

Unpaid Internships: A Trap For The Unwary Employer

WORKPLACE: Government views some arrangements as evading labor law compliance.

In an increasingly tight labor market, unpaid internships any time of the year are seen by some as a good way to get a foot in the door for a future employment opportunity. While this may be true, federal and state labor law agencies view many of these arrangements as simply a means for employers to obtain cheap labor by evading labor law compliance.

2010 is reported to be a banner year for wage hour audits of employers who hire interns. What's at stake? Whopping bills for payment of back wages, taxes, workers' compensation premiums and other penalties. Class action suits are also a possibility if a number of interns are used.

So, how does one go about setting up an unpaid internship without running afoul of the law? Surprisingly, there is no state statute or regulation which expressly exempts persons participating in an internship from the state's minimum wage and overtime requirements. Nor does the federal Fair Labor Standards Act (FLSA) contain an express exemption for interns. However, the United States Department of Labor (DOL) has consistently applied its six part test for "trainees" to determine the employment status of unpaid interns. California authorities follow these rules as well.

The starting point is whether the intern will be deemed an "employee" for wage hour law purposes. If so, then the intern must be paid at least the minimum wage and overtime pay, where applicable.

The FLSA defines an "employee" as any individual "employed" by an employer. The term "employ" is then defined to mean "to suffer or permit to work." It's the "permit" part of the definition that puts employers in DOL's sites when they use interns.

The fact that the intern wants to work for free is only of minor significance when evaluating the relationship for wage hour compliance purposes. While a clear mutual understanding to that effect is needed to have a valid internship arrangement, the wage hour laws forbid employees from agreeing to any arrangement that is not in keeping with the law.

Six-part test

DOL has developed the following six-part test to evaluate the bona fides of any internship. California follows suit. Fail any one part and be prepared to write a check. The six criteria are:

- (1) The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school;
- (2) The training is for the benefit of the trainees or students;
- (3) The trainees or students do not displace regular employees, but work under their close observation;
- (4) The employer derives no immediate advan-



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not entitled to wages for the time spent in training.

DOL has published Fact Sheet #71 to help employers figure out whether an internship qualifies for an exemption from federal wage hour laws. The Fact Sheet can be found at <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>

Application of these criteria can be very tricky. In general, the test is designed to evaluate which party gets the primary benefit from the arrangement. According to the authorities, it is supposed to be the intern. The government is looking for the arrangement to mirror the kind of job training one would obtain in a vocational educational setting. The more the internship looks and feels "educational", the more likely the arrangement will pass muster.

Training purposes

Along those lines, the more the arrangement provides the intern 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 the requisite training. On the other hand, if the intern is engaged in the operation of the employer's business (e.g., filing, performing research or clerical or other work normally done by a paid employee), then the mere fact that they also may be receiving some benefit in the form of a new skill or improved work habits is not enough to carry the day with the authorities.

In fact, the entire internship arrangement is supposed to be somewhat of an imposition on the employer representative(s) assigned to train and supervise the intern. Thus, the authorities look for records of actual time spent in supervision of the intern, the tasks assigned to the intern and any documentation to support the notion that there was indeed a real training component.

Authorities also evaluate whether the employer has created the internship simply as a means to obtain cheap labor. They will closely examine the extent to which the intern is doing the work that someone else would ordinarily be paid to do. The authorities will also examine how employer-specific is the training. The more real work the intern does, or the more employer specific the tasks, the harder it will be for the internship to pass legal

tage from the activities of trainees or students, and on occasion the employer's operations may be actually impeded;

(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

muster.

To ferret out the true nature of the position, the authorities will quiz the intern and the company hiring officials for any hint that the internship was intended as a trial period of employment or unpaid training period. They will also examine whether the intern was expressly or impliedly promised a job at the end of the internship and whether the period of internship was open ended or for a fixed duration. The authorities believe that a true internship will tend to be of a fixed and relatively short duration. Also, a job offer at the end makes the internship more like a tryout and is not in keeping with a bona fide educational experience.

Exploitation possible

With so many people out of work, it is understandable that many job seekers and students are anxious to line up an unpaid internship. While the arrangement is seen by the intern as a foot in the door, it is precisely such thinking that concerns the wage hour authorities. There is a tremendous incentive, they feel, for the employer to exploit the volunteer worker. That is why the wage hour laws long ago forbade most arrangements (voluntary or not) where the company obtains the services of an individual without paying at least the legally mandated minimum wage and overtime compensation.

Many employers feel that they have the upper hand when it comes to interns. They believe that a lowly unpaid intern (often a student or someone out of work for a long period) will be reluctant to rock the boat for fear they could lose out on an eventual paying job or be viewed as a troublemaker just as they are getting started in their career. Precisely because of such thinking, federal and state authorities have announced programs of stepped up enforcement to protect unpaid interns.

Also, it is a mistake to think that a plaintiff's lawyer won't make time to interview an unpaid intern. Indeed, an intern could provide a plaintiff's lawyer with a valuable birds eye view into what else the company is doing wrong, and perhaps lay the groundwork for a much larger class action wage hour compliance suit.

The unpaid internship rules are nuanced and more complex than they sound. The laws are purposely designed so that only a few work arrangements are truly exempt. Think of the internship rules as a narrow loophole. If a company wants to take advantage, it pays to have the entire arrangement evaluated by a labor lawyer familiar with how the authorities apply the rules.

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