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# THE REPORT

Summer 2010

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*"A highlight of my day is solving a client's problem."*

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## SUMMER INTERNS: BARGAIN OR HIDDEN LIABILITY?

Most of us are familiar with the concept of an unpaid summer intern, but in today's tough economy, it is not unheard of for recent graduates or unemployed workers to offer their services just to get their foot in the door, gain experience, or pad their résumé. Before your business brings on an intern, you should know that interns in the for-profit sector are most often viewed as employees, unless a specific 6-part "trainee" test mandated by the Fair Labor Standards Act (FLSA) is met:

1. The internship, even if it includes actual operation of the facilities of the employer, is similar to training in an educational environment;
2. The internship 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 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; and
6. The employer and intern understand the intern is not entitled to wages.

Generally, an internship program that is structured around a classroom or academic experience, for example, with school credit and school oversight, is less likely to be viewed as a "trial" job. If it were deemed to be a job, this would result in an obligation to pay wages.

Interns should be supervised, rather than left to work on their own, and the internship should be first and foremost for the benefit of the intern, rather than a cost-saving worker for the company.

Unless your internship meets all 6 criteria, your "intern" is probably an employee. Besides the minimum-wage and possible overtime obligations, other laws such as those that govern discrimination, workers' compensation, the withholding of taxes, and payment of benefits, are implicated by an improper classification. To better understand your rights in hiring unpaid interns, please contact Brigid Heid or your CPM attorney.

**The Report** is published four times a year as a service to business owners and professionals. The information contained in **The Report** is not intended to be and should not be construed as legal advice. Readers should consult their professional advisors to discuss specific issues and applicability.  
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## Is Health Care Reform Really Affordable?

Like it or not, the Patient Protection and Affordable Care Act of 2010 ("PPACA") is now law. The almost-2,500-page, 22-lb. text doesn't even include regulations to implement it, but for now, employers should arm themselves with information about the Act's implications. PPACA's provisions take effect gradually over the next 10 years. Fortunately, certain programs such as the Small Business Tax Credit, the Early Retiree Reinsurance Program, and the Individual High Risk Pool that may help offset the cost of implementation.

First, employers must determine whether their plan is "grandfathered" to know which rules and timelines will apply to them. Grandfathered plans are those that existed on March 23, 2010 - they are exempt from many of the reform provisions; non-grandfathered plans were created or "changed" after March 23, 2010. There are unanswered questions over what changes a plan. You should consult with your agent or carrier to determine which timelines apply to your plan. The following is a general summary of key changes expected in the coming months and years:

### 2010:

**General Plan Changes:** Plans cannot deny coverage to children under 18 due to preexisting conditions, and, as a general rule, children must be allowed to stay on parents' plan until age 26.\* Plans must provide preventive care at no cost - this requirement also extends to renewed grandfathered plans. Plans are also prohibited from placing a lifetime maximum on the dollar value of coverage (and, after 2014, will be prohibited from annual limits). New plans must allow employees to select their own primary care doctor and cannot require a woman to obtain special permission from a carrier before seeing an OB/GYN.

**Small Business Tax Credit:** The first phase of tax credits become available for employers with 25 full-time employees whose average wages are less than \$50,000, if the employer pays at least 50% of the employees' health insurance costs. This credit is available for tax years 2010 through 2013, and is for up to 35% of premiums paid (25% for tax-exempt employers).

### 2011:

**Large Employer Auto-Enroll:** Employers with 200+ employees must enroll all employees automatically and allow for opt-out from plan participation. Employers will also be required to disclose the value of coverage and benefits on each employee's W-2.

**Health care accounts:** Federal Simple Cafeteria Plans become available to small businesses, eliminating the burden of creating tax-free health savings accounts (HSAs). This will make it easier for businesses to offer HSAs, which allow employees to pay for some medical out-of-pocket costs with pre-tax dollars.

**Wellness grants:** Businesses with less than 100 employees who institute wellness programs can obtain grants between 2011 and 2015 (or until the funding is exhausted).

