



Legal Issues: Internships

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Employers must be wary of how they classify interns, how they structure an internship, and what benefits they will provide to interns.

Based upon recent court decisions and lawsuits, new laws, and the heightened scrutiny of internships, employers should review several areas when determining how and when interns will be used. Since colleges and universities are often where students find out about internships, career services also should be aware of these issues.

Compensation

The biggest issue continues to be the payment, or nonpayment, of interns. As many employers are aware, in May 2010, the U.S. Department of Labor (DOL) issued a six part test to determine if an employer is required to provide payment for an internship. Under this test, an employer is not required to pay an intern if these criteria are met:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in the educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees;
- The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages.

Since that test was enacted, a flood of lawsuits have been filed against employers, and websites have been established solely to recruit interns to join such lawsuits. In October 2014, approximately 9,000 unpaid interns were part of a class action lawsuit with NBCUniversal that was settled for \$6.4 million dollars. The interns in that matter claimed that NBCUniversal failed to provide them payment of minimum wage for performing actual “employee” work. In addition to the NBCUniversal claim, International Creative Management, CBS, and Fox Searchlight have also been subject to recent class action lawsuits filed by individuals who claim that they were wrongly classified by employers.

Employers may be subject to liability through more than just lawsuits. The DOL has begun to conduct its own investigations into allegations that employers have misclassified interns. These investigations have focused on smaller claims (in some cases \$700 in back pay), but any violation also subjects an employer to liquidated damages and additional penalties.

Employers, therefore, must be mindful when classifying an intern as “unpaid.” An employer must focus on the productive work performed by the intern. If the productive work outweighs the training and supervision burden imposed on the employer, an employee/employer relationship may be present, and an employer may be subject to liability under the Fair Labor Standards Act (FLSA).

Employers have also attempted to rely upon the fact that an unpaid intern receives college credit to support its position that regardless of the duties performed, the intern is technically “compensated.” Recent case law, however, has essentially blown that argument out of the water. Courts have recently stated that receiving college

credit in and of itself does not establish an unpaid internship and is of “little importance” in determining if interns must be paid. The true test is whether the internship is structured to benefit the intern and not the employer. As such, an employer must focus on the work performed by the intern, the training provided by the employer, and who, ultimately, receives the benefit of the internship.

Unemployment

A second issue that is tied to compensation is unemployment benefits. As an initial matter, each state has its own specific unemployment compensation regulations. Generally, to collect unemployment, one must be “able and available” for work. As a practical matter, interns, as college students, are usually not available for work at the conclusion of an internship because they must return to college. It is unlikely that interns, whether paid or not, will be able to collect unemployment benefits at the conclusion of an internship.

Workers’ Compensation Issues

Workers’ compensation provides benefits to individuals who suffer injuries during the course of and arising out of the scope of their employment. Workers’ compensation laws vary from state to state, with each state determining an individual’s right to benefits.

For example, the New York Workers’ Compensation Board specifically states: “An unpaid student intern providing services to a for-profit business, a nonprofit, or a government entity is generally considered to be an employee of that organization and should be covered under that organization’s workers’ compensation insurance policy. Workers’ compensation law judges have ruled that the training received by student interns constitutes compensation (even though the student interns may not be receiving actual “cash payments” for their efforts).”

Other states such as Utah look at the relationship between the intern and the employer to determine eligibility. As such, questions about whether an individual is an employee and whether the intern is paid or unpaid are essential to determining coverage under some applicable workers’ compensation statutes, but each determination must be made on a state-by-state basis.

Regardless, it is imperative to make a determination prior to implementing an internship program. In most instances, workers’ compensation claims bar recovery by the intern for any work-related injuries. So if an intern is injured while on an employer’s premises, his or her sole recovery would be under the applicable workers’ compensation statutes. Further, if an employer fails to include a covered employee on its workers’ compensation coverage, it could be subject to additional penalties from its carrier.

Discrimination Claims

Both federal and state statutes provide protections for individuals to be free from discrimination at the workplace. Generally, such antidiscrimination statutes only protect “employees.” Accordingly, unpaid interns were left without coverage under such statutes. Recently, however, several states have passed laws that protect unpaid internships. New York, Oregon, and California have all passed statutes that ban harassment and discrimination against unpaid interns in the workplace.

By way of example, California was the latest of the three to pass its law, which went into effect January 1, 2015. The law amended the current statute to make it unlawful to discriminate or harass an unpaid intern or volunteer on the basis of a legally protected classification (i.e., race, national origin, gender, sexual orientation—which is protected in some states, disability, or age). New York’s statute took effect July 22, 2014, and also prohibits employers from refusing to hire, discharging, or discriminating against an intern on the basis of a protected classification. Tellingly, New York’s statute provides a definition of “intern” that essentially mirrors the sixpart test.

Legal Issues: Internships

If an internship does not take place in one of those three states, the key inquiry remains whether the intern falls within the definition of an employee. New York's amendment came about, in part, as a result of a lawsuit filed by a former Syracuse University intern who alleged that she was subject to harassment during her internship. That student's case was eventually dismissed because, as an unpaid intern, she was not a protected employee under state or federal law.

Other courts have made similar determinations. Regardless of the issues presented, the key issue is generally whether there was remuneration provided to the intern in exchange for services. The question is what happens when the individual is not provided with pay but with other types of compensation. Courts have stated that nonfinancial benefits that create or relate to career opportunities may suffice. For example, free training and educational opportunities (such as a corporate leadership course) may establish an employer/employee relationship where the individual can demonstrate an economic dependence upon the training and not a mere pleasure from the "compensation."

