

LEGAL Q & A

By George C. Hlavac, Esq., and Edward J. Easterly, Esq.

Q. *What are some of the legal issues surrounding internships?*

A. *The legal issues concerning internship programs are vast and, at times, confusing even for courts. Nevertheless, the use of internship programs is ever-expanding, with many companies now requiring their new hires to have some prior internship experience. The benefits of an internship program are clear for both the intern and the employer. The intern gains experience and knowledge in a real-world setting in a chosen profession. An employer may use internship programs to find future “stars” for its organization. At times, however, employers use such programs to reap the benefit of “free” labor. As such, the questions surrounding the use of interns in an organization vary from how to structure compensation to the employer’s handling of complaints of discrimination and harassment. This article focuses on the legal implications surrounding internships. It should be noted, however, that at this time there is a void in the specific protections provided to interns and, as such, individuals sometimes fall through the cracks.*

Determining the Relationship

The initial question that must be answered by an organization with respect to its legal obligations for an intern is whether the individual is an employee, trainee, or volunteer. In fact, most, if not all, of the questions surrounding interns focus on their employment definition. The definition of an employee varies, somewhat, between the applicable statutes. Despite the different definitions, it is always difficult for employers to treat interns as nonemployee trainees or volunteers. This is because, generally, an employer treats its interns the same as the rest of its employees. The interns perform the same or similar work performed by other employees, they are supervised and directed like other employees, and are often provided with a financial or other benefit at the direction of the employer.

This is not, however, an unwavering rule. The Department of

Labor (DOL) has indicated that the mere fact that a student receives a “benefit” will not ultimately render them an employee of the organization. Student interns will not be considered employees of an organization where they engage in education or training programs that are designed to provide students with professional experience to further their education and training that are academically oriented for their benefit. As a practical matter, employers need to review all aspects of the relationship before determining that the intern is not an employee thereby absolving the employer of many of the legal responsibilities to that individual.

Compensation

There are obvious reasons beyond legal requirements that an organization must consider when deciding whether to sponsor a paid or unpaid internship (i.e. attracting high-quality interns). Beyond those practical concerns, an organization faces

legal obligation under the Fair Labor Standards Act (FLSA) to provide eligible employees with at least the federally mandated minimum wage.

The FLSA applies to all companies that have at least two employees directly engaged in interstate commerce and annual sales of at least \$500,000. Even if a company does not fall within those requirements, most states have wage payment laws that impose additional legal requirements on an organization (all organizations should check with their legal counsel to determine its requirements under the applicable state and federal laws). Under the FLSA, an “employee” is an individual employed by an employer. This somewhat circular definition is not overly instructive in defining an employment relationship. Nevertheless, if an intern is considered an employee by the FLSA, he or she is afforded all of the protections set forth under the statute. If an individual is a “learner/trainee” however, the requirements of the FLSA do not apply.

In this regard, the Wage and Hour Division of the DOL has developed six criteria for identifying a learner/trainee who may be unpaid. The DOL criteria are:

- The training, even though it includes actual operation of the employer's facilities, is similar to training that would be given in a vocational school.
- The training is for the benefit of the student.
- The student does not displace regular employees, but works under the close observation of a regular employee.
- The employer provides the training and derives no immediate advantage from the activities of the student. Occasionally, the operations may actually be impeded by the training.
- The student is not necessarily entitled to a job at the conclusion

of the training period.

- The employer and the student understand that the student is not entitled to wages for the time spent training.

According to the DOL, all six requirements must be satisfied in order for an intern to be deemed a non-employee trainee. The courts, however, have taken a more liberal interpretation of the six factors and have implied that the requirements should be viewed under a totality of the circumstances that does not require all factors to be met.

Generally, the most difficult factor to establish is the fourth criterion—the employer derives no benefit from the student's activities. In several DOL opinion letters, which do not carry the same weight as court decisions, but are instructive in analyzing an organization's requirements, the DOL has provided guidance on this issue. In its

opinion letters, the DOL has indicated that in situations where interns are responsible for providing a variety of tasks that were part of the normal operations of the organization, the interns would be considered employees under the FLSA. It should also be noted that the foregoing situation involved an internship program that was established solely by the employer without the involvement of the educational institution. It can be inferred that situations where an educational institution sponsors a program and provides academic credits may impact the DOL's determination.