**CLASS Act:** This government-run, long-term care program will become available.

### 2012:

**Comparative Effectiveness Fee:** Effective with the first plan year ending after September 30, 2012, nominal per-participant fees will be payable by plan sponsors and self-insured plans.

### 2013:

**Elimination of Deduction for Employer Part D Subsidy Eliminated:** This applies to employers who maintain prescription drug plans for retirees eligible.

**Required Notice of Health Insurance Exchanges to Employees:** Employer must provide employees with specific information about impending Insurance Exchanges.

### 2014:

**Insurance Exchanges open.** Insurance Exchanges will assist in providing individuals and small businesses with alternatives to traditional employer plans. While this is not the "government option" mentioned in the heated political debate, the exchanges are intended to provide smaller businesses and individuals with greater leverage to acquire insurance. Qualified businesses purchasing insurance through the state-run exchanges can take a 50% deduction for premium costs for 2 years (35% for tax-exempt entities).

**General Plan Changes:** Plans cannot deny coverage due to preexisting conditions beginning January 1, 2014.

**Mandated Coverage and Reporting:** Companies with 50 or more full-time employees must provide health coverage or pay a \$2,000 annual per-worker fee after the first 30 employees (the "play-or-pay" fine). Most employers will also have to report who pays costs; the name of each employee and dependent; the number of fulltime employees; length of waiting period; the monthly premium of lowest cost option; and other data.

**Cadillac Tax:** Plans that provide above-average benefits may be assessed a 40% nondeductible tax on defined "excess benefits".

Interestingly, the legislation exempts tanning salons and "construction firms" with 5 or less workers from the 2014 requirements. Cleanup legislation is certain to come, and the development of regulations is anticipated, all against the backdrop of court action challenging the constitutionality of forcing states to implement PPACA.

In sum, PPACA requires advance planning on the part of businesses to determine what is in the best interest of a company and its workforce. Employers should engage their agents, trade associations, or local chambers of commerce now, rather than in 2013, to evaluate potential costs. For more information about PPACA, please contact Megan Boiarsky, John Einstein, or your CPM attorney.

*\*Ohio law now mandates inclusion of qualifying dependent children up to age 28, effective August 1, 2010, and subject to enrollment limitations. A qualifying dependent child must be unmarried, a resident of Ohio or enrolled at an accredited institution of higher education, and not eligible for Medicare or Medicaid.*

## SUPREME COURT UPDATE ON EMPLOYMENT CASES

The U.S. Supreme Court has been busy deciding or accepting to hear cases of note for employers. In the first, *Rent-a-Center West, Inc. v. Jackson*, an arbitration provision in an employment agreement required claims or disputes among the parties to be arbitrated, and specifically provided that enforceability of this arbitration clause could only be submitted to an arbitrator. The trial court affirmed the agreement's language about who determines enforceability. The Ninth Circuit Court of Appeals reversed, holding that a court must decide questions of unconscionability and then allow the arbitrator to decide the case on the merits if the agreement were enforceable. The Supreme Court ruled that if the entire agreement's enforceability is at issue, the arbitrator considers all question; however, where only the arbitrability provisions are at issue, a district court will preliminarily consider that issue.

The second case addresses an employee's privacy expectation in text messages. In *Quon v. Arch Wireless Operating Co.*, four employees brought suit against the Ontario, California Police Department and the city's text messaging service provider, for violating their reasonable expectation of privacy in text messages sent over the city pager system. The police department's policy stated that employee email use was limited to City business, that email was subject to periodic review, and that employees had no expectation of privacy. But it did not expressly address text messages. When overcharges were initially detected, the employees' supervisor told the employees to pay for it or he would have to audit the messages and determine the number of personal texts. For several months, the employees paid the supervisor for overcharges. Following excessive overcharges, Internal Affairs contacted the text service provider, who sent hard copies of all the texts sent and received from specific numbers. Internal Affairs' audit found thousands of personal email, many of which were sexually explicit. The four employees sued for violation of the Stored Communications Act and the Fourth Amendment.

