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Intern or Employee? Unpaid Internships May End Up Costing Employers

With summer just around the corner, many students will accept internships in private companies throughout the country. Employers planning internship programs should be aware of the legal distinctions between unpaid interns and paid employees.

Department of Labor Guidelines

In interpreting the Fair Labor Standards Act (the FLSA), the U.S. Department of Labor presumes that individuals should be paid for services performed. According to guidelines published by the Department of Labor, if the following factors are met, the internship may be unpaid:

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 this intern;
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.

If all of the factors listed above are met, the Department of Labor will conclude that an employment relationship does not exist under the FLSA. In those circumstances, minimum wage and overtime provisions do not apply to the intern. Different rules apply for governmental agencies and non-profit organizations.

Academic Versus Operational

One important distinction is whether the internship program is structured around a classroom or academic program as opposed to the employer's actual operations. For example, where a college or university exercises oversight over the internship program and provides educational credit to the intern, the internship will more likely be viewed as an extension of the educational experience, which is a legitimate unpaid internship program. On the other end of the spectrum, if the intern is performing tasks normally done by paid employees and is used to fill-in for regular employees out on vacation, then the individual will most likely be considered an employee entitled to compensation.

The Department of Labor is wary of “displacement” — that is, where an unpaid intern is used to displace a regular, paid employee. If the employer would have hired additional employees or required existing staff to work additional hours had the unpaid intern not performed the work, then the intern will be viewed as an employee and is entitled to compensation under the FLSA.

In addition, an unpaid internship should not be used as a substitute for a trial or training period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual is generally considered an employee for purposes of the FLSA.

Increased Litigation

Historically, there has been little litigation or enforcement in this area, so the risk of misclassification has been understated. A number of recent class actions filed against high-profile media and entertainment companies, accusing them of misclassifying unpaid interns in order to reduce production costs, has changed those dynamics. Unpaid internships provide many important benefits for students seeking to explore potential careers. However, employers should be aware that simply labeling an employment relationship as an internship does not necessarily create an exemption from legal obligations to pay compensation for services performed.

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