A Timely Analysis of Legal Developments

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Internship Programs Present Potential Wage and Hour Risks for Employers

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As summer approaches, many employers are making plans to welcome an incoming class of summer interns. Historically, internship programs have offered employers a valuable opportunity to meet and evaluate potential new hires. For their part, interns often receive valuable experience and the opportunity to make connections that may lead to future employment. In short, internships are generally seen as a "win-win" situation.

In recent months, however, a number of interns have sued their former employers, claiming that they should have been classified as employees for purposes of state and federal wage and hour laws. The plaintiffs in these cases – who were not paid while serving as interns – are seeking to recover wages for all hours worked, as well as any overtime due. These lawsuits, all of which were brought as putative class actions, should serve to remind all employers about the potential risks associated with internship programs.

Putative Class Actions Target Media Companies

All three lawsuits were filed against media companies in New York. In each case, the plaintiffs claimed that interns were a crucial component of the workforce because they performed entry-level tasks for free. Those tasks included making coffee and taking lunch orders, managing corporate expense reports, coordinating and making deliveries, conducting research, and performing secretarial work. According to the complaints, if the companies did not use interns, they would have had to hire employees to perform these entry-level tasks. Thus, according to the plaintiffs, the use of interns served to keep the companies' costs down.

In each case, the plaintiffs claim that they, and the putative class of current and former interns they seek to represent, should have been classified as employees, not interns. Accordingly, they are seeking payment for all the hours they claim to have worked, including overtime pay.

The Test for Intern Status Under the FLSA

Interns are not employees and, therefore, are not subject to the minimum wage and overtime requirements of the federal Fair Labor Standards Act (FLSA). However, states may have adopted different tests for determining whether an individual is classified properly as an intern, as opposed to an employee. Individuals cannot simply agree to be interns; they must meet the applicable test.

Under the FLSA, individuals may not waive their statutory right to receive the minimum wage and overtime, even if they genuinely want to work voluntarily as an intern. Instead, according to the federal Department of Labor (DOL), the agency that interprets and enforces the FLSA, an individual is an intern, as opposed to an employee, only if:

1. the internship is similar to training that 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 internship derives no immediate advantage from the activities of the intern, and on occasion the employer's 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.

The DOL historically has taken the position that all six of these criteria must be satisfied for an individual to be considered an intern. Some courts, however, have criticized the DOL's six-factor test and suggested that, although all six criteria should be considered, an individual may still qualify as an intern under the FLSA even if not all of the criteria have been satisfied.

Regardless of whether all six of the criteria must be satisfied, the key to any finding of internship status is that the internship experience must predominantly benefit the intern, not the employer. In that light, the DOL has stated that, in general, "the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience," and, therefore, the more likely it is that the individual will properly be considered an intern, as opposed to an employee.

Confusion in the Non-Profit Sector

It is not entirely clear whether the six-factor test discussed above applies to internships in the non-profit sector.

When the DOL issued a "Fact Sheet" in 2010 discussing the six-factor test, it took pains to note that the fact sheet was intended to provide general guidance for the proper evaluation of individuals who provide services to "for-profit" private sector employers. In a footnote, the DOL observed that its Wage and Hour Division "recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations as volunteers." The DOL went on to say that "[u]npaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible."

The DOL, however, did not expressly articulate an alternative test for non-profit employers. Moreover, some courts have suggested, without actually holding, that a more lenient test should be applied to internships in the non-profit sector. As a result, there has been some confusion among non-profit employers as to the status of their interns.

The DOL currently is reviewing the need for additional guidance on the topic of internships in the non-profit sector. In the meantime, non-profit entities should continue to evaluate their internship programs using the DOL's six-factor test.

What Employers Should Do Now

In light of the recent lawsuits discussed above, employers in both the for-profit and non-profit sectors should carefully evaluate whether their existing internship programs comply with FLSA and state law standards. The DOL's six-factor test can be difficult to satisfy, particularly where the intern provides some useful service to the employer that otherwise would have been provided by an employee. If an individual fails to meet the applicable tests for intern status, then the employer needs to treat the intern as an employee for purposes of state and federal wage and hour laws. This means that the intern will need to be paid at least the minimum wage for all hours worked, plus any overtime due. In addition, employers will need to make sure that they keep proper records of the hours worked by interns/employees, as well as comply with any meal

and rest break requirements imposed by state law. Finally, employers should train their managers who deal with interns to make sure that they are ensuring compliance with these requirements.

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