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## Unpaid Internships Pose Problems for Unwary Employers

by Christine Nicolaides Kearns, Karen-Faye McTavish and Kristen E. Baker

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*In an economic environment where students are often willing, and, in fact eager, to intern for for-profit companies for the experience alone, many companies are, for good reason, interested in considering this option. It is important, however, to proceed with extreme caution.*

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Following press reports that the U.S. Department of Labor (“DOL”) planned to step up enforcement against for-profit businesses that illegally use unpaid interns,<sup>1</sup> the Department’s Wage and Hour Division recently offered guidance in the form of an [April 2010 fact sheet](#) to employers on maintaining a compliant internship program.

In general, the DOL utilizes a six-factor test for determining whether an individual may be classified as a “trainee” or intern who is not covered by the Fair Labor Standards Act (“FLSA”),<sup>2</sup> the federal law establishing the minimum wage for work performed by “employees.” **Please note that the wage laws of the particular state in which an individual will be working must also be carefully consulted prior to classifying an individual as a trainee or intern for wage payment purposes.** In its recent guidance, the DOL explains that “[i]nternships in the “for-profit” private sector will most often be viewed as employment,” unless all six of the following DOL “trainee” test criteria are met:

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

 <sup>1</sup> Steven Greenhouse, *The Unpaid Intern, Legal or Not*, NY TIMES, April 2, 2010.

<sup>2</sup> Please note that the DOL’s six-factor test only applies to internships at for-profit, private-sector businesses. The DOL has held: “[i]ndividuals 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 religious, charitable, and similar not-for-profit organizations which receive their services.” DOL Opinion Letter, 1998 DOLWH LEXIS 83 (September 28, 1998).

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.

Additionally, the new fact sheet provides greater guidance on several factors of the “trainee” test. Although it does not explicitly address the fourth criterion—the most problematic of the six—its discussion of the first and second criteria shed light on what the DOL considers to be a benefit or advantage to the employer:

“The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer’s operation, the more likely the intern would be viewed as receiving training. Under these circumstances 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 work of the intern. On the other hand, if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA’s minimum wage and overtime requirements because the employer benefits from the interns’ work.”

The fact sheet also emphasizes the importance of structuring the internship around a classroom or academic setting, such that “the internship [is] viewed as an extension of the individual’s educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit).”

Finally, the fact sheet warns that if an employer uses interns as “substitutes” for its regular employees or to “augment” its existing workforce, such interns should be paid. In other words, if the employer would have hired additional individuals or required existing staff to work additional hours had the intern not been there, then the intern should be considered an employee under the FLSA. The fact sheet explains, “[c]onversely, if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience.”

It should be noted that the implications of classifying an individual as a “trainee” or intern, rather than an “employee,” extend beyond the wage and hour laws. Because “trainees” or interns are not considered “employees” of a business, they are also not protected under workplace discrimination and harassment statutes, such as the Civil Rights Act and the Americans with Disability Act.<sup>3</sup>

Accordingly, in states that do not have wage laws that apply that are more stringent than the FLSA requirement, we generally suggest that clients take the following steps with respect to unpaid internships<sup>4</sup>:

- Provide a written offer letter to the student intern, stating that (a) the internship is unpaid; and (b) that a job is not guaranteed upon completion of the training or completion of the person’s schooling. And act accordingly. The DOL has warned that “even when such an agreement [that internship is unpaid and intern is not entitled to a job at the conclusion of it] exists, hiring workers who finish the training

<sup>3</sup> See, e.g., Kathryn Anne Edwards, Alexander Hertel-Fernandez, *Not-so-Equal Protection, Reforming the Regulation of Student Internships*, ECONOMIC POLICY INSTITUTE POLICY MEMORANDUM #160, April 5, 2010, at 1.

program is considered in determining whether an employment relationship exists, and frequently hiring such workers suggests that the workers are not trainees.”<sup>5</sup>

- When publicizing the internship, state that applicants who will receive college credit are preferred. If college credit is not available, seek to receive written documentation from the student intern’s school stating that the internship is approved and/or sponsored by the school as educationally relevant.
- Create a formal internship program with scheduled start and end dates. As part of the formal program, schedule presentations in which leaders from different parts of the company speak to student interns about their job duties, implement a mentoring program, and offer generous instruction and constructive feedback on student interns’ work product.
- Emphasize and put into practice the training and close supervisory characteristics of the internship program. Expend company resources to provide adequate training to the intern on general practices, so the intern will be well-equipped to use his or her skills in multiple employment settings.

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If you have any questions regarding the content of this advisory, please contact the Pillsbury attorney with whom you regularly work or the authors below

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<sup>4</sup> Some states employ more strict requirements in determining whether an individual may be considered an intern and, thus, be exempt from federal and state wage and hour laws. For example, California’s Division of Labor Standards Enforcement (“DLSE”) has historically required that for an individual to be considered an intern, his or her training “must be an essential part of an established course of an accredited school or of an institution approved by a public agency to provide training for licensure or to qualify for a skilled vocation or profession.” DLSE Enforcement Policies and Interpretations Manual § 46.6.6 (2002). The Division also advises that the internship program not be for the benefit of any one employer and that the training be supervised by the school or a disinterested agency. *Id.* In an April 2010 opinion letter, DLSE Acting Chief Counsel David Balter applied the DOL’s six-factor test in determining that an internship program, although not directly administered by a vocational or educational institution, was run in a “sufficiently similar” manner and accordingly, among other reasons, was exempt from the state’s minimum wage law. DLSE OL 2010.04.07. We recommend you consult counsel to find out if your state applies more strict requirements.

<sup>5</sup> DOL Training and Employment Guidance Letter No. 12-09, at p. 9 (January 29, 2010).

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