Also, at least one court has found that where a volunteer was provided with a "clear pathway to employment" deriving from her position as a volunteer, she could establish the plausibility of an employment relationship under federal antidiscrimination laws. If an intern can establish that he or she was provided with some form of remuneration for services provided, a court may find that the intern is afforded protections under federal and state antidiscrimination laws.

Additionally, both employers and universities can be subject to common law tort theories of liability. If the unpaid interns are unable to use the statutory protections, they may still file suit for intentional infliction of emotional distress for harassment or discrimination. As a result, employers should treat interns the same as regular employees and investigate all claims of discrimination promptly and effectively.

Whether an intern is paid or unpaid, it is recommended that employers take all claims of harassment or discrimination seriously and conduct a thorough investigation. Merely because an employer believes an intern is not an employee does not mean a court will make the same determination.

Employment Agreements

Some employers require interns to sign employment agreements at the commencement of the internship. Such agreements provide the scope of the intern's duties, along with the inclusion of restrictive covenants. Such agreements may include noncompete, nonsolicitation, or nondisclosure provisions. Both the intern and the employer should have an attorney review the agreement to ensure they understand the legal requirements that come along with entering into such terms and conditions.

Whether such agreements are valid, however, is an entirely different issue. In general, employment agreements are necessary if an employer wants to define the manner in which an employee can be terminated, to specify the terms of severance, and to provide certain restrictions on employment. Regarding interns, most of the foregoing terms are unnecessary as the scope and duration of the internship is definite and certain. The only true need to have an intern sign an employment agreement is to protect the employer's business interests.

Nondisclosure agreements

A nondisclosure agreement prohibits an employee or intern from disclosing an organization's confidential and/or proprietary information to third parties during both the tenure of employment and after termination. The individual agrees that he or she will not reveal anything the company considers confidential (e.g., customer lists or

research and development plans). Unlike other forms of restrictive covenants, a nondisclosure agreement does not restrict an individual's ability to obtain work upon the termination of employment, but merely protects an employer's proprietary information. As interns are generally provided with unlimited access to an employer's business, it is not unusual for a company to require interns to sign a nondisclosure agreement upon the commencement of the program. Employers should have interns sign such agreements to protect the company's interests. These agreements should be explained and given to interns during the orientation period. Provided the nondisclosure agreement is not overly broad and is explained to an intern prior to execution, a court will likely find such an agreement valid.

Noncompete and nonsolicitation agreements

Unlike a nondisclosure agreement, noncompete and nonsolicitation agreements limit an individual's ability to perform work in his or her chosen profession for a certain period of time. As of today, no court has determined whether a noncompete or nonsolicitation would be deemed valid and enforceable against an intern, but it is unlikely that a court would find such an agreement valid. The reason is that an employer would be hardpressed to point to the "legitimate interest" it is trying to protect with the use of such an agreement. Further, a court is unlikely to restrict the ability of a college student to engage in his or her chosen profession when he or she is entering the work force. While an employer may have interns sign such an agreement, the likelihood is that they are not going to be worth the paper on which they are drafted.

Affordable Care Act

In March 2010, the Affordable Care Act (ACA) was signed into law by President Barack Obama. At its heart, the ACA is a set of health insurance reforms intended to make healthcare more accessible to Americans. The consequence of such accessibility is increased responsibilities for employers. Not all employers, however, are impacted by the ACA's requirements and not all interns are required to be covered. In this regard, only "covered employers" are bound by the requirements of the ACA. A covered employer is any employer that employs 50 or more employees working an average of 30 or more hours per week. This includes nonprofit organizations. The determination of a "fulltime" employee also includes a "fulltime equivalent" (FTE) employee. An FTE employee equals the total number of fulltime employees plus the combined number of parttime employee hours divided by 30. Provided an employer's number of fulltime employees exceeds 50, it is covered under the ACA.

A fulltime employee does not, however, include independent contractors or unpaid interns (as defined above), as both are excluded from the definition of "employee" under the FLSA. If an internship is paid, however, there are additional exclusions available. "Seasonal employees" can also be excluded from the ACA. Seasonal employees are defined by the ACA as an individual hired to work for a position that is customarily six months or less at approximately the same time each year. Additionally, the ACA allows parents to keep their children on their insurance until the age of 26. If coverage is provided in that manner, the intern is not required to be covered by the employer.

Notwithstanding the foregoing, if an employer has more than 50 FTE employees, it must provide health insurance for its *fulltime employees*, or pay a per month "Employer Shared Responsibility Payment." This is essentially a penalty assessed to employers that fail to comply with the ACA. Regarding interns, such positions are usually short-term assignments, lasting only a semester or a few months during the summer. For an individual to be considered fulltime under the ACA, he or she must average more than 30 hours per week for 120 days. The 120 days do not have to be consecutive but must occur during a 360 day period. Accordingly, provided an intern works less than 30 hours per week, or does not work 120 days for an employer, he or she is not covered under the ACA and an employer is not required to provide healthcare coverage. However, if the alternative is true, the intern must be provided coverage and also must be counted toward the number of fulltime employees when determining whether an employer is covered by the ACA.



Legal Issues: Internships

Employers should also be fully aware that the ACA protects against retaliation. If an individual complains about an employer's implementation, or lack thereof, of any requirement of the ACA and is either terminated, disciplined, or not hired as a result of that complaint, he or she may file a complaint against the employer and seek damages. Employers should be wary of how they treat a new hire or intern who asks relevant questions related to the ACA and the employer's responsibilities for compliance.

Internships provide a benefit to both employers and the interns. Given the current legal landscape, however, employers must be mindful of how they structure such relationships. Each day more lawsuits are filed, more statutes are proposed, and new laws are implemented that impact the internship dynamic. Employers have a legal requirement to keep abreast of such changes to avoid significant liability.

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