

June 6, 2014

Internship Programs: Legal Developments

With summer internship season upon us, employers should make note of important legal developments concerning the hiring and retention of interns. This advisory summarizes some developments in this area and recommends strategies to reduce legal exposure arising from the operation of internship programs.

1) New NYC Law Protects Interns From Discrimination and Harassment

A recent amendment to the New York City Human Rights Law (“NYCHRL”) grants interns the same protections as employees with regard to unlawful discrimination and harassment by their employers. The amendment was signed into law by New York City Mayor de Blasio on April 15, 2014 and takes effect on June 14th.

The amendment defines “interns” as follows:

[A]n individual who performs work for an employer on a temporary basis whose work: (a) provides training or supplements training given in an educational environment such that the employability of the individual performing the work may be enhanced; (b) provides experience for the benefit of the individual performing the work; and (c) is performed under the close supervision of existing staff. The term shall include such individuals without regard to whether the employer pays them a salary or wage.

The amendment further provides that the provisions of the NYCHRL “relating to employees shall apply to interns.” As such, paid and unpaid interns working in New York City will now have legal protection against unlawful harassment and discrimination on the basis of protected characteristics, such as age, race, creed, color, national origin, gender, disability, marital status, partnership status, and sexual orientation, and status as a victim of domestic violence, sex offense or stalking. Some of the broader implications of this amendment still appear to be unsettled; for example, it is unclear whether the same analyses will apply to the accommodation of disabilities or religious obligations of interns as to employees; the circumstances under which interns would be entitled to monetary damages (other than

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attorney's fees) for violations; and the extent to which courts or administrative agencies will be willing or able to second-guess the academic components of internships.

While we await judicial and regulatory guidance on these and other issues, New York City employers should update their anti-harassment and anti-discrimination policies, and instruct supervisory and non-supervisory staff regarding the implications of the new law. This is particularly important for staff members who will have any contact with paid or unpaid interns.

2) Interns and the Wage-and-Hour Laws

There has been a growing trend in recent years of unpaid interns claiming violations of minimum wage and overtime laws. Federal and state government agencies have expanded their enforcement efforts in this area as well.

a) Interns and For-Profit Employers

The federal Fair Labor Standards Act ("FLSA") defines the term "employ" very broadly: "to suffer or permit to work." Covered individuals who are "suffered or permitted to work" for an employer must be compensated in compliance with the FLSA for the services they perform. According to the United States Department of Labor ("USDOL"), internships offered in the "for-profit" private sector will typically require compensation unless all of the following six factors are met:

- (i) the internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
- (ii) the internship experience is for the benefit of the intern;
- (iii) the intern does not displace regular employees, but works under close supervision of existing staff;
- (iv) the employer derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
- (v) the intern is not necessarily entitled to a job at the conclusion of the internship; and

- (vi) the employer and intern understand that the intern is not entitled to wages for the time spent in the internship program.

b) NYSDOL Guidance

Depending on where they operate, employers' relationship with interns also may be subject to certain state-law requirements. The New York State Department of Labor ("NYSDOL"), for example, has developed an eleven-factor test to determine whether interns (referred to as trainees or students) of for-profit organizations should be exempt from New York's state-law minimum wage requirements. In addition to the DOL's six-factor test set forth above, which the NYSDOL has adopted, New York law requires the internship to be paid unless the following five factors are also met:

- (i) Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed;
- (ii) The trainees or students do not receive employment benefits;
- (iii) The training is general, so as to qualify the trainees or students to work in any similar business rather than designed specifically for a job with the employer offering the program;
- (iv) The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program; and
- (v) Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

If any of the eleven factors are not satisfied, the intern is not exempt from New York's state-law minimum wage requirements, and the intern will have to be paid an hourly wage. As a word of caution: Although six of these factors are repetitive of the FLSA, the NYSDOL interprets them more strictly than the USDOL. As a result, even if these requirements are satisfied for purposes of the FLSA, they may need to be reconsidered under New York law.

c) Interns and Not-For-Profit Employers

As our non-profit clients are well aware, the FLSA does allow “public agencies” to accept unpaid services from volunteers. *See* 29 U.S.C. § 203(e)(4)(A). The USDOL has long taken the position that religious, charitable, civic, or humanitarian non-profit organizations should be considered “public agencies,” and that unpaid volunteers for non-profit charitable organizations are usually permitted.

To qualify as a volunteer for a non-profit organization under the FLSA, the individual must perform services freely, without pressure or coercion, and such services must be performed without promise, expectation or receipt of compensation. A limited range of payments to volunteers is permitted under the FLSA, such as expense reimbursements for uniforms, transportation and meals.

As with its regulation of for-profit employers, the NYSDOL has adopted and expanded upon federal rules governing the engagement of certain unpaid staff at non-profit organizations by creating three permitted categories of unpaid workers: *bona fide* volunteers, students, and trainees. A *bona fide* volunteer cannot replace or augment paid staff or do the work of paid staff, must perform tasks traditionally reserved for volunteers, and cannot be paid for his or her services (although certain expense reimbursements are allowed). A student-intern must, among other requirements, attend an institution of learning with courses leading to a degree, certificate or diploma, and the student internship must satisfy residence requirements for that degree. A trainee must, among other things, receive formal instruction and on-the-job training as part of a *bona fide* training program, be granted only limited responsibility, and receive direct and specialized supervision and guidance.

d) Recommendations

Employers that operate internship programs, or contemplate doing so, should carefully review their programs to analyze compliance with applicable law.

A “for-profit” employer wishing to sponsor an unpaid internship program should structure the program so that interns receive beneficial instruction without displacing regular employees. The duration of the internship should be made clear from the outset, and the program should clearly explain that the internship is not paid and will not necessarily result in a job with the employer. The usable work product generated by unpaid interns should be kept to a minimum, and they should not receive employee benefits. If these requirements are not feasible—because, for example, the company expects its interns to augment the work of

current staff—the employer should consider treating the interns as temporary employees subject to the federal and state wage-and-hour laws.

Non-profit organizations should verify that potential unpaid interns qualify as *bona fide* volunteers, students, or trainees under applicable federal and state standards. Among other requirements, the services such individuals render for the organization must be performed freely, without any promise or expectation of compensation. Although the New York state requirements are generally stricter than their federal counterparts, it is not necessarily true that satisfying the New York standards will also satisfy the federal requirements. For instance, unlike the student-intern exception recognized under New York law for non-profits, there is no specific non-profit exception for a “student-intern” recognized under the FLSA. All employers should assume that their programs may be subjected to close scrutiny by government agencies and plaintiffs’ lawyers and be vigilant about complying with any applicable wage-and-hour laws.

The consequences of misclassifying an employee as an unpaid intern can be severe. Liability for misclassification may include unpaid minimum wage and overtime payments, liquidated damages, and attorney fees. The employer may also be subject to significant tax and other liabilities, together with penalties and interest, for failing to properly withhold payroll taxes, for failing to contribute to the state unemployment insurance system on behalf of the misclassified interns, and for failing to provide workers’ compensation coverage.

If you have any questions regarding any of these issues or need further guidance regarding your internship program, please contact Phil Repash at (212) 758-1078, or another attorney at the Firm.

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