BUTZEL LONG
ATTORNEYS AND COUNSELORS

Automation Alley Newsletter

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Unpaid Summer Internships - Buyers Beware!

As summer approaches, many employers are being asked to consider using summer interns. Students and others who are unable to obtain jobs are nonetheless interested in holding internships as a means to gain valuable experience and perhaps an eventual job. Many of these prospective interns are willing to serve without pay. This option has some appeal to many businesses. Notwithstanding these mutual interests, the Department of Labor has recently announced that unpaid internships are virtually barred in the for-profit private sector. This warning is made clear in the DOL's Fact Sheet (available at http://www.dol.gov/whd/regs/compliance/whdfs71.htm) published in April 2010.

Significantly, the legal standard being applied is no different than that which has existed, but in the past the DOL (through practice and formal opinions) analyzed the appropriateness of unpaid internships on a fairly flexible basis. Now, however, the DOL is abandoning its past tolerances and has announced that unpaid internships will be subject to more scrutiny than in the past. In this regard, the acting director of the DOL's Wage and Hour Division said: "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."

As explained by the DOL, individuals who are suffered or permitted to work are generally regarded as employees, and therefore they must be paid the minimum wage and overtime pay as otherwise required by the Fair Labor Standards Act ("FLSA"). Contrary to prior constructions of the law, the DOL is now stating that internships in the for-profit private sector will almost always be deemed employment under the law. The only exception to this rule is if the interns are truly "trainees" as defined in the FLSA's regulations, and this exception is to be narrowly construed.

For a trainee or intern to be excluded from coverage under the FLSA's pay requirements, all of the following criteria must be 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;

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.

The first factor is likely the most difficult to overcome. As explained by the DOL:

> In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be 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). 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.

In these hard times, many people who want internships are done with school. Unless the internship program is somehow attached to an educational program or mirrors one, it likely will not pass the DOL's scrutiny. Interestingly, many colleges are endeavoring to help employers document a sufficient connection to their programs to help their students obtain these internships.

In addition to the above, the more the work done is similar to that performed by regular employees, the less likely the individual will be deemed a trainee. A trainee, according to the DOL, is often more of a burden to supervise than a regular employee. If, on the other hand, as the DOL explained, "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." In this instance, and if the other criteria are satisfied, then the intern may be a non-employee/trainee. Internships should also normally be short-term for fixed periods, without any expectation of employment.

The DOL's pronouncement is limited to for-profit private sector employers. Other employers may be allowed more latitude in using unpaid interns, but the DOL is also specifically reserving the right to review this apparent double-standard further. These employers, though, may be able to classify such individuals as volunteers.

This new and highly publicized DOL announcement should cause employers to closely review their internship programs. Under this guidance, many interns may have to be paid at least the applicable

minimum wage and likely overtime pay. Employers utilizing unpaid interns should have their intern programs reviewed by counsel. The DOL is actively inviting students and others to bring claims on this issue. Indeed, this initiative is only a part of the many other new enforcement initiatives underway by the government, including but not limited to close scrutiny about individuals who may be misclassified as independent contractors.

In other words, and perhaps more so than ever before, employers should closely scrutinize their payroll practices under the FLSA. The DOL is now, more than ever before, eager to prosecute these matters and appears to be less eager to work with employers who are trying to navigate through the maze of complex wage and hour rules.

For additional information, please contact your Butzel Long attorney or the author of this E-news Bulletin.

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