid employees.

As a general matter, employers also should beware that federal law strictly limits situations where an employer can offer an unpaid internship, as federal and state departments of labor have stepped up their enforcement efforts in recent years. As such, employers should carefully review their internship programs to ensure that they do not violate minimum wage laws. If you have any questions or concerns regarding the proposed changes to New Jersey law, please contact the lawyers listed on this alert or your Proskauer relationship lawyer.

[1] These bills were introduced in the wake of a recent ruling by the Southern District of New York. In that case — *Wang v. Phoenix Satellite Television US, Inc.*, No. 13 Civ. 218 (PKC), 2013 WL 5502803 (S.D.N.Y. Oct 3, 2013) — the court held that an intern could not sue her former employer for sexual harassment because she had not received compensation for her work and, therefore, was not an "employee" under New York discrimination law.

[2] Protected characteristics under the LAD include: race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer.

[3] Employers also would be obligated to circulate a notice to all unpaid interns at the time of their initial engagement in an internship apprising them of their rights and protections under CEPA, among other posting/distribution requirements.

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