In this regard, the DOL has stated that where the educational or training programs are designed to provide students with professional experience in the furtherance of their education and the training is academically oriented for the benefit of the students, the students

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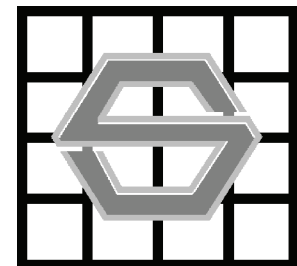
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will not be considered employees of the organization to which they are assigned, provided the six criteria are met. When students volunteer to perform internships under a college for-credit program that involves them in real-life situations providing educational experiences unobtainable in the classroom, an employment relationship will not exist between the student and the organization providing the instruction.

As such, an employer must focus on the productive work performed by the intern. If this work does not outweigh the training and supervision burden imposed on the employer, the DOL is unlikely to find an employee/employer relationship, and the employer will not be subject to the FLSA requirements.

Another question that incorporates the issue of pay is whether an intern is entitled to unemployment compensation at the conclusion of the internship or if the individual is terminated prior to the internship's conclusion. As a practical matter, every state has its own unemployment compensation regulations. In some states, full-time students may not be entitled to unemployment compensation because they are not availing themselves to the work force. As such, individuals and employers are encouraged to seek legal counsel to determine the applicability of unemployment compensation in a given situation.

Are the Interns Independent Contractors Or Volunteers?

It is unlikely that a student intern meets the legal requirements necessary to establish the existence of a bona fide independent contractor or volunteer relationship.

There are several factors to consider when determining if someone is an employee or an independent contractor. The main focus, however, is whether the company exercises control over "the result to be accomplished and means and manner by which the result is achieved." This is, essentially, the definition of an intern. The focus of an internship is for the intern to learn from a company how to perform the required work and when such work is to be accomplished. The company controls most, if not all, aspects of an intern's daily work schedule. As a result, the independent contractor designation will not apply with virtually all internship programs.

With regard to the volunteer classification, the DOL regulations, which have been cited repeatedly by recent court decisions, define a "volunteer" as an individual who provides services to a public agency for civic, charitable, or humanitarian reasons without promise or expectation of compensation for services rendered. As such, the DOL has limited the

application of the term volunteer so that not all individuals are "stamped" as employees. Accordingly, individuals who provide their services to for-profit, private sector employers do not fall within the definition of volunteer. As a result, most interns cannot be classified as volunteers under the applicable laws.

International Students And Internships

Must an international student serving an unpaid internship claim the internship time period as part of his or her practical training time? Can the student serve the internship without authorization from the U.S. Citizenship and Immigration Services (USCIS)?

Some employers have suggested that if the international student is not paid, then the internship is not practical training and the student does not have to claim the internship as part of his/her 12-month allotment of practical training time. Others suggest that if the training is unpaid, students do not have to seek authorization from the USCIS.

There are no easy answers to these issues. The practical training regulations do not address the issues of compensation for practical training. As such, whether or not unpaid internships must be counted toward a student's practical training time is unclear.

Additionally, whether or not an unpaid internship requires USCIS approval is not specifically addressed in the regulations. The only issue that is clear, however, is that international students who work without proper USCIS authorization risk the possibility of sanctions. If an individual is found to be working "out of status," which *could* include working in practical training without the appropriate authorization, the student may be barred from re-entry into the United States for a period of five years. As such, individuals



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employment discrimination and harassment, wrongful discharge, wage and hour, safety and health, employment contracts, non-competition agreements, employee handbooks, union avoidance, collective bargaining agreements, grievance arbitrations, and unfair labor practice charges.

and employers faced with these issues should seek legal counsel from an immigration expert before agreeing to permit an international student to participate in an unpaid internship without receiving appropriate USCIS work authorization approval.

Interns and Noncompete and Nondisclosure Agreement

Many organizations have employees sign nondisclosure and/or noncompete agreements at the commencement of employment to protect its proprietary interests. Such agreements are becoming more and more popular among organizations in today's business world. The applicability of these agreements to an intern, however, is another question altogether.

Nondisclosure Agreements

A nondisclosure agreement prohibits an employee or intern from disclosing an organization's confidential and/or proprietary information to third parties during both the tenure of employment and after termination. In other words, by signing a nondisclosure agreement (also referred to as a "confidentiality agreement") the individual agrees that he or she will not reveal anything the company considers confidential, such as customer lists, marketing and business plans, pricing lists, research and development plans, and any other information that is not publicly known or ascertainable from outside sources. A nondisclosure agreement does not restrict an individual's ability to obtain work upon the termination of employment; it merely limits the information he or she can use once alternative employment is obtained.

