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Avoiding Liability For Unpaid Interns

Law360, New York (June 02, 2010) -- Once the exclusive domain of students, several recent articles suggest that individuals decades removed from the classroom are now vying for unpaid internships to enhance their competitive standing when searching for paid positions at the same time that the Department of Labor is increasing its scrutiny of internships.[1]

While the recent press on internships has been helpful and informative, most of these articles have not provided practical advice for avoiding liability. So, what can an employer offering internships do to avoid potential liability?

In order to avoid misclassifying interns (which would trigger the Fair Labor Standards Act's minimum wage and overtime requirements), it is the Department of Labor's position that the internship must satisfy the criteria used to assess job training programs (in which case the FLSA's provisions do not apply). The Supreme Court established these criteria in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) more than a half-century ago in the context of a training program for railroad workers.

Although the workplace has changed dramatically since that time, the Department of Labor indicated in two recent publications, Training and Employment Guidance Letter Number 12-09 (published on January 29, 2010) and Wage and Hour Division Fact Sheet Number 71 (published on April 21, 2010), that it continues to rely upon these criteria.

The six criteria are:

- The internship, even though it includes actual operation of the employer's facilities, is similar to what would be given in a vocational school or academic educational instruction;
- The internship is for the interns' benefit;
- The interns do not displace regular employees, but work under their close observation;

- The employer derives no immediate advantage from the interns, and on occasion the employer's operations may actually be impeded;
- The interns are not necessarily entitled to jobs at the conclusion of the internship; and
- The employer and the interns understand that the interns are not entitled to wages.[2]

While the Department of Labor expects employers to satisfy all six criteria, some courts have expressly rejected this position — finding that a relationship that fails as to one or more of the six criteria may still properly be classified as an internship based on the totality of the circumstances. See, e.g., *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026-27 (10th Cir. 1993); *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 n.2 (4th Cir. 1989).

Applying a totality assessment, the U.S. District Court for the District of Maryland recently determined that firefighters/paramedics were not entitled to wages while serving as interns in hospitals and ambulances. The interns did not perform duties that displaced existing personnel, and the benefit to the interns outweighed the de minimis benefit to the employer. Consequently, the court held that these individuals were not employees entitled to wages. See *Carter v. Baltimore City*, No. WMN-07-CV-3117, 2010 WL 761210, at *3-7 (D. Md. Mar. 2, 2010); see also *Reich*, 992 F.2d at 1027-29.

In contrast, the U.S. District Court for the Southern District of New York found that formerly homeless and jobless workers were employees entitled to wages despite participating in an internship that provided counseling, orientation materials, seminars, and progress reports. The workers displaced regular employees, logged significant overtime hours, maintained records identical to employees, worked without meaningful supervision and sometimes supervised other workers, allowed the employer to underbid competitors, remained interns beyond the time required for training, and believed that the "pay" and "stipends for reimbursement of expenses" were wages. See *Archie v. Grand Cent. P'ship*, 997 F. Supp. 504, 531-35 (S.D.N.Y. 1998).

Given the multiple criteria used to assess internships, no "magic bullet" exists to ensure interns will not be deemed employees entitled to wages. And applying these criteria — which were developed in 1947 for blue-collar workers — to white-collar internships is particularly challenging. Nevertheless, observing the following best practices will help ensure compliance.

An internship should be educational.

An internship should have a considerable educational component to negate an employment relationship.

An internship should be structured like an academic or vocational course.

An internship should benefit interns by allowing them to observe the practical application of classroom instruction. In this regard, employers should consider distributing a syllabus to underscore an internship's educational component. An internship's duration should also be fixed and commensurate with the training provided.

If the intern is a student, the schedule should correlate with the school's calendar. Indeed, employers may consider restricting internships to students who receive credit from their schools — which can then be used to demonstrate the educational benefit to the interns.

An intern's duties and supervision should reinforce the educational nature of an internship.

An internship should impart general skills that can be useful to many employers rather than skills particularized to the employer's operation. Production work, such as clerical work or interactions with customers, should be limited.

An intern's level of supervision should exceed the supervision provided to an employee. To ensure close supervision, employers may consider limiting interns' remote access to computer systems or restricting interns' physical access to the workplace to normal working hours. Interns should also not supervise other interns.

Interns should be given distinct duties.

As *Archie v. Grand Central Partnership* reinforces, interns should be given distinct duties to show that they are working to further their own interests rather than the employer's interests.

Interns cannot replace employees.

Employers should not use interns to replace employees — including overtime work by employees. Instead, interns should be relegated to a job-shadowing role with minimal work that is supervised closely by employees.

Postings for internship positions should be separated from salaried positions.

In order to avoid the impression that an internship is a working interview, employers should

post internship opportunities on school or internship-only Web sites. Current and former employees should not serve as interns.

The arrangement should be clearly defined — both in writing and in practice.

The parties' expectations regarding an internship should be clearly defined and documented in writing at the outset to prevent misunderstandings. These expectations should also be reinforced through the employer's practices.

Employers should not create an impression that an internship will lead to a job.

Employers should explicitly inform interns that they are not entitled to jobs at the conclusion of the internship or to wages while interning. Written acknowledgments with appropriate disclaimers should also be used.

Practices should reflect the parties' understanding.

Employers should use a consistent title for interns. Differences in titles among departments — such as "apprentice," "trainee," and "intern" — can cast doubt that an internship was intended.

Terminology suggesting an employment relationship should not be used. Employers should never "hire" interns or characterize an internship as a "trial period" or "working interview."

At the conclusion of an internship, interns should not be invited to attend an "exit interview." Because interns cannot be entitled to jobs, employers should be cautious when adding interns to the payroll. The Department of Labor views the hiring of interns as evidence that an employment relationship existed during the internship.

Handbooks (if used) should be unique to interns.

Interns should not be given the same handbook provided to employees, which will undoubtedly contain policies — such as a vacation policy — suggesting an employment relationship. While an intern handbook should be distinct from an employee handbook, interns should be apprised of policies concerning trade secrets, technology, harassment, and discrimination.

Payments (if any) should be distinguished from wages.

Stipends or per-diem reimbursements for expenses may look like a wage. If interns are

reimbursed for expenses, the employer should identify the exact nature of the payment and the types of documentation required.

The Department of Labor has cautioned that the permissible scope of internships is quite narrow and depends on a fact-intensive inquiry. And while there is no "magic bullet" to ensure compliance, following these best practices will help limit potential exposure to lawsuits and enforcement actions.

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[1] See, e.g., Steven Greenhouse, Growth of Unpaid Internships May Be Illegal, Officials Say, N.Y. Times, Apr. 3, 2010, at B1.

[2] In an opinion letter dated April 7, 2010, the California Division of Labor Standards Enforcement stated that California will also follow the six-factor test used by the Department of Labor, as opposed to a previous test used by California that included 11 factors.

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