AVOIDING PITFALLS WITH INTERNSHIPS: DOL EXPLAINS WHEN INTERNS MUST BE COMPENSATED

In the current job market, more and more employers are receiving requests from applicants for unpaid internships. These offers can be tempting. However, the adage "look before you leap" is especially applicable in this situation, and employers should be cautious before entering an internship relationship.

Without careful scrutiny and advance planning, the employer's decision to take on an unpaid "intern" can have costly legal consequences. Based on the six-part test set out in a Fact Sheet issued by the U.S. Department of Labor (DOL) earlier this year, unless a number of specific criteria are met, the "intern" label may be disregarded and the DOL may treat the individual as an employee.

The Six-Part Test

At the outset, the DOL notes that interns in private sector "for-profit" positions will "most often" be considered employees. Although each determination is fact-specific, the DOL outlines six criteria that must be met in order to prevent a "for-profit" private sector intern from being considered an employee subject to, among other things, the compensation requirements of the Fair Labor Standards Act (FLSA). These six criteria are as follows:

1. Although the internship takes place on the employer's premises, it is similar to training the intern would receive in an educational setting (*e.g.*, a workshop or classroom). According to the DOL, an internship is more likely to comply with this requirement to the extent that it is structured around an academic experience, such as a for-credit class with school oversight.

2. The internship is for the benefit of the intern (as opposed to the employer). The reasoning behind this requirement is that an individual who performs work only in his or her self-interest is not an employee of someone who is merely providing instruction. The requirement is more likely to be met when an individual learns general skills that can be applied across multiple settings. Conversely, training is less likely to be considered for the individual's benefit where he or she receives instruction that is specific to a particular employer (such as a proprietary internal process that is not used elsewhere in the industry). In addition, to the extent that the employer is viewed as dependent upon the work of the individual, or the individual is deemed to be engaged in "productive work" for the employer, the relationship is more likely to be considered that of an employer and employee.

3. The intern does not fill a spot occupied by an ordinary employee and is supervised closely by existing employees. If an employer would have either (1) hired additional employees, or (2) required current employees to work additional hours "but for" the services performed by the individual, then the DOL is more likely to disregard the unpaid "intern" label and find that an actual employment relationship exists. The bottom line is that if an employer treats an unpaid intern like an employee, the DOL will likely do so as well. The DOL cites the example of a "job shadowing" opportunity as a situation where actual employees would not be displaced.

4. The employer receives no immediate advantage from the internship. As the DOL indicated in its recent publication, *any* benefit received by the employer could jeopardize an otherwise valid intern relationship. For example, while an individual otherwise engaged in a valid unpaid internship may realize some educational benefit from assisting customers or performing filing work, the fact that the employer also derives benefits from the work may require that the individual be compensated as a regular employee. In contrast, the DOL notes that in a true intern relationship, sometimes the employer's business may actually be impeded by the presence of the intern (such as the "job shadowing" arrangement mentioned above).

5. At the end of the internship, a job will not necessarily be provided to the intern. In this regard, employers should take care not to use unpaid internships to evaluate prospective employees for longer-term positions.

6. Both the employer and the intern understand that the intern is not entitled to receive wages for the time spent in the internship. As will be discussed in more detail below, employers may wish to consider confirming this understanding in writing.

Why Is This Important To Employers?

Employers who misclassify workers as unpaid "interns" may encounter a number of serious consequences. The FLSA requires that covered individuals who are employed (meaning that they are "suffered or permitted" to work) must be compensated for their work. As noted by the DOL, the exclusions from this broad definition are "quite narrow." Consequently, employers may be liable for compensating individuals misclassified as "interns" for their hours worked (including any overtime), along with penalties and, potentially, attorneys fees.

In addition to liability under the FLSA, the misclassification of employees as unpaid "interns" may carry additional legal implications. Among other things, employers could be subject to additional tax, unemployment and workers' compensation liability.

What Can Employers Do?

Employers should examine any existing or potential relationships deemed to be "internships" and apply the above six-part test to each of them. If an employer has an intern that it believes meets each of the six criteria set forth above, or if it is contemplating bringing an individual into such a role, then the employer should consider setting out the details of the relationship in writing. Among other things, this language should reflect the understanding that the intern is not entitled to receive wages for time spent in the internship. Moreover, the duration of the internship should be for a fixed period of time, which should be established on or before the internship begins.

If, after reviewing the six-part test above, an employer believes that an individual may have been misclassified as an intern, the employer should consider taking steps to voluntarily correct the misclassification.

The expense of misclassification can outweigh the potential savings realized by an unpaid internship. To borrow another old adage, this is not a situation in which employers are well-served to be "penny wise and pound foolish."

EMPLOYMENT LAW

E-VERIFY REDESIGNED

On June 13, 2010, the Department of Homeland Security unveiled its latest redesign of the E-Verify website with the goal of improving its usability, security, accuracy and efficiency. The website can be found at www.uscis.gov by selecting the "E-Verify" tab. For those already enrolled in E-Verify at the time of the redesign implementation, all pending queries will be handled under the new system. The redesigned website includes two videos on how to create a case and how to resolve a tentative nonconfirmation result in a query. Also, the website includes new features including a three day rule screen whereby employers will need to offer explanations for "late" E-Verify queries, as well as a work authorization document expiration tab whereby employers will be notified when certain I-9 documents are expiring within a 90-day period.

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