

Uniforms And Unpaid Interns And Minimum Wage! Oh, My!

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Employees cannot be required to pay for uniforms or for the cost of maintaining (i.e., cleaning) them if the cost causes employees to fall below the minimum wage or overtime compensation rate, and in some states, employees cannot be required to cover certain uniform expenses at all.

Employers should review and evaluate their existing uniform-related policies and procedures to reduce the risk of minimum wage-related and other state law claims. The following recommendations incorporate guidance provided by the U.S. Department of Labor to comply with the Fair Labor Standards Act:

Understand What Is Considered a Uniform

An employer's obligations in connection with uniform cost and maintenance apply only where an item of clothing qualifies as a "uniform." If an employer allows employees to wear an ordinary type of basic street clothing at work; allows variation in the brand, style and other details of the item of clothing; and permits an item of clothing to be worn as part of an employee's ordinary wardrobe, the clothing should not qualify as a uniform. Specifications regarding the brand, design or source of an item of clothing increase the risk of the item being a uniform. For example, asking employees to wear black pants and a black button-down shirt, without any additional requirements, should not be considered a uniform. To reduce risk, employers should avoid specifying a particular style or brand or store or location where the item must be purchased. Items will also be regarded as a uniform if they have a company logo.

If an item of clothing qualifies as a uniform, employers must provide it to an employee without charge or reimburse the employee for the cost of the uniform if it would drop the employee below the minimum wage and any overtime to which the employee is entitled for the payroll week in which the employee incurred the cost.

Reimburse Employees for Cost of Laundering or Maintenance Before Next Payday

Even where employers provide or cover the cost of new uniforms, the cost of laundering or maintenance also may not bring the employee under minimum wage or cut into required overtime



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compensation (unless the exception below applies). The actual cost of laundering or dry-cleaning services should be used. Where the employer or employee does not know the actual cost, the Department of Labor will accept payment equivalent to an extra hour of minimum wage per week, currently \$7.25, as covering the expense.

Consider Laundering Uniforms Directly

An employer may also meet uniform maintenance obligations by itself laundering or cleaning uniforms free of charge. If employers offer such services, they are not responsible for compensating employees who voluntarily decline to use the service. A best practice is to notify employees of the service in writing and consider having them sign an acknowledgment of receipt.

Consider Offering “Wash-and-Wear” Uniforms

An exception exists to the uniform maintenance pay requirement where an employee can routinely wash and dry a uniform with other personal clothing and the relevant wash-and-wear materials used to make the uniform do not require any other special treatment, such as dry cleaning or daily washing. According to the Department of Labor, this means that the uniform does not require “ironing, dry cleaning, daily washing, commercial laundering or other special treatment.”

It is crucial that employers carefully consider the requirements of the wash-and-wear exception. To minimize legal risk, employees should be given an appropriate number of uniforms per week to avoid daily washing (e.g., five uniform shirts if the employee works five days), and special care instructions should be eliminated. Employees should be able to wash and tumble dry or drip dry the uniform with their other personal clothing. Policies or instructions that require ironing, dry cleaning, or patching and repairs will likely be viewed as outside the wash-and-wear exception by the Department of Labor. Employers should also replace free of charge any uniforms damaged in the course of work-related duties or regular wear and tear.

Review Policies

Review written policies, as well as clothing care tags, to ensure that uniform-care instructions are consistent with any uniform maintenance obligations. Employers that intend to use the wash-and-wear exception, for example, should avoid providing pants with tags stating that they are “dry clean only.” Similarly, managers and supervisors should be trained on proper implementation of any attire-related policies to avoid inconsistent application.

Review State and Prevailing Wage Laws

Some state and prevailing wage laws have additional or unique uniform cost and maintenance pay obligations, which may be more onerous than federal law. Employers should consult with their local labor counsel or human resources professionals on these additional requirements.

Unpaid Interns

The number of lawsuits claiming that unpaid interns are “employees” entitled to minimum wage and overtime pay under the FLSA and applicable state wage-and-hour laws continues to grow. Spurred in part by significant media coverage, political and social justice organizations as well as aggressive solicitation by plaintiffs’ counsel, unpaid interns have brought a number of class and collective actions in

the last two years. Suits have been brought against high-profile media, entertainment and fashion companies, in particular, however, we are now seeing suits brought against companies in other industries.

Under the direction and supervision of counsel, employers should conduct a careful review of any unpaid internship program. Although courts differ on what is the proper test to use to determine whether an unpaid intern is an “employee” under the law, following the below guidelines will reduce the legal risk associated with unpaid internships.

Provide Training Similar to What One Would Receive in an Educational Environment

Design an internship program to provide meaningful learning opportunities. Structure the program around activities and experiences created to teach transferable skills similar to what one would learn in an academic or vocational setting. Consider partnering with educational institutions to help construct the internship program, and confirm that interns will receive college credit for their participation in the internship program.

Ensure Experience Benefits Interns

Structure the internship to primarily benefit the intern — not the company. For example, consider having interns shadow employees and attend workshops and meetings to enhance their skills. Remind managers that the intern is on premises to learn and that they should limit an intern’s involvement in tasks that benefit the company. Accordingly, it is expected that having interns may impede business operations. Prior to approving an internship, consider having the intern’s supervisor submit a written proposal stating how the internship will provide a learning experience for the intern and specifically how the intern will benefit from this opportunity.

Consider Displacement and Supervision Issues

Ensure that supervisors understand that interns need to be closely supervised and cannot displace regular employees. To reduce the risk of an assertion that interns displace employees, provide interns with assignments that differ from those that paid employees perform.

Limit Any Immediate Benefit to the Employer and Confirm Interns’ Understanding of Compensation and Future Employment Considerations

Consider having interns acknowledge in writing that they understand that they are not entitled to any wages during the internship and that they are not entitled to a job at the conclusion of the internship,

Finally, if an unpaid internship program cannot be structured in a way that sufficiently minimizes the legal risk, consider paying the interns at least the applicable minimum wage.

Minimum Wage Requirements

There have been a number of lawsuits filed in California claiming that employees were not paid minimum wage for all hours worked under state law when they were paid under an incentive compensation plan, such as commissions or piece-rate pay, that did not separately pay hourly minimum wage for each hour worked. These lawsuits rely on court decisions in California that have held that employers cannot use an “averaging” method to meet their state minimum wage obligations. These

lawsuits claim that employers must pay at least minimum wage for each hour worked and that minimum wage is not earned during "nonproductive" hours, such as waiting time and rest breaks. Based on the current state of the law, compensation plans that do not have a component that pays employees at least minimum wage for "nonproductive" hours create risk to California employers.

In contrast, courts have consistently held that averaging for minimum wage compliance is allowed under the FLSA.

Recommended Action

Consult with employment counsel about any compensation plan that includes a piece-rate and/or commission component. Although each type of compensation plan is unique, following the guidelines below may help reduce the legal risk associated with potential minimum wage claims.

- Pay base hourly rates for "nonproductive" time that are at least the minimum wage. This means hours when incentive pay is not earned, including waiting time, training time and rest breaks.
- Pay an hourly minimum wage rate, currently \$9, for all hours worked, and have incentive pay in addition to the hourly pay. Piece rates or commission rates can be prospectively adjusted as part of this change.
- Consider the effect of any changes to how employees are paid on compliance with California's complex wage statement and wage notice requirements. California law requires that various items be included on employee wage statements and wage notices, including all applicable hourly rates and information about piece rate or commission pay.

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