Legal Implications of Unpaid Internships

Lindsay Coker

This article considers unpaid internships under the Fair Labor Standards Act and advises employers to analyze any existing or contemplated program for unpaid internships and ensure that it is in compliance with Department of Labor guidelines.

Internships offer a great opportunity for someone interested in a certain field to gain experience. In the current economic climate, marked by a significant contraction in entry level positions, new entrants into the workforce are looking to internships with increasing frequency in order to build resumes and as a bridge into a full-time position. Recent layoffs have forced many employees who suddenly are unemployed to consider internships as a means to utilize their skills and prevent a gap in their resume while they search for new employment. Likewise, employers who have no current headcount for new entrants, are adopting a "try before you buy" approach, seeking interns to test a potential employee prior to offering a full-time position. While internships can be beneficial to both the organization and the intern, employers should be mindful of the potential legal perils of hiring unpaid interns. If an intern qualifies as an employee under operative statutes, there may be far-reaching implications for employers.

THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) requires that all nonexempt employees receive minimum wage and overtime pay.[1] The question is whether an unpaid intern is considered an employee under FLSA.[2] FLSA defines an employee as "any individual employed by an employer."[3] "'Employ' includes to suffer or permit to work."[4] The Supreme Court held that FLSA's definition of employ was "obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."[5] Rather, prospective employees receiving instruction and training were not employees entitled to FLSA's requirements regarding minimum wages.[6]

Lindsay Coker is a former associate at Weil, Gotshal & Manges LLP. She can be reached at *lmcoker@gmail.com.*

THE SIX FACTOR TEST

The US Department of Labor (DOL) relied on the opinion in *Portland Terminal*[7] to establish six factors to determine whether an intern should be considered an employee:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainee;
3. The trainees do not displace regular employees, but work under close supervision;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; and
6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.[8]

Many courts have referred to this same test in opinions determining whether an employment relationship exists for employees in training programs.[9] However, no court has ruled on these factors as applied to an unpaid intern position specifically.

INSIGHT FROM THE DOL

While there is no case law on how the *Portland Terminal* six-factor test would apply to unpaid interns, opinion letters from the DOL offer helpful insight into what employers should consider when hiring interns. The situations discussed in these DOL opinion letters differ from those where laid-off employees seek internships; however, the analysis by the DOL is instructive because it demonstrates that the *Portland Terminal* factors apply to unpaid internships and that work performed by unpaid interns cannot offer a significant immediate benefit to employers.

In one instance, the DOL advised a company that sought to create an internship program for college students.[10] The program was structured much like a college course, with outline, syllabus, and assignments, and the interns were given college credit for their participation in the internship. The DOL stated that, where educational or training programs are designed to provide students with professional experience and "the training is academically oriented for the benefit of the students," the students will not be considered employees and the six *Portland Terminal*

factors were met.[11] The DOL analyzed each of the *Portland Terminal* factors and concluded that they were unable to determine whether the third and fourth criteria were met. The DOL questioned the third factor because, while the students worked only a few hours a week and likely did not displace other employees, they were expected to "assume the role of regular staff members."[12] The DOL said that they would need more information about how closely the students were supervised in order to make a determination. The DOL also questioned the fourth factor because it was unclear whether the employer would derive an immediate benefit from the activities of the interns. While the DOL was not able to provide a definitive answer, their response indicates that they will closely examine each of the factors and employers should ensure that any unpaid internship program complies with the *Portland Terminal* criteria.

In another opinion letter, the DOL found that interns participating in a college externship program would not be considered employees.[13] The interns shadowed an existing employee for one week. Here, the DOL stated that all of the *Portland Terminal* factors were met because the interns did not displace anyone, were there for only a short time, and there was no immediate benefit to the employer. However, in this situation, the interns did perform small office tasks and assist with projects. Additionally, the employer had stated that a potential benefit for them was the "opportunity to screen future interns or employees."[14] Despite there being some benefit to the employer, the DOL nonetheless found that the *Portland Terminal* factors were met and that the interns would not be considered employees. In coming to this conclusion, the DOL also considered that the students were told that they would not receive a job at the conclusion of the internship and would not receive compensation for the work.[15]

In contrast, the DOL found that interns working in a youth hostel in exchange for free room and board would be considered employees where they were to assist in the daily operation of the hostel, check guests in and out, and perform maintenance and administrative work.[16] The DOL applied the same six-factor test and found that the fourth factor would not be met because the employer derived an immediate advantage from the duties performed by the interns.

