Student Internships: What Employers Need to Know

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Recent press coverage has shined a spotlight on student intern programs, including the issue of whether unpaid internships comply with applicable laws. In fact, many may not, and federal and state agencies are stepping up enforcement efforts regarding unpaid internships as part of a renewed focus on wage/hour compliance generally. Employers with internship programs should carefully analyze whether they meet the criteria for unpaid interns or whether such individuals are actually employees entitled to minimum wages and overtime payments. Although the law in this regard has not recently changed, the United States Department of Labor ("DOL") recently issued guidance that is helpful in undertaking this analysis, specifically in the for-profit sector. The considerations may differ for non-profit employers, as discussed further below.

SIX-FACTOR TEST FOR UNPAID INTERNS

The Fair Labor Standards Act ("FLSA") mandates that individuals who are employed must be compensated for the services they perform. "Employ" is defined very broadly as "suffered or permitted" to work. The Wage and Hour Division of the DOL recently issued a fact sheet on internship programs under the FLSA.[1] According to the DOL, internships in the for-profit private sector will most often be viewed as employment requiring compensation, unless a narrow exclusion can be met.

Although employment is defined broadly, it does not encompass work that serves a person's own interest, even where an employer provides aid or instruction. Accordingly, if an intern is receiving training for his or her own benefit, the internship program may qualify for the exclusion from the FLSA. The following six criteria will be applied to make this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, 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 that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;

[1] The fact sheet can be found at http://www.dol.gov/whd/regs/compliance/whdfs71.htm.

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 time spent in the internship.

In order to meet this test, an internship must fulfill *all* of the factors. As the DOL put it, the exclusion is narrow because the definition of employee is broad. The salient point is that the program must be for the benefit of the intern, and the employer cannot derive an immediate advantage from the internship. For example, an internship that primarily involves clerical work, assisting an employer's customers or clients, or other productive work for the employer likely would not pass the test. The DOL guidance advises that an internship is more likely to pass the test where it provides an individual with skills that can be used in multiple employment settings, as opposed to skills specific to the employer's operations, and where it is structured around an academic experience, rather than the employer's actual operations (such as when a college or university exercises oversight and provides educational credit). An unpaid intern cannot substitute for, or do the work of, a regular employee. It is permissible, however, for an intern to shadow a regular employee and learn the job under the employee's supervision, provided that the intern performs no or minimal work of benefit to the employer. In addition, employers should not use an internship as a trial period for a potential employee; in that case, the individual would be a probationary employee.

A DOL opinion letter issued in response to an inquiry about the status of a university externship program illustrates how the test may be applied. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter (April 6, 2006). Students in that program spent one week shadowing an employee at a sponsoring employer. The students received neither compensation nor college credit. Although the students did not generally perform work for the employers, they might perform small office tasks or assist with a project. A stated benefit to the employers was the potential opportunity to screen future interns or employees, although the student externs were not guaranteed future internships or employment.

The DOL applied the six-factor test to the program and concluded it did not create an employment relationship between the extern and the sponsor. The DOL noted that: the training the externs received was a practical application of material taught in a classroom; the sponsoring employers might lose productive work from the employees assigned to the students; the externs did not displace any regular employees; and the externs were clearly told they would not receive compensation or a job at the conclusion of the externship. Although the students might perform small tasks or provide assistance to the employees, the DOL stated that because the students participated for only one week and there was a "virtual absence" of work, and a corresponding burden on the employers to provide shadowed employees, the training primarily benefited the students. The fact that the employers had the opportunity to screen future interns or employees did not compel a different conclusion.

In sum, if an internship meets all six factors of the test, then an employment relationship does not exist and the provisions of the FLSA do not apply. If the test is not met, then the interns qualify as employees and must be paid at least the minimum wage, plus overtime for hours

worked over forty. Improper classification of an employee as an unpaid intern can result in liability for unpaid minimum wages and overtime payments, as well as possible liquidated damages and attorney's fees. It may also result in tax and other liability (including penalties and interest) associated with failure to withhold from payments to the intern and make other required payments, and there may likewise be state and local liability if the employer did not pay into the state unemployment insurance system on behalf of the intern and/or provide workers' compensation (and, in some states, mandatory disability insurance) coverage to the intern.

CONSIDERATIONS FOR NON-PROFIT EMPLOYERS

The DOL guidance specifically stated that the six-part test was applicable to for-profit private sector employers, noting that the FLSA makes a special exception for individuals who volunteer to perform services for religious, charitable, civic or humanitarian purposes to non-profit organizations or for government agencies. According to the DOL, unpaid internships in the public sector and for non-profit charitable organizations generally are permissible.

In order to qualify as an unpaid volunteer for such an organization, an individual generally must perform services freely, without pressure or coercion, and such services must be performed without promise, expectation or receipt of compensation. A limited range of payments are permitted: (i) reimbursement for expenses, such as uniforms, transportation and meals; (ii) reasonable benefits, such as health and pension; and (iii) nominal fees, meaning payments that are not tied to productivity or intended as a substitute for compensation. 29 U.S.C. § 203(e)(4)(A). Regarding the last point, the DOL generally uses a "20 percent rule," under which a fee paid to a volunteer will be considered nominal if it does not exceed 20 percent of the wages that would be paid to a regular employee performing the same tasks. If an internship at a non-profit organization meets the standard for volunteers, then the interns will not be considered employees subject to the FLSA.

