Class Action Risk For Unpaid Internship Programs

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The wave of class actions in the United States now includes a full frontal assault on unpaid internship programs, with plaintiffs' attorneys securing some successful preliminary results in the Southern District of New York. These recent decisions should prompt all employers with unpaid internship programs to consult with qualified legal counsel to attempt to reduce or eliminate risk of suit while these issues wend their way through the appeal process and uniform guidance is available to employers.

These arguments by creative plaintiff's lawyers to argue that unpaid interns are really employees in disguise are not new, but they have in the last sixteen months been renewed with vigor. Plaintiff's lawyers have sought a strict application of a U.S. Department of Labor Wage and Hour Administrator's six part test of determining when a trainee is not an employee. Under this test, an intern is not an employee if:

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; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship. (emphasis added).

According to the DOL, "[i]f all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern. This exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of "employ" is very broad."[1]

Obviously, the fourth element of the test could prove problematic if strictly enforced, as it appears to say that if an employer derives an advantage from an intern's work, the test is not satisfied.

In two cases pending in the Southern District of New York, two District Court Judges reached different conclusions on how to apply this six part test. In one of those decisions, Glatt v. Fox Searchlight Pictures, District Judge William Pauley, III rejected the defendants' argument that the DOL 6-part test should yield to a more broad "primary benefit test" that has been followed in several other circuits. Judge Pauley

[1] US DOL Factsheet, available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

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found that interns (class representatives) working in the media industry were employees rather than interns, and certified a large class. His decision, and that of Judge Baer in another SDNY case where it was held that the determination of employee status would need to be determined by a jury, are both expected to be appealed shortly to the Second Circuit.

Given these preliminary successes by plaintiff's counsel, employers would be well advised to undertake a review of their internship programs to ensure compliance with the six factor DOL test. Some of the considerations which can be gleaned from these recent cases and a reading of the DOL test are as follows:

- The courts will look to the "value added" and overall educational value of an internship program. Interns retained in a program with no educational value will be subject to attack. The employer should arrange workshops and organized training programs for the intern, and consider assigning mentors. Consideration should also be given to rotating the intern through different departments at the employer's business to broaden the internship experience;
- The overall intent of the program should be educational in nature and programs that are created in partnership with educational institutions and for which the intern is receiving college or vocational credit tend to survive scrutiny;
- Interns should not be taken on to displace employees who were being paid for those duties. Where interns are being used to complete productive tasks which otherwise would be fulfilled by paid employees, this creates risk;
- The overall length of internships should be limited time periods.

The new case developments highlight the importance of closely examining any internship program to ensure compliance with applicable law and guidelines to avoid prolonged and expensive litigation in the event of claims for unpaid wages. Our Labor Relations and Employment Law Department is available to counsel your business in these areas, so please feel free to contact us at any time.