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Internships, Co-ops, and Volunteers

Internships and co-op programs are a popular way for students to gain valuable “real-world” work experience before entering the work force. These programs are perceived as a win-win situation for students and employers alike. Students seek out internships for training and experience. Employers establish internship programs for a variety of reasons, including positive exposure to bright students about to enter the work force and as a means for identifying and recruiting candidates. However, employers need to be aware of the legal issues governing internships and co-op programs to ensure that these programs do not unwittingly subject them to potential liability.

This article will address a few of the major areas that employers will need to consider to ensure compliance with the laws applicable to internship programs. For career services professionals, this article provides a solid understanding of the relationship between employer and student involved in an internship or co-op program.

Key Questions

Perhaps the single most important factor in considering an internship program is the decision as to whether the internship will be paid or unpaid. This article will discuss the distinction between trainees and employees for purposes of the Fair Labor Standards Act (FLSA), the issue of volunteers, and the applicability of federal anti-discrimination laws.

Does the law require an organization to pay its interns?

The possibility of free labor in the form of student interns may be a tempting one for employers. However, employers must be aware of and ensure compliance with the Fair Labor Standards Act, before classifying an intern as an unpaid “trainee.” If an intern is considered an “employee” for purposes of the FLSA, then the employer must pay its interns at least the minimum wage.

“Employee” is defined by the Fair Labor Standards Act as “any individual employed by an employer.” Under the FLSA, to “employ” means “to suffer or permit to work.” Since this definition is somewhat circular, the Department of Labor’s Wage and Hour Division developed a six-factor test for determining whether workers are to be considered “trainees” or “employees” under the FLSA:

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 observation;
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;
6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.

The Department of Labor’s six-part test is derived from the Supreme Court’s decision in *Walling v. Portland Terminal Co.* The *Portland Terminal* case involved a railroad that gave a course of unpaid, practical training to prospective yard brakemen. The plaintiffs claimed that they were entitled to payment as employees under the FLSA. The court disagreed, and held that they were not considered “employees” under the law. In so holding, the court took into account several factors, such as the fact that the trainees did not displace any workers, and the fact that the trainees’ work did not expedite the company business. The various factors that were considered by the court in reaching its holding were used to form the six-factor test developed by the Department of Labor.

The Department of Labor takes the position that all six factors must be present in order for a worker to be considered a trainee under the law. However, the courts have generally interpreted this test more loosely. For example, the Tenth Circuit Court of Appeals has held that the six-factor test is a “totality of the circumstances” test, and does not require the satisfaction of all six factors. In *Reich v. Parker Fire Protection District*, the defendant fire department required attendance at its training academy as a condition for permanent employment. The trainees were not entitled to wages during the training period and sued under the FLSA. The court held that each of the six factors were present, with the sole exception of one—the expectation of employment upon successful completion of the course. The Department of Labor took the position that unless all six criteria are met, the trainees are employees for purposes of the FLSA. The defendant argued that as a true “totality of the circumstances” test, the presence or absence of one factor in the equation should not be determinative. The court held that there was nothing in the *Portland Terminal* decision that required the “all or nothing” approach advocated by the Department of Labor.

Notwithstanding this difference of interpretation between the courts and the Department of Labor, an employer establishing an unpaid internship program should ensure compliance with the six-part test and seek legal counsel in this regard.

May we consider our interns to be “volunteers”?

As stated above, the FLSA defines employment very broadly, i.e., “to suffer or permit to work.” However, the law does recognize that the FLSA was 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.” (*Walling v. Portland Terminal Co.*)

Individuals who serve as unpaid volunteers in various community services are not considered employees for purposes of the FLSA provided they meet the applicable guidelines. The Department of Labor takes the position that individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious, or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the organizations that receive their service. Examples of volunteer work might include parents who assist in a school library or cafeteria, or drive a school van on a field trip.

However, employees may not volunteer services to for-profit private sector employers. Therefore, for most private sector employers, it is not acceptable to consider interns to be unpaid volunteers, unless they otherwise qualify as a trainee as set forth above.

Are our interns considered employees for purposes of federal discrimination law?

Paid interns would be considered employees for purposes of the federal discrimination laws. Therefore, covered employers should assume that their paid interns are employees and comply with applicable discrimination statutes, such as Title VII, the Americans With Disabilities Act, and the Age Discrimination in Employment Act. However, the issue of whether unpaid interns and volunteers qualify as employees under Title VII and other federal discrimination laws is less clear.

Title VII defines “employee” as “an individual employed by an employer.” In determining whether an individual is an “employee” for purposes of Title VII, the courts look to whether there is evidence of compensation. However, for purposes of making this determination, the courts will look to benefits other than wages, such as health insurance, group life insurance, and tuition reimbursement. In the absence of any direct or indirect economic remuneration to the intern, the courts will likely find no employment relationship between the parties.

However, in the case of *Rafi v. Thompson*, the court was willing to extend the definition of compensation to include a “clear pathway to employment.” In *Rafi*, the plaintiff, Dr. Syed Rafi, applied for certain volunteer positions with the National Human Genome Research Institute (NHGRI) and the National Institutes of Health (NIH). His applications were denied. He then brought an action against the agencies under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA), arguing that the agencies discriminated against him in violation of federal law by denying him the volunteer positions he sought.

The defendant filed a motion for summary judgment, arguing that the volunteer positions that Rafi sought did not qualify as federal “employment” for purposes of Title VII and the ADEA. The court ruled that whether a volunteer position could qualify as “employment” depended upon the “nature and extent of the compensation that volunteer researchers receive.” The plaintiff asserted that volunteering at NIH could lead to subsequent paid employment at NIH and elsewhere, and that this “clear pathway to employment” constituted sufficient compensation to bring NIH volunteers under Title VII as employees. In this regard, the plaintiff introduced evidence that 9.5 percent of volunteers with the agency went on to full-time employment. The court held that this was a high enough conversion percentage to indicate that volunteers did in fact have a path to permanent employment. The plaintiff also identified another tangible benefit of a volunteer position: an increased opportunity to participate in NIH’s Interinstitute Medical Genetics program, which would have offered him the training necessary to fulfill certain requirements in his field of expertise. The court agreed that this could qualify as form of compensation, ruling that the plaintiff had made a plausible showing that the volunteer positions for which he applied would qualify as “employment” under Title VII and the ADEA.

The significance of this case lies in the fact that the court was willing to recognize an employment relationship for Title VII purposes even in the context of an unpaid volunteer. The presence of either direct or indirect economic remuneration or the promise thereof has been recognized as an essential condition for the presence of an employment relationship. In this case, the court expanded the definition of “compensation” to include an increased opportunity to obtain employment with the organization.

While an organization that uses unpaid interns may very well have good legal arguments in the event of a discrimination claim, it is nevertheless sound practice to ensure that all interns, paid or unpaid, are treated fairly and in accordance with the discrimination laws.

For additional information about the legal issues pertaining to college recruiting and hiring, see www.nacweb.org/info_public/legal.htm

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