The California trial court held that the text service provider violated the Act because it released archived text messages to the subscriber, not the intended recipient of the communication. The appellate court agreed and also held the city violated the officers' constitutional privacy right, finding the search unreasonable and that users of text messaging services have a reasonable expectation of privacy in the text messages stored by the provider. The court noted that the supervisor's conduct in requesting payment for overcharges strengthened the employees' expectation of privacy. The court noted that if the city had made clear that the email policy applied to text messages and had the "operation reality" in the workplace confirmed that policy, the employees would not have had a reasonable expectation of privacy.

The third case involved the so-called "cat's paw" doctrine, which gets its name from a 17th century poem about a monkey who persuaded a cat to pull chestnuts out of a fire for him, causing the cat to get burned. As that theory applies to employment law, it seeks to hold an employer liable for

discrimination by an employee who does not make the actual job decision but influences the one who does. In *Staub v. Proctor Hospital*, an employee alleged he was dismissed for being in the Army Reserves, in violation of the employment laws that protect service members.

Mullaly, the second-in-command of Staub's department resented his involvement in Reservist activities, made anti-Reservist remarks, and scheduled him for weekends when he was in training. Staub was also disciplined for insubordination, based largely on reports made by Mullaly. He was ultimately terminated by a company vice president, who had no animus against Staub or his activities, based on further allegations of insubordination and of a history that Staub was difficult to work with which predated Mullaly's management.

At trial, Staub attempted to demonstrate that Mullaly's animus influenced the ultimate decisionmaker. The jury found for Staub, but the court of appeals reversed, finding the lower court erred in admitting evidence of the cat's paw theory. The court found there was not "blind reliance" on the part of the vice president on Mullaly's unlawful animus and she thus did not have a "singular influence" over the decision-making by the manager. In other words, though anti-military animus may have been an influence, the plaintiff's other problems could have given rise to his termination. It remains to be seen if the Supreme Court will affirm this narrow interpretation of the cat's-paw doctrine.

Finally, a case heard by a Tennessee District Court (which is in the same appellate jurisdiction as Ohio's federal courts), is notable for its holding that the employer must not only have a sexual harassment policy and make it available to all employees, but it must also actively train employees to be able invoke defenses in harassment suits. In *Bishop v. Woodbury Clinical Laboratory*, the court reminded employers that the Faragher/ Ellerth defense (referring to prior Supreme Court decisions on this subject) is available to employers sued for vicarious liability in a harassment case only when the employer can prove it exercised reasonable care to prevent or correct any harassment but the plaintiff failed to avail herself of the protection of the policy. If successfully asserted, an employer is not liable for damages that a plaintiff could have avoided by reporting the misconduct to the designated person(s). In *Bishop*, the court expanded the Faragher/ Ellerth defense requirements, saying a company's policy should "(1) require supervisors to report incidents of sexual harassment, (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) provide for training regarding the policy." In that case, although Woodbury provided employees with a handbook policy, there remained a question of fact as to whether training on implementation of the harassment policy was conducted.

These cases underscore the need to have and train employees on policies that reflect a company's evolving technologies, policies, and procedures. For more information about handbooks and training, please contact Joëlle Khouzam or your CPM attorney.

## IN THE NEWS

**Brandon Borgmann** recently spoke about estate tax, fiduciary income tax, and probate at a seminar held at the Greater Columbus Convention Center.

**Joe Patchen** recently spoke at an Ohio State Bar Association continuing-education program on Commercial lease Defaults and Remedies.

**Jane Higgins Marx, Rich Seils, and Brandon Borgmann** have been invited to speak on estate planning at a series of sessions called Smart Money Choices offered by the Ohio Treasurer of State. Jane will present at the Concourse Hotel in Columbus on August 6. Rich will present at the Quaker Square Inn near University of Akron on July 16 and at the Hope Hotel & Conference Center at Wright-Patterson Air Force Base (Dayton) on July 23. Brandon will present at Ohio University Inn on September 17. For a complete list of events and registration information, visit <http://www.tos.ohio.gov>, select the tab called "For You", and then select "Smart Money Choices" from the pull-down menu, or call 1-800-228-1102.

