Schaffer Law, LLC
Labor and Employment Law

Connecticut Expands Employee Pay, Online Privacy, and Intern Protections

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During the recent legislative session, Connecticut laws were changed to expand employee rights in several key areas. Employers who fail to properly pay all wages owed will now be automatically liable for double damages, unless they can show a good faith basis for the failure to pay. In addition, employers may no longer deny employees the right to discuss their wage rates with co-workers. Employers will also be prohibited from asking employees for passwords to their social media accounts, and unpaid interns gained new protections under the state's anti-discrimination law.

Wage Theft

Under long standing principles, employers who fail to pay employees all wages earned are considered to have engaged in wage theft. As such, corporate individuals responsible for the violation are subject to arrest and jail time. In addition, companies have historically been liable for back pay, interest, penalties, and attorney's fees. At the discretion of the court, an employee could also be awarded two times (2x) the wages owed. Effective October 1, 2015, under Public Act 15-86, the award of double damages is now automatic, unless the company is able to prove it had a good faith belief that the underpayment was lawful. Wages include not only the minimum wage and overtime, but all wages earned under any agreement between the employee and employer. Therefore, a failure to pay the agreed on rate, or any amounts owed at termination, fall under the law. Wage theft remains an area of intense regulatory scrutiny and employers should make sure all wages owed are paid in a timely fashion.

Pay Secrecy

In an effort to bring greater wage transparency and end discriminatory pay practices, Public Act 15-196, effective July 1, 2015, prevents all employers from prohibiting employees from disclosing or discussing their wages, or the wages of another employee who has already voluntarily disclosed the information. Wages have typically been interpreted to include base pay and non-discretionary bonuses. Excluded are discretionary bonuses and severance pay.

Under the new law, employees may now ask co-workers about their wages, but no employee is required to disclose the information. In addition, companies are not required to disclose the wages of any employee, even if asked to do so by the employee or a co-worker. Further, employers may no longer discharge, discipline, discriminate or retaliate against any employee who discusses his wages, or those of others voluntarily disclosed.

In the past, companies often had policies requiring employees to remain silent on their rate of pay and sometimes required them to sign away their right to discuss compensation issues. Those agreements are now invalid. They may also be unlawful under section 7 of the National Labor Relations Act.

The new Act permits an employee to bring a civil action seeking compensatory damages, attorney's fees, costs, punitive damages, and such other legal and equitable relief as may be determined by the court. There is a two year statute of limitations for bringing suit.

Online Privacy

Effective October 1, 2015, under Public Act 15-6, employers may no longer require applicants or current employees to provide user names or passwords, or any other authentication information, for accessing a personal online account. Such accounts include any personal email, social media, or retail-based Internet website. Further, employers are prohibited from having an

applicant or employee authenticate or access a personal online account in the employer's presence, or require that an applicant or employee invite or accept an online invitation from an employer.

In addition, employers may not discharge, discipline, discriminate or retaliate against any employee who refuses to comply with an employer's unlawful requests. A refusal to hire an applicant for failure to comply with an unlawful request is also a violation of the Act.

Under the Act, an employer may request user ID's and passwords necessary to access any account provided by the employer, or related to the employment relationship, or that the employee uses for business purposes, or for any electronic device supplied or paid for in whole or in part by the employer. Employers also retain the right to discipline employees who transfer an employer's proprietary information to or from an employee's personal online account, without permission.

Employers may also conduct investigations for the purpose of ensuring compliance with applicable state or federal laws, regulatory requirements, or prohibitions against work-related employee misconduct based on the receipt of specific information about activity on an employee or applicant's personal online account. Investigations are also permitted based on the receipt of specific information about an employee or applicant's unauthorized transfer of such employer's proprietary information, confidential information or financial data to or from a personal online account operated by an employee, applicant or other source.

When conducting an investigation, the employer may require an employee or applicant to allow access to his or her personal online account for the purpose of conducting such investigation, provided such employer shall not require such employee or applicant to disclose

the user name and password, or other authentication means for accessing such personal online account.

Employees or applicants may file a complaint with the CT Department of Labor. For employee complaints, the employer is subject to a civil penalty of up to five hundred dollars for the first violation, and one thousand dollars for each subsequent violation. Employees are also entitled to all appropriate relief including reinstatement, payment of back wages, reestablishment of employee benefits, or any other remedies that the commissioner may deem appropriate, and shall also be awarded attorney's fees and costs. For applicant complaints the employer may be fined twenty-five dollars for a first offense, and five hundred dollars for each subsequent violation.

Interns

Public Act 15-56 expands coverage of the Connecticut Fair Employment Practices Act ("CFEPA") to unpaid interns effective October 1, 2015. While the CFEPA normally covers employers with 3 or more employees, this Act extends CFEPA's jurisdiction to employers with only one employee when the discriminatory act is claimed by an intern. For purposes of the Act, an intern is defined as an individual who performs work for an employer for the purpose of training, provided (A) the employer is not committed to hire the individual performing the work at the conclusion of the training period; (B) the employer and the individual performing the work agree that the individual performing the work is not entitled to wages for the work performed; and (C) the work performed (i) supplements training given in an educational environment that may enhance the employability of the individual, (ii) provides experience for the benefit of the individual, (iii) does not displace any employee of the employer, (iv) is performed under the supervision of the employer or an employee of the employer, and (v) provides no immediate

advantage to the employer providing the training and may occasionally impede the operations of the employer. All prongs of the definition must be met for an individual to be considered an unpaid intern.

While the above criteria defines an "intern" for purposes of state discrimination law, employers should be aware that the Second Circuit Court of Appeals, which covers Connecticut, recently used a different definition to determine whether a worker is an intern or paid employee under the federal Fair Labor Standards Act. Glatt v. Fox Searchlight Pictures, Inc. In rejecting the U.S. Department of Labor's six factor test, which is similar to that now being used for Connecticut discrimination law purposes, the Court instead held that such determinations must be based on a more flexible and nuanced "primary benefits test." Under that test, the key is whether the employer or the intern is the primary beneficiary of the relationship. To determine the answer, the Court employed a totality of the circumstances test using a seven factor, non-exhaustive set of criteria, and further pointed out that not all factors must be met to prove intern status. The seven factors considered by the court included:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Because federal and state law now use different criteria to determine unpaid intern status, employers must comply with both. Therefore, the relationship must not only be for the primary benefit of the intern, but all elements of the state test must also be met.

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