# WILLCOX SAVAGE
# Employment Law Outlook
Spring 2018


## U.S. DOL Establishes Payroll Audit Program

**William M. Furr**

On March 6, 2018, the U.S. Department of Labor announced that it was implementing the Payroll Audit Independent Determination Program (PAID) to allow employers to resolve potential overtime and minimum wage violations without having to go to court. All employers covered by the Fair Labor Standards Act (FLSA) are eligible to participate in this pilot project. Employers will be asked to identify their business and review a series of short videos on FLSA topics. After the employers complete the compliance assistance review, the program will generate a Certificate of Completion which allows the employer to conduct a self-audit of its compensation practices.

As part of this self-audit, employers must identify the potential violations that may have occurred in the last two years; identify which employees were affected; identify the timeframes in which each employee was affected; and calculate the amount of back wages the employer believes is owed to each employee. Employers undertaking this program should not pay back wages to any employees until the Department of Labor has reviewed and approved the proposed payments to the employees. Once the information is provided to the DOL, it will evaluate the information and contact the employer to verify that the employer's self-audit is accurate. If the DOL verifies the employer's self-audit, it will provide the employer with a proposed scope of release of liability for the potential violations presented to the DOL.

After the DOL assesses the back wages due, it will issue a summary of unpaid wages and will issue forms describing the settlement terms for each employee. The employer may then present these forms to the employees who should sign the

(Continued on Page 4)

## It's Almost Summer Internship Season: Are Unpaid Internships Now Viable Under The Department of Labor's New Guidance?

**David A. Kushner**

When the Great Recession hit in 2008, the business community saw a drastic increase in students and graduates seeking unpaid internships. Many employers found it hard to say no to this free recruitment tool, and unpaid internships became much more prevalent in the years that followed. However, the pendulum swung in the opposite direction after (1) a number of highly publicized lawsuits alleging that interns were actually employees who should have been paid the minimum wage and overtime and (2) the Department of Labor (DOL) adopted a test strictly limiting when internships can be unpaid. Following these developments, the number of employers willing to risk unpaid internships fell precipitously.

Under the previous administration's DOL guidance, an internship could only be unpaid if all of the following six criteria were met. If any of these criteria were not met, the intern would be considered an employee who must be paid.

1. The internship is similar to training which would be given in an educational environment;

2. The internship is for the benefit of the intern (i.e. not the employer);

3. The intern does not displace regular employees;

4. The employer derives no immediate advantage from the activities of the intern;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

(Continued on Page 3)

## Impact of Recent Legislation on Retirement Plans

**Cher E. Wynkoop** **Corina V. San-Marina**

The Tax Cuts and Jobs Act (Tax Act) and the Bipartisan Budget Act of 2018 (Budget Act) contain provisions that affect qualified retirement plans, such as 401(k) and 403(b) plans. Below is a high level summary of those provisions and their impact on the retirement plans.

**Hardship Distributions – Damage to Participant's Principal Residence**

- The Tax Act changes the rules regarding deductibility of personal casualty loss under Section 165 of the Internal Revenue Code (Code), and indirectly impacts 401(k) and 403(b) plans that follow the "safe harbor" standards for allowing participants to receive hardship distributions.
- For tax years beginning before January 1, 2018, a taxpayer was eligible for a casualty loss deduction under Section 165 for uncompensated damage to the taxpayer's home resulting from any fire, storm, flood or other isolated incidents.
- For tax years beginning on or after January 1, 2018 and before January 1, 2026, the loss must result from a Federally-declared disaster.
- It is not clear whether Congress intended to narrow the circumstances in which hardship distributions may be taken when enacting the change to Section 165, and it is possible that the IRS will publish guidance obviating the need to impose the Federally-declared disaster requirement in the hardship context.
- Until the IRS offers further guidance, retirement plans that follow the "safe harbor" standards for hardship distributions should make sure that any necessary administrative changes are implemented to reflect the narrower basis for hardship distributions based on a casualty loss deduction under Section 165 of the Code.

**Hardship Distributions – Reduced Restrictions Introduced by the Budget Act**

- Effective for plan years after December 31, 2018, plan participants taking hardship distributions will no longer be prohibited from contributing to their employer plans for six months after receiving the hardship distribution.
- A plan participant will no longer be required to obtain all available loans before obtaining a hardship distribution. It does not remove the requirement that a participant first obtain all other available distributions. Thus, to the extent a plan makes other types of contributions available for in-service distribution without a showing of financial hardship, a plan administrator would have to continue applying this restriction.
- The type of contributions from which participants can receive hardship distributions is expanded to include qualified nonelective contributions, qualified matching contributions, and any earnings on employer and employee contributions. It is not clear whether these changes apply to 403(b) plans.
- It is not clear if these provisions are optional or mandatory. The current consensus is that they are optional. The IRS may provide further clarification. If the provisions are optional, sponsors of 401(k) and 403(b) plans will want to take some time to consider which, if any, of these new rules make sense for their workforce (and their administrative procedures) and work with their legal counsel to timely amend the plan documents to reflect the changes implemented.

