



Careful Considerations for Hiring Summer Interns

by Thomas A. Dixon and Andrew L. Smith

Around this time of year employers think about whether to utilize summer interns and whether those interns should be paid or unpaid. In determining whether an employer can utilize an unpaid intern, the employer must carefully consider whether the intern is an “employee” subject to the Fair Labor Standards Act (FLSA) and its child labor prohibitions and wage regulations.

Last year the Department of Labor (DOL) signaled that it is placing more emphasis on regulating unpaid internships and training programs, and reaffirmed that its “six-factor test” should be used for determining the legality of unpaid internships. Under the DOL’s stringent test, an intern is classified as an employee unless all six of the following factors are present:

1. The internship is similar to training which would be given in an educational environment;

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About the photo: Flag flying over Hancock County Courthouse.

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.

Recently, in *Solis v. Laurelbrook Sanitarium and School, Inc.*, the Sixth Circuit Court of Appeals was asked whether boarding school students who work at a school-owned nursing home as part of their education are employees (who must be paid) or interns (who do not). The Court refused to apply the DOL test reasoning that it was overly rigid. Instead, the court utilized a more employer-friendly “primary benefit test.”

The proper approach for determining whether an intern is an employee is to ascertain which party derives the primary benefit from the relationship. Factors such as whether the relationship displaces paid employees and whether there is educational value derived from the relationship are relevant considerations. While the six factors from the DOL test may be analyzed, the "economic realities" and "totality of the circumstances" determine which party derives the primary benefit of the relationship.

Applying this test, the Court held that the students were not employees, and, therefore, the students were not required to be paid. The Court reached this conclusion even though the services performed by the students provided benefits to the school, including contributions to its maintenance, operations and licensing requirements. Additionally, the school received payment for the students’ services. Those benefits, however, were offset in various ways. The training allowed the students to be competitive upon graduation, taught responsibility, demonstrated the value of hard work, provided the students with a strong work ethic and fostered leadership skills. The students also received valuable hands-on training. Furthermore, the nursing home instructors were required to spend extra time supervising students at the expense of performing productive work. The nursing home also was sufficiently staffed so that if the students did not perform work, the staff could provide the same services without interruption. Finally, the school was not in competition with other institutions for labor, so the school did not enjoy an unfair advantage by utilizing free labor. Therefore, the Sixth Circuit held that the students were properly classified as unpaid interns.

What does this mean for employers? When determining whether to hire an unpaid intern, employers must analyze which party derives the primary benefit from the relationship. In doing so, employers must engage in a fact-intensive case-by-case analysis by reviewing such factors as whether the relationship displaces paid employees and whether there is educational value derived from the relationship. Additionally, the employer should analyze the six factors from the DOL test.

In general, an employer should take the following steps when employing unpaid interns:

- Provide a written offer to interns stating that the internship is unpaid, and that a job is not guaranteed upon completion of the internship;
- Create a formal internship program with a scheduled start and end date;
- Implement a mentoring program;
- Offer detailed instruction and training to interns;
- Provide constructive feedback to interns;
- Closely supervise interns; and
- Provide sufficient staffing allowing business operations to continue without interns present.

If you have any questions in determining whether to hire summer interns and whether those interns subject you to the requirements of the FLSA please contact your labor and employment counsel.



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