**Brigid Heid** was recently inducted as a Fellow into the *Litigation Counsel of America*, an honorary society for lawyers whose invitation-only membership is restricted to one-half of one percent of American lawyers. Evaluation for fellowship is based on the effectiveness and accomplishment of the attorney in trial work along with their ethical reputation. Brigid's trial work is focused on representing businesses in employment-related disputes. Congratulations, Brigid!

CPM welcomed **Daniel O. Barham** to the firm in April 2010. Dan is a 2007 graduate of Vanderbilt Law School and graduated in 1997 from Texas A&M University with a degree in business administration. Dan's approach to the practice of law is unique, probably because he spent six years in the business world before entering the legal field. Dan worked



in the plastics industry: a career that began with Ashland Chemical in Dublin, Ohio. Eventually, Dan managed the Southeastern United States business for AT Plastics, a multi-national plastics manufacturer. Dan's territory generated over \$20 million in profit. Everyday, Dan uses the lessons learned from his business experience to provide custom-tailored legal services to the firm's clients.

When he is not practicing law, Dan enjoys golf, travel, hunting, fishing, outdoor sports, reading historical novels and non-fiction, and entertaining friends and family.

### Welcome Dan!

CPM welcomes back two attorneys: **Doug Jennings** has returned to the Securities Litigation practice, after spending several years as an in-house attorney at Nationwide Insurance's headquarters, and **Brian Johnson** returns to the full-time practice of litigation and commercial work after serving as a minister with Heritage Christian Church in Westerville for the past several years.



We are delighted to become more active in efforts to "Go Green." With support from WattWorks, Inc., a Columbus-based energy consulting firm, we recently conducted a business energy audit to explore how we can reduce consumption and preserve resources. WattWorks' recommendations included changing over to more efficient LED lighting, making sure computers are set to "sleep" mode when not in use, and sealing leaky entrances to prevent heating and cooling loss. CPM has also eliminated all Styrofoam products in favor of paper cups, has implemented a recycling program, and has taken steps to become certified as a Columbus **GreenSpot**. We'd like to encourage more businesses to become **greener**. To see commercial and residential suggestions for saving **green** by going **green**, or to discuss what an energy audit includes, visit WattWorks' website at <http://www.wattworks.com/>.

### Banking & Finance

- Consumer Finance & Collections
- Creditor Right & Bankruptcy
- Loan Documentation/Structuring
- Loan Workouts/Restructuring

### Business

- Business Structures, Financing
- Contacts
- Entrepreneurial/Closely Held Businesses
- Franchise Law
- Immigration
- Intellectual Property
- Mergers & Acquisitions
- Warehouse & Transportation

### Family Law

### Family Wealth and

### Estate Planning

- Will & Trusts
- Probate and Trust Administration
- Business Succession Planning
- Probate and Trust Law Litigation

### Labor & Employment

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- Employee Benefits
- Labor Negotiations
- Immigration
- Workers Compensation

### Litigation

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- Construction Law
- Employment Litigation
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- Unfair Competition
- White Collar Criminal Defense

### Mediation Services

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- Family Law Mediation

### Public Law

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- Government Relations
- Public Finance

### Real Estate

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- Affordable Housing Tax Credits
- Annexation, Zoning & Land Use
- Construction Law
- Economic Development Incentives
- Title Agency

### Securities

- 1933 and 1934 Act Compliance
- Arbitration/Litigation
- Bond Counsel Underwriter Representation
- Employment/Recruitment Issues
- Regulatory Compliance
- Investment Banks, Broker-Dealer Representation
- Public and Private Equity and Debt Offerings
- Registered Investment Advisory Formation & Representation

### Taxation

- Tax Appeals
- Entity Taxation
- Exempt Entity Representation
- Like-Kind Exchanges
- Affordable Housing Tax Credits
- New Markets Tax Credits
- Personal Tax
- Qualified and Non-Qualified Deferred Compensation Plans/ESOPs
- Syndications/Tax Opinions