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Turns Out, There's No Such Thing As "Free Labor" Either: Why Most Employers Should be Paying Interns or Modifying/Abandoning Their Unpaid Internship Programs

In light of the recent economic downturn, it is not surprising that an increasing number of young, inexperienced people are turning to unpaid internships as a gateway into the working world. What is surprising, however, is that this potentially symbiotic relationship may actually be illegal, violating federal and state wage laws. The Department of Labor ("DOL") is cracking down on the illegal use of free labor, which means that employers should proceed with extra caution before creating or continuing an unpaid internship program.

Regulators insist that violations abound, yet enforcement efforts are made difficult by the interns' reluctance to file complaints, due to fear of professional repercussions. Determined to ferret out wage law violators, state and federal governments are now increasing their investigation efforts and issuing fines to employers. In New York State, Patricia Smith, formerly the state's labor commissioner, last year ordered investigations into several firms' internship programs. Her new role as DOL Solicitor of Labor, the department's top law enforcement official, heralds an increase in enforcement activities nationwide.

The Definition of "Employment" and the Narrow "Trainee" Exception

The Fair Labor Standards Act ("FLSA") defines employment very broadly. To "employ" is to "suffer or permit" to work. Generally speaking then, individuals who are permitted to work must be compensated. Moreover, interns cannot waive this federal right, which requires minimum wage and overtime pay to compensate for labor. The DOL has, however, made an exception for "trainees," and internships which meet all six prongs of the trainee test will generally be exempt from federal wage law.

The DOL's Wage and Hour Division ("WHD") recently published these six factors in a Fact Sheet ("Fact Sheet #71"), along with additional guidance to "for profit" employers with internship programs. The fact sheet cautions that "[i]nternships in the 'for profit' private sector will most often be viewed as employment" unless the test laid

forth by the DOL is met. Prior to Fact Sheet #71's publication, most courts held employers need not necessarily meet **all six** of the particular criteria. However, courts are now likely to require that all six prongs of the test be satisfied to avoid liability. While the facts and circumstances of each individual program should still be considered, the following criteria must apply to the position in order for it to be subject to the DOL's exclusion:

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;
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.

Many critics feel that the criteria—developed by the DOL over 60 years ago—are outdated and fail to account for the realities of the modern work force, particularly in the white collar arena.

Are the Only Compliant, Unpaid Internships Useless or Strictly Educational?

One of the most difficult challenges to employers will undoubtedly be ensuring that they derive “**no immediate advantage**” from the intern's activities. It may prove difficult to provide interns with an engaging work experience that renders absolutely no benefit to the employer. If the intern routinely engages in the employer's business operations or performs what the DOL refers to as “productive work” (e.g. clerical or assistant work), then the internship benefits the employer and is thus subject to FLSA coverage, regardless of whether the intern is also benefiting in any way from the experience. The DOL advises that, in general, the more an internship program is structured around an **academic** experience, whereby the intern learns skills applicable to multiple employment settings, the more likely the internship is to be viewed as *bona fide* educational experience and not employment.

Although Fact Sheet #71 explicitly refers to “for profit” employers, the DOL's guidance includes a footnote to the not-for-profit sector, which states in part, “[u]npaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.” However, such employers should note that there is **no blanket non-profit exclusion** in the law itself. Generally speaking, the FLSA covers individuals who are engaged in interstate commerce by virtue of the work they perform (e.g. regularly handling interstate mail and phone calls), irrespective of the organization type. Given the

tension between this footnote advisement and the law, the DOL's guidance to non-profits, while helpful, is far from conclusive.

Designing a Defensible Internship Program

Given the legal hurdles and enforcement activities surrounding unpaid internships, employers wanting to create or maintain such programs should consult with counsel and formalize the internship program to the greatest extent possible. For example, the internship relationship should be outlined in writing, signed by the intern and a representative for the employer. The writing should, at a minimum, contain the terms of the relationship, including explanation of: (a) the unpaid nature of the program, (b) any contemplated scholarly credit or a description of the educational intent of the program, (c) the fixed duration of the internship, and (d) language that the internship **is not** a trial period for prospective employment. Additionally, employers should closely monitor the intern throughout the course of the relationship, to ensure that the benefit of the program lies solely with the intern—unexpected benefit to the employer could result in a violation.

Moreover, organizations should be mindful that state wage and hour laws often vary from their federal counterpart. For example, in a handful of states, including California, unpaid interns **must receive** college credit. However, college credit alone does not exempt these students from federal and state wage laws. To ensure jurisdictional compliance, employers should consult with legal counsel.

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