The primary consideration in this analysis, and the most difficult to determine, is whether tasks performed by an intern offer an "immediate benefit" to the employer. For instance, if an intern is learning about car mechanics and is asked to remove and replace a carburetor in order to learn how to do so, that task would be acceptable for an unpaid intern. If, however, the employer asked the intern to replace the carburetor both because the intern would learn how to do so, and because the car actually needed a new carburetor, there would be an impermissible immediate benefit to the employer. Thus, the only acceptable activities for unpaid interns are those that are purely for teaching purposes and do not help with the employer's day-to-day tasks.

PENALTY FOR VIOLATION

While there is no case law on how the FLSA would apply to an unpaid internship, an employer who violates the minimum wage standards of FLSA is liable for compensatory damages for unpaid wages and an additional equal amount in liquidated damages.[17] However, if an employer demonstrates that the act or omission was in good faith and that it had reasonable grounds for believing its act or omission was not a violation of FLSA, then the court may, in its discretion not award liquidated damages.[18] Employers found liable could also be required to pay attorney's fees and costs.[19]

CONCLUSION

In light of the DOL opinion letters, employers should analyze any existing or contemplated program for unpaid internships and ensure that it is in compliance with DOL guidelines. Employers should ensure that the interns are closely supervised, are not performing significant tasks that will provide an immediate benefit to the employer, and are not taking the place of any regular employees. Employers also should take steps to establish at the outset of the internship that the intern has no expectation of future employment as a result of the internship and that the intern will not be compensated for his or her time.

NOTES

1. Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.*

2. Employers also should consult applicable state minimum wage and unemployment compensation statutes which may impose requirements upon employers who engage student interns in addition to or different from those required by the FLSA. *See, e.g.*, N.Y. Labor Law § 511 (McKinney 2004) ("The term 'employment' does not include service performed by an individual, regardless of age, who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers."); N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.6 (2009) ("For each individual for whom student status is claimed, an employer's records shall contain a statement from the school which the student attends, indicating such student: 1) is a student whose course of instruction is leading to a degree, diploma or certificate; or 2) is required to obtain supervised and directed vocational experience to fulfill curriculum requirements.").

3. 29 U.S.C. § 203(e)(1).

4. 29 U.S.C. § 203(g).

5. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

6. *Id.*

7. *Id.*

8. U.S. Dept. of Labor, Wage & Hour Div., Field Operations Handbook § 10b11 (citing Portland Terminal Co., 330 U.S. 148).

9. *See, e.g.*, Archie v. Grand Cent. P'ship, Inc., 997 F. Supp. 504 (S.D.N.Y. 1998) (applying the six-factor test from *Portland Terminal* to determine that workers were employees, not trainees, because employer received an immediate benefit); *see also* Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1127 (5th Cir. 1983); Donovan v. Am. Airlines, Inc., 686 F.2d 267, 273 n.7 (5th Cir. 1982); Marshall v. Baptist Hospital, Inc., 473 F. Supp. 465, 478 (M.D. Tenn. 1979), rev'd on other grounds, 668 F.2d 234 (6th Cir. 1981).

10. Opinion Letter from Barbara Relerford, Office of Enforcement Policy, Fair Labor Standards Team (May 17, 2004).

11. *Id.*

12. *Id.*

13. Opinion Letter from Alfred B. Robinson, Jr., Acting Administrator, U.S. Department of Labor Employment Standards Administration, Wage and Hour Division (Apr. 6, 2006).

14. *Id.*

15. *Id.*

16. Opinion Letter from Daniel F. Sweeney, Deputy Assistant Administrator, U.S. Department of Labor, Wage and Hour Division (Mar. 25, 1994).

17. 29 U.S.C. § 216(b).

18. Spires v. Ben Hill County, 745 F. Supp. 690, 707 (M.D. Ga. 1990).

19. 29 U.S.C. § 216(b); *see also* Cho v. Koam Med. Services, P.C., 524 F. Supp. 2d 202, 210–211 (E.D.N.Y. 2007).