Moreover, even bona fide employees at certain non-profits may not be covered by the FLSA. The FLSA covers only employees who are (i) engaged in commerce or in the production of goods for commerce or (ii) employed in an enterprise engaged in commerce or in the production of goods for commerce. *See* 29 U.S.C. § 207(a). The two categories are known as individual and enterprise coverage, respectively, and either is sufficient to establish coverage under the FLSA. In other words, a non-profit organization may be covered by the FLSA under a theory of enterprise coverage, or an individual employee who is involved in interstate commerce may be individually covered by the FLSA even if the organization is not.

Enterprise Coverage

A non-profit may be subject to the FLSA by way of enterprise coverage if it is an enterprise that (i) has employees engaged in commerce or in the production of goods for commerce, or has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and (ii) has an annual gross volume of sales of not less than $500,000. *Locke v. St. Augustine's Episcopal Church*, 690 F. Supp. 2d 77, 84 (E.D.N.Y. 2010) (citing 29 U.S.C. § 203(s)(1)(A)). Charitable contributions donated to a nonprofit are not

included in meeting the $500,000 threshold, unless the organization solicited or used the contributions for the purpose of furthering commercial activities. An organization is an "enterprise" under the FLSA when "the related activities performed (either through unified operation or common control) by any person or persons [are] for a common business purpose...." *Id*. at 85 (citing 29 U.S.C. § 203(r)). Generally, "[a]n organization that performs religious, educational, or charitable activities does not perform these activities for a 'business purpose,' and thus does not constitute an enterprise, unless the activities compete in the marketplace with ordinary commercial enterprises." *Locke*, 690 F. Supp. 2d at 87 (citing *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296-97 (1985) (noting the "considerable weight" given to the business purpose of an entity in determining whether an employer constitutes an enterprise).[2]

Individual Coverage

Even if enterprise coverage does not apply to a non-profit organization, an individual may still fall within the ambit of the FLSA if the individual is personally involved in interstate commerce. The FLSA covers employees engaged in commerce or in the production of goods for commerce, regardless of the status of their employer. *Locke*, 690 F. Supp. at 90 (citing 29 U.S.C. § 207(a)(1)). An employee is eligible for individual coverage under the FLSA by "performing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence)" between states. *Id.* (citing 29 C.F.R. § 779.103 (1970)) (noting that "workers who regularly use the mails, telephone or telegraph for interstate communication" "engage in commerce"). This type of activity must constitute a "substantial part" of the employee's work. *Id.*

For example, in a case where a church custodian purchased supplies from out-of-state vendors several times per year, the court found that this "recurrent and frequent" participation in interstate commerce created individual coverage under the FLSA. *Boekemeier v. Fourth Universalist Society*, 86 F. Supp. 2d 280, 283, 287-88 (S.D.N.Y. 2000). However, in another case, where a church custodian in New York purchased supplies and contacted vendors only within New York, the court distinguished the earlier case and found that the custodian was not covered as an individual under the FLSA. *Locke,* 690 F. Supp. 2d at 90.

It is important to note that even if the FLSA does not cover a non-profit organization, state wage and hour laws may still apply. For example, New York's minimum wage act is specifically applicable to non-profits, with certain exceptions, including for volunteers, as well as for students obtaining vocational experience to fulfill specific curriculum requirements. N.Y. Labor Law §§ 511, 651, 652.

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[2] Certain organizations—such as hospitals, schools, transportation carriers, and public agencies—are expressly included within the scope of FLSA overtime and minimum wage regulations, whether public or private, or operated for profit or not for profit. Similarly, the FLSA covers federal, state, and local government employees. However, a recent ruling by the United States Court of Appeals for the Second Circuit held that a private, not-for-profit organization that acts as an independent contractor providing services to a public agency is not an "enterprise" covered by the FLSA. *Jacobs v. New York Foundling Hosp.*, 577 F.3d 93 (2d Cir. 2009).

CONCLUSION

Employers should carefully review ongoing and contemplated internship programs to analyze their compliance with applicable law. If a for-profit employer plans to engage unpaid interns, the program should be structured so that the interns receive training that benefits them without displacing regular employees. The interns should not perform anything but *de minimus* work for the benefit of the employer. At the outset, the employer should make it clear to the interns that the program is unpaid and will not necessarily lead to a job at the conclusion of the internship. If these terms are not feasible for the employer, then the employer must consider the interns to be employees entitled to minimum wage and overtime protections.

Likewise, non-profit organizations should confirm that potential interns qualify as volunteers. Such individuals must freely perform services for the organization without any promise or expectation of compensation. In addition, non-profits should ensure that no payments are made to such volunteers, with the possible exception of reimbursement for expenses, reasonable benefits or a nominal fee that meets the DOL's "20 percent" test. If the interns do not qualify as volunteers, then the organization should assess whether the interns are subject to the FLSA, through either enterprise or individual coverage, or state wage laws.

In the current enforcement environment, all employers, whether for-profit or not-for-profit, should assume their programs may be subjected to close scrutiny by government agencies and should be vigilant about complying with applicable wage laws.

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For further information regarding these issues, please contact J. Scott Dyer or Julie Levy of the Firm's Labor and Employment Group.

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