Monday, June 22, 2015

With the arrival of summer, many companies are hiring college and high school students to work as interns during summer break. Often, employers do not pay interns at all, or only pay them a stipend or other amount which is lower than the minimum wage. From an employer’s perspective, it may make good business sense not to pay the intern since they usually are not providing the same experience, skill, and expertise which regular employees provide. In addition, usually the practical experience, relationship building, and resume-padding are more valuable to the intern than any compensation.

However, the failure to pay interns the requisite minimum wage and overtime under the Fair Labor Standards Act (“FLSA”) has been a hot issue in recent years. There have been several high-profile cases in which large companies have been found to have violated the FLSA by not paying interns properly under this law. Under the FLSA, most interns are actually considered employees subject to the FLSA’s minimum wage and overtime requirements. If, of course, an intern is not an employee within the meaning of the FLSA, then the minimum wage and overtime requirements of federal law do not apply.

The Department of Labor uses a six-part test to determine whether an intern is considered an employee or not, and this determination is very fact-specific. Each of the following factors must be established for the intern to be exempt from the requirements of the FLSA: (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 instead works under close supervision of existing staff; (4) the company which 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 automatically 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.

Most internship programs do not meet each of the above criteria. That is why, given the DOL’s strict enforcement of these guidelines, many interns are actually considered employees for purposes of the FLSA, contrary to what employers expect.

The DOL offers some practical advice for structuring an internship program so that interns are not employees subject to the minimum wage and overtime requirements of the FLSA. Not surprisingly, these suggestions are consistent with the requirements of their six-factor test. For instance, the DOL recommends that businesses structure their intern program so it resembles a classroom or academic experience, rather than the actual operation of the company. According to the DOL, this can be accomplished by working with a college that oversees the program and provides course credit to the interns. The program should give interns an opportunity to develop skills that can be used at other places of employment, too.
Also, do not use interns as replacements for regular employees. In fact, the unpaid intern should perform little or no productive work. In this regard, employers should know that the DOL views filing, performing other clerical work, or assisting customers as the type of productive work that would create an employment relationship. With this in mind, structure the program so that the intern – rather than the company – benefits most from the relationship.

Additionally, the company should exercise significant supervision over the intern to avoid the applicability of the FLSA. In a perfect scenario, the intern would shadow a regular employee and would not perform substantial productive work. While serving in this role, the intern should sign an acknowledgement that he or she understands that no compensation will be paid to him or her for their service.

Although it can be tempting, employers should not use the internship as an extended interview or trial period for future employment. The intern should understand that there is no expectation that he or she will be hired on a permanent basis following the internship. That, too, should be communicated in writing to the intern. Making the internship for a fixed period is something which helps this cause.

Given the strict requirements relating to the use of unpaid interns and given the recent flurry of lawsuits regarding this issue, the best approach for most private employers who have interns is to treat them as employees and pay them minimum wage and overtime. If a private employer wants to use unpaid interns, it must pay careful attention to designing an internship program that meets the requirements set forth above. Finally, if you insist on having an intern program, don’t forget to check to make certain that the program complies with state and local wage-and-hour requirements, too. Those requirements – of course – may be different than those which are created by the terms of the FLSA.

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