

U.S. Department of Labor and State Agencies Step Up Enforcement of Unpaid Internships

April 9, 2010

Amidst high unemployment and continued cutbacks at many companies, unpaid internships have become increasingly common in the private sector. According to recent published reports, the U.S. Department of Labor (DOL) and several states have announced their intent to step up their enforcement of wage and hour laws as they apply to such interns. Thus, employers that utilize unpaid interns should be aware of the requirements of both federal and state law that may apply to such individuals.

Unlike nonprofit organizations, which can legally utilize volunteer labor, for-profit employers can only utilize unpaid interns if they comply with the Fair Labor Standards Act (FLSA). According to the DOL, to be exempt from the FLSA's overtime and minimum wage provisions, an intern must be a "trainee" and not an employee.

The DOL has developed the following six criteria that must be met for an individual to qualify as a trainee and thus be eligible for an unpaid internship with a for-profit company. If these conditions are met, the worker qualifies as a trainee and an employment relationship is not established, and thus the overtime and minimum wage requirements do not apply to such individual:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction.
2. The training is for the benefit of the trainees.
3. The trainees do not displace regular employees, but work under their close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion the employer's operations may actually be impeded.
5. The trainees are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

The DOL has recently explained that "[b]ecause the FLSA's definition of "employee" is broad, the excluded category of "trainee" is necessarily quite narrow. Moreover, the fact that an employer labels a

worker as a trainee and the worker's activities as training . . . does not make the worker a trainee for purposes of the FLSA unless the six factors are met." DOL Advisory: Training and Employment Guidance Letter No. 12-09, Jan. 29, 2010, at 8. In each instance, the specific facts and circumstances of a worker's activities must be assessed to determine whether the individual qualifies as a trainee. For example, the more a training program resembles a classroom or academic setting, providing skills widely applicable in employment settings, the more likely the individual would be deemed a trainee. By contrast, an individual engaged in the employer's actual operation, learning skills applicable only to one employer, is more likely to be found to be an employee.

Under the DOL criteria, if an employer uses an intern as a substitute for a regular worker, or would need to hire an additional employee if the intern was not able to perform the work, the intern would likely be deemed an employee. Similarly, if an intern receives the same level of supervision as regular employees, rather than shadowing opportunities or a more closely supervised training program, he or she would likely be considered an employee for purposes of the FLSA and must be compensated according to minimum wage and overtime provisions.

Government agencies responsible for enforcing wage and hour laws are concerned that while unpaid internships are becoming more common, there may be little incentive for interns to report potential violations of federal and state wage laws. That is because interns often value the experience obtained during internships, even if they are not compensated with a paycheck for the hours worked. As a result, some states, including New York, California, and Oregon, have begun to enforce potential wage and hour violations by launching investigations into internship programs and fining employers where applicable.

As the season for summer college internships quickly approaches, employers should be mindful of the DOL's criteria for unpaid internships and the potential for increased enforcement of state and federal wage laws.

If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

Corrie Fischel Conway	202.739.5081	cconway@morganlewis.com
James J. Kelley, II	202.739.5095	jkelly@morganlewis.com

Chicago

Barry A. Hartstein	312.324.1140	bhartstein@morganlewis.com
--------------------	--------------	--

Dallas

Ann Marie Painter	214.466.4121	annmarie.painter@morganlewis.com
-------------------	--------------	--

Houston

Nancy L. Patterson	713.890.5195	npatterson@morganlewis.com
--------------------	--------------	--

Irvine

Barbara J. Miller	949.399.7107	barbara.miller@morganlewis.com
-------------------	--------------	--

Los Angeles

John S. Battenfeld	213.612.1018	jbattenfeld@morganlewis.com
--------------------	--------------	--

Miami

Anne Marie Estevez 305.415.3330 aestevez@morganlewis.com

New York

Christopher A. Parlo 212.309.6062 cparlo@morganlewis.com

Palo Alto

Carol R. Freeman 650.843.7520 cfreeman@morganlewis.com

Philadelphia

Michael J. Ossip 215.963.5761 mossip@morganlewis.com

Pittsburgh

Christopher K. Ramsey 412.560.3323 cramsey@morganlewis.com

Princeton

Richard. G. Rosenblatt 609.619.6609 rosenblatt@morganlewis.com

San Francisco

Rebecca Eisen 415.442.1328 reisen@morganlewis.com

About Morgan Lewis's Labor and Employment Practice

Morgan Lewis's Labor and Employment Practice includes more than 265 lawyers and legal professionals and is listed in the highest tier for National Labor and Employment Practice in *Chambers USA 2009*. We represent clients nationwide in a full spectrum of workplace issues, including drafting employment policies and providing guidance with respect to employment-related issues, complex employment litigation, ERISA litigation, wage and hour litigation and compliance, whistleblower claims, labor-management relations, immigration, occupational safety and health matters, and workforce change issues.

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—more than 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2010 Morgan, Lewis & Bockius LLP. All Rights Reserved.