

It's That Time of Year Again...

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New Hampshire Employment Law Letter

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With summer nearly here, we thought it was time to look again at the hiring of interns and the obligations of private employers under the Fair Labor Standards Act when they hire interns. We did an article on New Hampshire's requirements regarding summer interns back in August of 2009 (Vol. 14 No. 9) but, in April, the U.S. Department of Labor (USDOL) issued Fact Sheet #71 regarding "Internship Programs Under the Fair Labor Standards Act" and we want to review that guidance with you as well.

Background

Initially, the USDOL reminds employers how broad the definition of "employ" is under the Fair Labor Standards Act (FLSA). As you will all recall, the FLSA defines "to employ" as "to suffer or permit to work;" unless some particular exemption applies, anyone who is employed must be paid at least the minimum wage and overtime. The USDOL notes that internships in the "for-profit" private sector will most often be viewed as employment unless the tests summarized in the Fact Sheet are met.

Can we have an unpaid internship?

The USDOL recognizes that there are some circumstances when individuals who participate in private-sector internships or training programs at for-profit companies may do so without being compensated, noting that the U.S. Supreme Court has concluded that the FLSA's definition of "to employ" cannot be interpreted to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. Of course, determining whether someone will qualify as an unpaid intern depends on the "facts and circumstances of each such program" and the exclusion is intended to be narrow.

So, to qualify as an unpaid internship, all of the following factors must be met:

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.

Is it all a judgment call?

To some extent, yes; however, there are certain factors that the USDOL recognizes, if they are found in an internship, are more likely to satisfy the requirements outlined above. The USDOL notes 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 it is that the internship will be viewed as an extension of the individual's educational experience. The agency notes that this often happens where a college or university oversees the internship program and provides academic credit.

The more an internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to the one operation, the more likely the intern will be viewed as receiving training. In this situation, the intern is less likely to be considered to be performing the routine work of the business on a regular and recurring basis, and the business is not dependent on the work of the intern. Conversely, if the interns are engaged in the operations of the employer or are performing productive work (such as, filing, performing other clerical work, or assisting customers), then it is the USDOL's view that the fact that the intern may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's requirements regarding the payment of wages because the organization benefits from the intern's work.

If an employer uses interns as substitutes for regular workers or to augment its staffing levels during specific time periods, the interns will be viewed as employed. If an organization would have hired additional employees or required existing staff to work more hours had the interns not performed their work, the interns will be viewed as employees entitled to compensation. However, if the company is providing job-shadowing opportunities where interns learn under close supervision – but perform no or minimal work – the arrangement is more likely to be viewed as a bona fide educational experience or internship.

The USDOL also expects that internships will be of limited duration, established prior to the outset of the internship. It is also expected that unpaid internships generally will not be used as a trial period for individuals seeking employment at the end of the internship. If an individual is placed with the company at the end of the internship, the individual would generally be considered an employee.

Bottom Line

Under most circumstances, the decision to start an unpaid internship requires careful consideration of both state and federal law. More information is available on the state requirements in our earlier article and in the "School to Work" section of the NHDOL website: www.labor.state.nh.us. Fact Sheet #71 outlining the USDOL's position on internships is available on line at www.dol.gov/whd/regs/compliance/whdfs71.htm. The USDOL's Fact Sheet also provides contacts for additional information on line or through their helpline (1-866-4USWAGE or 1-866-487-9243).

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