

MORE NEWS



Louis DiLorenzo

Unpaid Internships — The Hidden Dangers

By: Louis P. DiLorenzo

It is that time of year when employers are approached with requests from college students for unpaid internships. The benefits of the symbiotic relationship are obvious. The internship provides the student with an opportunity

for real life experience, resume enhancement and perhaps a step towards a paying position with the employer after graduation. The employer receives the chance to evaluate a new applicant, at no cost. What is not so obvious are the legal risks.

One area of risk is the Fair Labor Standards Act ("FLSA") which requires non-exempt employees to be paid the minimum wage for all hours worked. Non-exempt employees must also receive 1.5 times their regular rate of pay for all hours in excess of 40 in a workweek.

The \$64,000 question, however, is whether the unpaid intern is an "employee" within the meaning of this and other federal and state statutes. The Department of Labor has adopted six criteria for evaluating this issue. They are as follows:

1. The internship should be similar to the training given in a vocational school;
2. The training must be primarily for the benefit of the intern, not the employer;
3. The intern must not displace any regular employees, but must work under close supervision;
4. There should be no immediate advantage to the employer and, in fact, operations may be impeded by the training;
5. The intern must not be entitled to a job at the completion of the internship; and
6. The intern and the employer must understand that the intern shall receive no pay for the training.

In one case, a company requested an opinion from the Labor Department as to whether unpaid interns who received college credit to work 7 to 10 hours per week as field marketers were employees. There was a coordinator who advised the students and communicated regularly on their progress. There was no obligation to hire them. The Labor Department found that four of the six criteria were established: (i) training similar to vocational school; (ii) no expectation of compensation; (iii) training primarily for the benefit of the intern; and (iv) no obligation of hiring.

On the two remaining questions, displacing regular employees and whether the company derived an immediate benefit, the Labor Department indicated the record was not clear. This opinion letter indicates employers should not assume the Labor Department will not carefully scrutinize these relationships.

If a company is using unpaid interns, it should make sure:

1. It has an agreement or letter making it clear there is no pay and no guaranteed job;
2. Adopt a policy that sets up strict supervision and assigns a mentor;
3. Ensure the primary benefit of the internship is for the student, not the employer — minimize assigning the same duties given to regular employees, do not use interns to displace any employees, and, if possible, require college credit; and
4. Arrange for a structured program of internal and, if possible, external instruction of the type of work done by the employer.

Remember, a determination that an unpaid intern is, in fact, an employee can have impact beyond minimum wage and overtime. The discrimination laws, Worker's Compensation, state and federal taxes, benefits and unemployment insurance coverage all pose potential consequences in the event of a misguided classification.

Be careful out there!

Mr. DiLorenzo is a senior partner at Bond, Schoeneck & King, PLLC, and Co-Chair of its Labor and Employment Law Department. He divides his time between the firm's Syracuse and New York City offices.