



Interns, Volunteers, or Employees? Employers Need to Be Sure They Aren't Getting Too Much of a Good Thing

By Jillian Barron

The economic climate in the past few years has resulted in a glut of students, recent graduates, and even seasoned workers vying for unpaid internships and volunteer opportunities that will provide experience and possibly lead to a paid position in a field of their choice. Although this may appear to be a boon for employers, the parameters for unpaid internships and volunteer positions must be met, or the individuals involved may be deemed employees entitled to minimum wages and overtime, as well as basic benefits such as workers' compensation and unemployment coverage.

Internships in the Private, For-Profit Sector

With the exception of a program established in this year's session of the Washington legislature, which permits farm internships without payment of minimum wages and overtime, neither Washington nor federal law or regulations expressly permit unpaid internships in the private, for-profit sector. In several opinion letters over time, however, the U.S. Department of Labor (DOL) has articulated a set of requirements for unpaid student internships in the private, for-profit sector. Apparently recognizing the current prevalence of internships, in April 2010 DOL issued a "fact sheet" setting forth what it views as the necessary criteria.

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
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
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship

All of these factors must be met in order to avoid an employment relationship. Although the Washington Department of Labor & Industries (L&I) has not formally adopted these criteria, it reportedly follows them, with particular emphasis on the third and fourth factors.

DOL describes several considerations that will shape its determination as to whether an arrangement is in fact an internship. For example, the more an internship involves a classroom or academic experience, or other close supervision, and provides skills that can be used in multiple settings, as opposed to simply learning and performing the employer's specific routine operations, the more likely an internship will be found. Conversely, if an employer effectively uses "interns" to perform productive work, thereby avoiding the need to hire additional employees or have its existing staff work more hours, the arrangement is likely to be considered employment. Also important, an internship should be set up with a fixed duration, and not be used as a trial period with the *expectation* the intern will be hired as an employee at the program's conclusion.

Internships and Volunteer Work for Public Agencies and Non-Profit Entities

The federal Fair Labor Standards Act (FLSA) permits volunteer work for public agencies under certain conditions, without such work creating an employment relationship. DOL has applied this exception more broadly to allow volunteer work to be done for religious, charitable, civic, or humanitarian purposes on behalf of non-profit organizations, as well as unpaid internships in the public sector and for non-profit charitable organizations. L&I guidance provides a similar exemption for volunteer work under Washington law. To qualify as a volunteer, as opposed to an employee, individuals must:

1. Volunteer their time, freely and without anticipation of compensation
2. Not be paid for their services, other than reimbursement for expenses, reasonable benefits, and/or a nominal fee
3. May not be employed by the same agency or organization to perform the same or similar services. However, individuals may volunteer for their own agency or organization to perform services *different* than their normal work, such as a city police officer volunteering part-time to referee a city-sponsored sports league.

Neither DOL nor L&I has defined the criteria for unpaid internships with public agencies and non-profit organizations. However, satisfying the requirements for volunteer work, or those for internships in the for-profit sector, is likely to be sufficient to avoid creation of an employment relationship.

Advice to Employers

Interns, and volunteers in the public and non-profit sectors, can provide benefits to employers. However, in the case of interns, in particular, the benefit is not a free, productive equivalent of an employee. Employers who fail to comply with the requirements for interns or volunteers may be in for an unpleasant surprise in the form of liability for back-pay, benefits, taxes and penalties. To avoid that risk, employers may wish to consult with legal counsel before establishing internships or volunteer programs.

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