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Are Businesses Breaking the Law by Making their Interns Work?

By Jerilyn Jacobs, Esq.

With the new school year upon us, many employers are preparing to welcome a new batch of fall interns, and for good reason. Student interns are traditionally eager, excited to work, and -- most importantly -- free. But a recent publication by the Department of Labor (DOL) indicates that even this area of the workforce is not immune from the increased employee classification initiatives on which Gonzalez Saggio & Harlan has recently reported, and employers may soon find that hiring unpaid student interns may be far costlier than anticipated.

This past April, the Wage and Hour Division of the Department of Labor posted on its website Fact Sheet #71, titled "Internship Programs Under The Fair Labor Standards Act," to provide guidelines as to whether interns at for-profit employers are, in fact, employees and fall under protection of the Fair Labor Standards Act (FLSA). If interns are deemed employees, they would qualify for minimum wage and, if applicable, overtime. They also could qualify for worker's compensation if injured on the job.

Fact Sheet #71 lays out a six-part test that must be satisfied in order for an unpaid internship to pass muster:

- (1) The internship is similar to the training that would be given in a vocational or other educational environment;
- (2) The internship is for the benefit of the intern;

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(3) The intern works under close staff supervision and does not displace regular employees;

(4) The employer derives no immediate advantage from and may in fact be impeded by the intern;

(5) The intern is not necessarily entitled to a job after the internship; and

(6) The employer and the intern understand that the intern is not entitled to wages.

Each and every one of the six criteria must be met, as failure to meet even one of the above criteria would result in the intern being classified as an employee. And while the DOL stated that it would be "more likely" to view internships arranged through colleges as "an extension of the individual's educational experience," the fact that a student receives college credit is not a guarantee that the intern will not be deemed an employee.

Further, it is not enough to divide the intern's time between tasks designed to provide the intern training and tasks that benefit the employer. As Fact Sheet #71 states:

[I]f the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.

Given the DOL's recent issuing of Fact Sheet #71, employers should expect increased scrutiny. State regulators - most notably in California, Oregon and New York - also have taken an interest in private employer's use of interns.

Having an intern deemed an employee may also have ramifications under anti-discrimination laws. Most obviously, interns who are determined to be employees can seek personal recovery for discrimination or harassment. Further, smaller employers that fall just below the minimum threshold for being subject to anti-discrimination laws (for example, 15 under Title VII and 20 under the Age Discrimination in Employment Act [ADEA]) may find themselves in the position of having *all* of its employees being able to avail themselves of anti-discrimination statutes. For example, the employer with only 19 employees who had to lay off a 58-year-old employee earlier this year due to the economy and then brought on two unpaid interns for 20 weeks or longer may find itself on the difficult end of an age discrimination charge by the displaced employee.

Overall, what does Fact Sheet #71 and the DOL's recent interest in unpaid internships mean to employers thinking about using interns? Probably the most important lesson to be taken away is that the temptation to have an intern open or deliver the mail, help with the filing, answer the telephones or run menial errands should

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