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Phil Antis Authors "The Fate of the Unpaid Intern-The Saga Continues" for the July Issue of The Federal Lawyer

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The best internship programs provide invaluable experiences, challenging assignments, and real-world immersion not found in the classroom. The worst are glorified mailroom or data-entry positions disguised as internships for employers looking for free or cheap labor. Regardless of the quality of the experience, private-sector entities must place strict guidelines on unpaid internship programs to comply with the Department of Labor's ("DOL") rules or consider paying interns at least minimum wage. Otherwise, entities risk significant exposure to wage claims by their interns under the Fair Labor Standards Act.

In "The Fate of the Unpaid Intern – The Saga Continues", I explain how the DOL has provided some guidance on whether interns qualify as FLSA "employees" who must be paid minimum wage and overtime. In the DOL's view, if all of the following six factors are met, an intern will not qualify as an employee under FLSA:

1. The internship, even though it includes the actual operation of the facilities of the employer, is similar to training that 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 works under the close supervision of existing staff;

4. The employer that 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 necessarily 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.

Unfortunately, there is not much guidance from federal courts on the application of these factors, and the opinions that do exist are inconsistent. What's an employer to do? Class action suits by interns are increasing in frequency, and FLSA liability can be significant, especially on a classwide basis. In my article, I suggest that the DOL consider adopting a specific safe-harbor exemption that allows legitimate internship and externship programs to continue providing exposure and opportunity to students and others interested in a new field.

In the face of this uncertainty, employers can manage the risk of wage claims from their interns. Strict adherence to the DOL's six-factor test does not assure protection, but compliance with the six-factor test should be the goal. Employers with unpaid internship programs should, at the minimum:

• Provide skills training that can be used in multiple settings, as opposed to skills particular to one employer's operation;

• Ensure the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the intern;

• Provide job shadowing opportunities (as opposed to replacing or substituting for regular employees) that allow an intern to learn under the constant supervision of regular employees, and not the same level of supervision as the regular workforce;

• Record that its operations are impeded by the intern, for example, that existing employees spend time supervising and training, causing some loss of production or duplication of effort;

• Make the program a fixed duration, established prior to the outset;

• Not use the internship as a trial period for regular employment at the conclusion of the internship period; and

• Document a clear understanding and acknowledgment that the intern does not expect wages or compensation for the internship.

Internship program guidelines should be in writing, including a description of the responsibilities and duties of both the entity and the interns, and be acknowledged by the interns.

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