

It's Internship Time!

Labor & Employment Law Update

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It's that time of the year when college students will come knocking looking for a job or an internship. Depending on the nature of an organization's business, an *unpaid* intern might be a great idea. But before organizations start engaging summer intern help, they need to make sure that they are complying with the Department of Labor (DOL) requirements, which include the following six factor test:

- The internship is similar to training that would be offered in an education environment;
- The internship experience is for the benefit of the intern;
- The internship is not displacing a regular employee;
- The training provided by the employer to the intern may impede employer's operations;
- The intern is not expecting a permanent position at the conclusion of the internship; and
- Both the employer and intern understand that there is no compensation.

Assuming all of these apply, the Fair Labor Standards Act (FLSA) is not triggered and the intern need not be paid minimum wage or overtime. While there are limited exceptions applicable to local government agencies or those who volunteer their time without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to nonprofit organizations, the six-factor test is generally applicable to most organizations.

In 2015, however, the federal second circuit court issued a decision in a case involving an unpaid intern for the award winning movie *Black Swan*. There, the court established a more employer-friendly test heavily focused on training, integration of coursework and receipt of academic credit, accommodation to the intern's academic calendar and the duration of the program as it related to beneficial learning. The court also emphasized that a clear understanding must exist that there is no expectation of compensation. This test was subsequently adopted by the eleventh circuit in August 2016. To date, the DOL has not amended the six-factor test.

Thus, as organizations develop internship programs, special care must be taken to ensure that it is the intern who is drawing the benefit from the program as opposed to the company. In other words, the focus should be on the intern attaining valuable and useful skills and experience in his chosen discipline

instead of the company aiming to receive “free labor.” To avoid slipups, interns should not be engaged in menial tasks that can be performed by clerks or other administrative personnel already on board. Such tasks might include making copies, fetching coffee, delivering mail or running errands. Rather, interns should be assigned to career related tasks – for instance an IT intern might assist staff in performing backup and maintenance functions or update user and technical documentation.

Congress has made it clear that its intent is not to discourage volunteerism or to prevent willing individuals from attaining skills and training by serving as unpaid interns. Nevertheless, managers in charge of internship program development should be mindful of the DOL requirements and consult experienced counsel to ensure compliance and design internship programs that truly benefit participants.

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