

Legal Update

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EMPLOYERS BEWARE: FREE LABOR MAY NOT REALLY BE FREE

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For many businesses, summer brings the potential opportunity for free student labor. In these tough economic times, many students are willing to accept unpaid internships for “experience,” and companies may be tempted to create “internship programs” to accommodate them. Yet, unless employers act carefully in creating unpaid internships, they may be in for an unpleasant surprise.

Employers who improperly classify an employee as an unpaid intern may be subject to lawsuits and investigations by the Department of Labor (DOL), as well as liability for unpaid wages, attorneys’ fees, penalties, interest and taxes. This Legal Update describes the factors used for determining whether an “internship” is merely employment in disguise and provides tips for employers who have or are considering an unpaid internship program.

Employees Disguised As Unpaid Interns

The Fair Labor Standards Act (FLSA) is a federal law which, among other things, provides that (a) employees may not be employed for less than the minimum wage, and (b) non-exempt employees who work more than 40 hours in a week must be paid at least one and one-half times their regular rates of pay for overtime hours worked. To determine whether unpaid internships violate the FLSA, the key is whether the student intern is “employed” – a term broadly defined under the FLSA.

In general, under the FLSA, covered and non-exempt employees who are “suffered or permitted” to work must be paid for their services. (For additional information pertaining to covered and non-exempt or exempt employees, please see FVLD’s [July 2004 Legal Update](#).) According to the DOL, which enforces the FLSA, an unpaid intern is not “employed” (and thus does not need to be paid under the FLSA) if the internship is more similar to a classroom or academic experience than to participation in the employer’s actual business operations. In other words, if the experience is primarily for the employer’s immediate benefit, rather than for the intern’s own educational benefit, then the “internship” is employment and the intern must be paid.

In the for-profit sector, an internship may be deemed “employment” unless the employer satisfies the following six-factor test: (1) the internship is similar to training which would be given in an educational environment; (2) the internship experience 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

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impeded; (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand that the intern is not entitled to wages for the internship.

For example, an intern who performs primarily clerical work in an employer's office would likely be deemed an employee since the intern is doing the same work as a regular employee would perform and the employer is benefiting from the work the so-called intern is providing. This does not mean, however, that the intern cannot observe a regular employee to learn the employee's job. In fact, the more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern will be viewed as receiving training.

Non-Profit Volunteers

The DOL generally views individuals who volunteer or donate their services (without contemplation of pay) for public service, religious or humanitarian objectives or similar non-profit organizations as non-employees. The key in the non-profit sector is whether the unpaid volunteer performs the services freely, without pressure or coercion and without promise, expectation or receipt of compensation (except possibly reimbursement of expenses or other nominal fees).

Tips

Employers should carefully assess the tasks assigned to unpaid interns and the structure of their internship programs. While employers should consult counsel about their individual situations, below are some tips that may help minimize the risk that an employer (especially one in the for-profit sector) may face for not paying its interns:

- Provide each intern with a written "internship description" describing the educational value of the program. The description should note that the internship is unpaid and that participating in the program will not necessarily lead to a job.
- Train employees that are supervising the interns about the goals of the internship in order to ensure the interns receive training that benefits them.
- Closely monitor each intern's assignments to ensure that he or she is not providing work that is primarily for the benefit of the employer, as opposed to the educational benefit of the intern.
- Communicate with the intern's school to determine what type of projects would best assist in his or her education.
- Make clear that any reimbursements provided to the intern are not compensation.
- Seek legal counsel to create or modify the internship program.

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