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Free Help Comes With A Price

Companies must be vigilant about the laws of hiring summer interns

By MARY GAMBARDELLA

Student internships have been used by employers for many years, but these arrangements may now be scrutinized by the U.S. Department of Labor and other federal and state agencies due to perceived abuses of various employment laws.

As a result, it behooves employers who engage interns, paid and unpaid, to review the rules applicable to these arrangements and ensure compliance with applicable wage and hour laws.

Under the Fair Labor Standards Act (FLSA), and comparable state wage and hour laws, non-exempt employees cannot work without pay, but must be paid at least the applicable minimum wageOne exception to this rule is the engagement of the student intern/trainee. In order to be deemed a true student intern/trainee, the individual must be working for his or her "own advantage," and all six elements of the following test must be satisfied. These standards apply to internships in for-profit, private sector businesses.

1. The training received is similar to what would be given in a vocational school or academic educational instruction.
2. The training is for the benefit of the student/trainee.
3. The student/trainee does not displace a regular employee or employees but works under an employee's or employees' close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the student/trainee, and on occasion, the employer's operations may actually be impeded.
5. The student/trainee is not necessarily entitled to a job at the conclusion of the internship.
6. The employer and the student/trainee understand that the student/trainee is not entitled to wages for the duration of the internship.

The courts that have addressed the student/trainee arrangement appear divided over whether all six elements must be met, but there appears to be a consensus that the totality of the circumstances of the student/trainee arrangement must convey that it is not an employment relationship.

The enhanced scrutiny of these arrangements is borne of the perception that there is rampant abuse of the status; i.e., that employers are routinely categorizing individuals as interns/trainees when they are, in fact, performing work for the employer's benefit without pay.

At the same time, students face the prospect of diminishing internship opportunities if monetary compensation is required. In particular, law student interns worry about losing the ability to tout hands-on experience in law firms, because the law firm benefits from the work at least to the same extent as the student.

These are the most noteworthy consequences of relationships with student/trainees: Students are being required to perform services for the primary benefit of the employer without pay; regular employees would be displaced in favor of the unpaid intern, or not hired; students remain unprotected by wage and hour laws, discrimination laws, and other laws governing the employment relationship; and students are not eligible for regular employee benefits, including workers' compensation coverage. Consequently, the call for investigation and possible reform of the current guidelines is underway.


Mary Gambardella

Cost-Benefit Analysis

In policy memorandum published earlier this month, the Economic Policy Institute (EPI) suggests a quantitative test be applied to the second and fourth element: Is the experience primarily for the benefit of the intern, and does the employer directly benefit from the internship?

Specifically, it is recommended that the new test compare the per-hour cost to the employer (through supervision and training) relative to the per-hour benefit to the employer (through an intern's production).

As the memorandum notes, "If the cost exceeds the benefit, then the student would

Mary Gambardella is a litigation Partner in Wiggin and Dana's Labor & Employment practice in the Stamford office. Her e-mail address is mgambardella@wiggin.com.

qualify as an intern and FLSA wage protections would not apply. If the benefit exceeds the cost, then the student is simply replacing work that the employer would have already paid a regular worker to perform, and the student should be compensated as an 'employee.'" If an educational institution "formally endorses an internship program with an employer," an exception could be established.

Not surprisingly, more aggressive monitoring and enforcement of applicable rules and regulations by the Wage and Hour Division of the Department of Labor are also recommended, along with participating secondary educational institutions apprising students of their rights.

With the media spotlight on these perceived abuses, as well as the above-referenced EPI's policy memorandum on the subject, employers would be well advised to examine their current arrangements against the backdrop of the six-point analysis.

If any doubt persists, employers might also be well advised to determine whether a minimum wage should be paid as a precautionary measure, so as to avoid the risks, such as back pay and fines, associated with the potential consequences of misclassification. ■