**Rollover of a Loan Offset Period Extended by the Tax Act**

- Effective for plan distributions made after December 31, 2017, participants in 401(k) plans and 403(b) plans have until the due date (with extensions) for filing participant's federal income tax return to rollover the plan loan offset amount to an eligible retirement plan that accepts rollovers in order to avoid a taxable loan default. Prior to the change, the deadline to rollover the offset was 60 days after the date of the loan offset.
- The new rule applies only to an unpaid accrued loan amount that is offset from the participant's plan account at plan termination or at or after severance from employment if the plan provides that the accrued unpaid loan amount must be offset at that time. It does not affect loans that go into default because loan payments have not been made within the default cure period.

(Continued on Page 3)

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(Continued from Page 1)

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

However, with changing political tides often come changing interpretation by administrative agencies. In January 2018, the DOL adopted a new, less restrictive test for determining whether an intern is an employee who must paid.

Under the new "primary beneficiary" test, it is not necessarily fatal if one or more of the factors is not met. Instead, the new test looks at the all of the factors to determine who the primary beneficiary of the relationship is, analyzing the extent to which:

- Both parties understand that the intern is not entitled to compensation.
- The internship provides training that would be given in an educational environment.
- The intern's completion of the program entitles him or her to academic credit.
- The internship corresponds with the academic calendar.
- The internship's duration is limited to the period when the internship educates the intern.
- The intern's work complements rather than displaces the work of paid employees while providing significant educational benefits.
- The intern and the employer understand that the internship is conducted without entitlement to a paid job at the internship's end.

According to the DOL the new test is intended to be flexible and no single factor is determinative. Accordingly, whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case.

So should employers dip their toes back in the unpaid internship pool? While there is no doubt that doing so has become at least somewhat less risky based on the DOL's new test, we recommend that employers continue to proceed with caution.

***If an intern is performing work that could be performed by a paid employee or that benefits the organization, there will still be a risk that the DOL or a court could consider the intern an employee.***

If an intern is performing work that could be performed by a paid employee or that benefits the organization, there will still be a risk that the DOL or a court could consider the intern an employee. Prudent employers will limit unpaid internships to school sanctioned programs for which the intern will receive academic credit. Even in these circumstances, if the intern is performing valuable services for the employer, the cautious approach is to pay the intern minimum wage.

Employers should also note that several states have adopted their own tests to determine whether interns should be paid or not. Employers who plan to use unpaid interns should review their programs with their employment lawyer to make sure that they comply with all state and federal requirements.■

## IMPACT OF RECENT LEGISLATION ON RETIREMENT PLANS

(Continued from Page 2)

- Plan sponsors should review and update their plan loan related documents and the tax notice provided to participants who receive eligible rollover distributions to reflect the extended period of time to rollover the plan loan offset amount.

**Qualified Moving Expenses – Impact on the Definition of Plan Compensation**

- Plan sponsors should review their definition of "plan compensation" as it relates to "qualified moving expenses." The Tax Act discontinues the favorable tax treatment for employer reimbursements of an employee's moving expenses during any taxable year beginning after December 31, 2017, and before January 1, 2026. As a result, any employer reimbursement of moving expenses is now considered taxable wages and reported on W-2, and will likely become an item considered "plan compensation" under most plan definitions.■

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(Continued from Page 1)

forms in order to receive payment. The forms signed by the employees include a release that releases the employer from liability for those violations for which the employer has paid back wages. All back wages must be paid by the employer by the end of the next full pay period after receiving the confirmation from the Department of Labor. The DOL's program is a pilot program for six months from April 2018 to October 2018. At the end of the six month period, the DOL will evaluate the program and determine whether to continue it.

This program is designed for employers that have concluded that they are not paying their employees properly under the FLSA and would like to remedy the errors by paying the employees and receiving enforceable releases from the employees. Historically, employers have not undertaken such a voluntary remedy because the law does not recognize releases of FLSA claims unless it is approved by a court or the Department of Labor. This pilot program allows employers to resolve discrepancies through a DOL-approved process without having to seek court approval.■

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