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Internship Programs: Emerging Legal Risks for Employers

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Agenda

- Recent Enforcement/Litigation Developments Involving Interns
- Requirements Under the Fair Labor Standards Act of 1938 (FLSA)
- Exceptions to the FLSA's Requirements
- Determining Whether an Individual is an Intern or an Employee
- The Supreme Court's Factors
- The Department of Labor's (DOL) Six-Part Test
- Application of the Six-Part Test by DOL and the Courts
- Highlights of State Law Tests
- Special Considerations for Non-profit Employers (use of "volunteer" test)
- Risks of Misclassifying Interns
- Best Practices for Developing and Implementing an Internship Program

Recent DOL Enforcement Policy Pronouncement

"If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."

Nancy J. Leppink, Acting Director of the Department of Labor, Wage and Hour Division, The Unpaid Intern, Legal or Not, N.Y. TIMES, Apr. 2, 2010.

Recent Litigation Developments

"Since filing a lawsuit on behalf of unpaid interns late last year, our office has received numerous calls from other current and former interns who were not paid for the productive work they performed."

Adam Klein, Outten & Golden, Employers Beware: Unpaid Interns Ready to Cash in, LAW360, Mar. 16, 2012

Fair Labor Standards Act of 1938 (FLSA)

- The FLSA requires federal minimum wage and time-and-a-half overtime wages for all hours over 40 the employee works in a workweek unless an employee meets one of the FLSA's exemption requirements. 29 U.S.C. §§ 206, 207.
- An individual cannot waive his or her rights under the FLSA.
- Many states have wage and hour laws that mirror the requirements of the FLSA, or provide even greater rights to employees.

Defining "Employee" Under the FLSA

- FLSA broadly defines "employee" to include "any individual employed by an employer." 29 U.S.C. § 203(e)(1).
- FLSA defines "employment" as "to suffer or permit to work." Id.
- Not everyone who performs services for an employer is an "employee."

Non-Employees Under the FLSA

- Intern/Trainee
- Volunteer (only the public and nonprofit sectors can utilize volunteers)
- Independent Contractor

The Supreme Court's "Trainee" Test

- The Supreme Court held in Walling v. Portland Terminal Co., 330 U.S. 148 (1947), that individuals who work for their own advantage on the premises of an employer, with no express or implied agreement that they will be compensated, are not "employed" and are, therefore, not "employees." 330 U.S. at 152-153.

Walling v. Portland Terminal Co.

The following factors were considered by the Supreme court in Walling in determining that the individual was a trainee and not an employee:

- Instruction and training
- Close supervision
- Regular employees not displaced
- Presence of trainee does not expedite employer's business and sometimes impedes it
- Compensation agreement – presence of one or lack thereof

Is an Intern an Employee?

- Based on Walling, the DOL's Wage and Hour Division (WHD) established a **six-part** test to assess whether interns, externs, graduate assistants or similar individuals are "trainees" or "employees." See U.S. Department of Labor, Employment Relations Under the Fair Labor Standards Act, WH Publication 1297 (reprinted August 1985).
- If all of the factors are met, the interns or trainees are not "employees" within the meaning of the FLSA.
- The employer bears the burden of establishing that an intern is not an employee.

The DOL Six-Part Test

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in an educational environment;
2. The training is for the benefit of the trainees or students;
3. The trainees or students do not replace regular employees but work under their close supervision;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion its operations may actually be impeded;

The DOL Six-Part Test

5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

See DOL Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (April 2010).

Applying the Test

- Application of these criteria requires a fact-intensive analysis.
- Determining whether an intern is an employee depends upon all circumstances surrounding his or her activities on the premises of the employer.
- Even if the internship program is designed to provide students with professional experience to further their education and the training is academically oriented, employers should be aware that all six parts of the test **must** be met and that implementation is key.

DOL's Fact-Specific Application of the Six-Part Test

Failure to Establish that the Employer Received No Immediate Advantage.

- In an Opinion Letter dated March 25, 1994, (1994 U.S. Dept. of Labor Op. Ltr. LEXIS 17), the DOL stated that an employer failed to establish that the employer received no immediate advantage from the trainees' work and that the trainees in the employer's program were actually employees when those trainees participated in a Hostel Management Training lasting one to two months.
- During the training, the trainees assisted with the daily operation of a youth hostel, which included checking customers in and out, performing maintenance and administrative work, and establishing/designing an educational program for the hostel.

DOL's Fact-Specific Application of the Six-Part Test

Failure to Establish that the trainees Do Not Displace Regular Employees and that the Employer Received No Immediate Advantage.

- In an Opinion Letter dated May 17, 2004 (U.S. Dept. of Labor Op. Ltr. FLSA2004-5NA), the DOL concluded that an employer failed to meet the test despite the fact that the stated purpose of the internship was to teach "marketing, promotion, and statistical analysis to students in a real world setting."
- The internship was even structured like a college marketing course, and the student interns only worked 7 to 10 hours per week, were required to obtain college credit, and were closely supervised.
- However, in reaching its conclusion, the DOL reasoned that the students performed the work of a field marketing representative on campus and that the students were expected to assume the role of regular staff members of the employer.

DOL's Fact-Specific Application of the Six-Part Test

- In an Opinion Letter dated April 6, 2006 (U.S. Dept. of Labor Op. Ltr. FLSA2006-12), the DOL concluded that an employer successfully demonstrated each of the six factors when the program's only purpose was educational and was designed to expose students to different careers.
- Students in the program spent one week shadowing an employee at a sponsoring employer and received no compensation or college credit.
- While students did not generally perform work for the employers, they did perform small office tasks.
- DOL's Application of the 6 factors in determining that the students were not employees:
  - Factor 1: Training was practical application of material taught in a classroom setting, therefore, the program qualified as training similar to a vocational school or academic educational instruction.

DOL's Fact-Specific Application of the Six-Part Test

- Factor 2: Students' participation in the program facilitated their observation of the practical application of what they learned in the classroom so they received the primary benefit from the program.
- Factor 3: Students do not displace regular employees because they merely shadow another employee for one week.
- Factor 4: Students only participated for one week, were assigned a shadowed employee and performed virtually no work, therefore providing no immediate advantage to the employer.
- Factors 5 & 6: Students are clearly informed that they will not receive a job at the conclusion of the program and that they are not entitled to compensation.

The Courts' Approach

Federal courts have taken different approaches to applying Walling and the DOL guidelines. Generally, three approaches have been taken by the courts:

- **Immediate or Primary Benefit Test (4th Cir., 6th Circ., and D. Md.)**
  - Not an employee unless there is an immediate or primary benefit to the employer
  - Considers the Walling factors and does not evaluate the DOL guidelines
- **All-or-Nothing Test (5th Cir. and W.D. Wash.)**
  - To satisfy the all-or-nothing test, an employer must meet all six of the criteria set forth by the DOL
  - If the employer is unable to establish a single factor, then the individual is classified as an employee
- **The Totality of Circumstances Test (10th Cir. and N.D. Okla.)**
  - Rejects all-or-nothing application of the guidelines
  - Considers guidelines in the totality of the circumstances and makes determination even if one factor may be missing

California

- Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) follows federal law in classifying interns and employees.
- Applies the DOL's six-part test.
- Considers "all of the circumstances" when applying the DOL's six-part test.
- Rejects prior use of 11-factor test that included DOL's six-part test and five additional factors.

New York

- New York State Department of Labor looks at the "totality of circumstances" in applying the DOL's six-part test and adds five additional criteria.
- In addition to the DOL's six part, New York also requires that:
  - The trainees or students be notified, in writing, that they will not receive any wages for such training and are not considered to be employees for minimum wage purposes.
  - Any clinical training be performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed.

New York

- The training is general, so as to qualify the trainees or students to work in any similar business, rather than designed specifically for a job with the employer offering the program.
- The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program.
- Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

New Jersey

- In New Jersey, a trainee is not considered an employee. There is a nine-part test for determining whether someone is a trainee. N.J.A.C. 12:56-2.1.
  1. The training is for the primary benefit of the trainee;
  2. The employment for which the trainee is training requires some cognizable, trainable skill;
  3. The training is not specific to the employer, that is, it is not exclusive to its needs, but may be applicable elsewhere for another employer or in another field of endeavor;
  4. The training, even though it includes actual operation of the facilities of the employer, is similar to that which may be given in a vocational school;

New Jersey

5. The trainee does not displace a regular employee on a regular job or supplement a regular job, but trains under close tutorial observation;
6. The employer derives no immediate benefit from the efforts of the trainee and, indeed, on occasion may find its regular operation impeded by the trainee;
7. The trainee is not necessarily entitled to a job at the completion of training;
8. The training program is sponsored by the employer and is outside regular work hours, the trainee does no productive work while attending the program, and the program is not directly related to the trainee's present job (as distinguished from learning another job or additional skill); and
9. The employer and the trainee share a basic understanding that regular employment wages are not due for the time spent in training, provided that the trainee does not perform any productive work.

Volunteers Under the FLSA

Unlike employees, volunteers are not protected by the FLSA. There are limited instances in which an individual is considered a volunteer outside of the FLSA's protections:

- Individuals who volunteer to perform services for state or local government agencies and individuals who volunteer for humanitarian purposes for private nonprofit food banks
- Individuals who volunteer their time for religious, charitable, civic, or humanitarian purposes to nonprofit organizations
- For-profit employers may not use this test.

Volunteers Under the FLSA

In determining whether an individual qualifies as a "volunteer," the Department of Labor (DOL) examines whether an individual:

- (1) performs hours of service for civil, charitable or humanitarian reasons;
- (2) works without promise, expectation, or receipt of compensation for services rendered;
- (3) enters into the agreement without coercion or undue pressure; and
- (4) is not otherwise employed by the same entity to perform the same type of services as those for which the individual proposes to volunteer. See Wage and Hour Opinion Letter, FLSA2006-28 (Aug. 7, 2006).

Misclassifying an Individual as an Intern

- Back pay (including overtime wages)
- Back taxes (payroll and state employment taxes)
- Workers' compensation insurance premiums
- Liability for workplace injuries
- Liability for unemployment benefits
- Liability for fringe benefits not provided (pension plans, health insurance, vacation and sick pay)
- Possible attorneys' fees and costs

Best Practices for Developing and Implementing an Intern Program

- Weigh the costs and benefits; an employer may spend more time and money closely supervising the intern than it would if the intern was classified as an employee.
- Structure around a classroom or academic experience rather than the employer's actual operations.
  - Set up as formalized program with agendas, ect.
- Provide the intern with skills that can be used in multiple employment settings, rather than skills limited to one employer's operation.
- Provide job-shadowing opportunities in which the intern performs no or minimal work.

Best Practices for Developing and Implementing an Intern Program

- Do not be dependent upon the work of the intern, even if the intern may be receiving some benefit in the form of a new skill or improved work habit.
- Tailor the internship to the intern's goals and interests rather than to the employer's.
- Prior to the commencement of the internship, have the intern sign an agreement that (1) describes the nature of the internship and (2) explains that the intern neither expects compensation nor a job offer at the internship's conclusion.

Best Practices: Advising Clients on an Internship Program

- Create written policies or handbooks devoted exclusively to interns to avoid using the same policies and handbooks used for employees.
- Be clear about the distinction between interns and employees.
- Keep detailed records to make it clear that expense reimbursements are not disguised wages.

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