Courts routinely find such agreement valid as they do not restrict an individual's ability to perform in his or her chosen profession.

Because interns are generally provided with unlimited access to an employer's business, it is not unusual for a company to require interns to sign a nondisclosure agreement upon the commencement of the program. Employers are generally advised to have interns sign such agreements to protect their organizations' interests, and such agreements should be provided during an intern orientation period. Because most interns have limited, if any, experience in the work force prior to the internship, the impact of the nondisclosure agreement may escape them. Therefore, it is recommended that employers carefully explain the impact and legal ramifications of the nondisclosure agreement to the intern at the time it is provided.

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Noncompete Agreements

Conversely, the sole goal of a non-compete is to limit an individual's ability to perform work in his or her chosen profession for a certain period of time. Specifically, noncompete agreements preclude an individual from working for a competitive company subsequent to the end of the employment/intern relationship. A noncompete agreement generally restricts an individual's ability to work for a competitor for a period of time within a geographic region.

While there is a dearth of case law dealing with the validity of non-compete agreements with respect to interns, courts will review the reasonableness of the restrictions to determine if an agreement is enforceable. Generally speaking, a court looks at the following factors when reviewing a noncompete agreement:

- What is the legitimate interest the employer is trying to protect?
- What is the scope of the agreement (geographic and temporal)?
- What consideration was provided in return for signing the agreement?

Despite the lack of court guidance on this issue, given the nature of an internship program, it is unlikely that a court would find such an agreement valid. As an initial matter, because most interns do not enter the work force immediately, the temporal scope of the restriction would have to be significant and, in turn, overbroad. In addition, an employer is going to be hard-pressed to point to the "legitimate interest" it is trying to protect with the use of such an agreement.

Nevertheless, if an organization desires the use of a noncompete for its interns it should, at a minimum, do the following:

- Explain to the student that the internship is predicated on signing the noncompete;
- Discuss the purpose, intent, and crucial provisions of the non-compete with the intern;
- Ensure that the agreement contains the necessary definitions, specifically, the activity to

be restricted and the time and geographic limits of the restriction; and

- Have the agreement executed by the intern contemporaneously with the start of the internship.

Workers' Compensation Issues

Workers' compensation provides limited benefits to individuals who suffer injuries during the course of and arising out of the performance of their employment. Generally, workers' compensation laws vary from state to state. Therefore, prior to implementing any internship programs, the organization should determine whether it is necessary to cover interns under the workers' compensation insurance program.

Generally, however, questions of whether an individual is an "employee" and whether the intern is paid or unpaid are essential to determining coverage under the applicable workers' compensation statutes. In some relatively recent cases, courts have found that where the internship is "paid" the responsibility to provide workers' compensation coverage falls to the employer. If, on the other hand, the internship is unpaid and it is affiliated or sponsored by the educational institution, the burden falls on the school to provide workers' compensation coverage.

Regardless, it is imperative to make a determination prior to implementing an internship program. In most instances, workers' compensation claims bar recovery by the intern for any work-related injuries. Thus, if an intern is injured while on an employer's premises, his or her sole recovery would be under the applicable workers' compensation statutes. Absent such coverage, an intern can seek compensation for both emotional distress and pain and suffering from the employer, or the educational institution, under general tort remedies, which significantly increase the potential exposure to

these entities. By way of example, in a recent case, a court found that an educational institution could be negligent where a student was assaulted at her internship location, the site of which was selected by the university. The court found that negligence could be imposed where the university assigned the intern to perform the position at a facility it knew was unreasonably dangerous and presented the risk of harm. To avoid potential exposure, employers and educational institutions may want to cover interns even if not legally required to do so.

Minority-Only Internships

As a general matter, "exclusive" programs are deemed impermissible by the Supreme Court of the United States. If an employer chooses to implement such a program regardless, it will generally be subject to strict scrutiny. As a result, the program must be narrowly tailored to remedy the present effects of past discrimination or implemented to promote diversity. In other words, the program must be necessary to further the organization's interest in diversity and must not unduly restrict access to the benefits for students who do not meet the race-based eligibility criteria. If such a program is not narrowly tailored, it is likely to be deemed discriminatory under the law.

Further, strict scrutiny must be applied within the *context* of the program under review. The narrowly tailored inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve diversity or remedy past discrimination. The organization must show that the means chosen closely fit the compelling goal of the program. In other words, the organization must show that the minority-exclusive internship program is being used to rectify the organization's poor reputation within that specific minority community or that group's underrepresentation in the organization.

If an organization can satisfy the foregoing requirements, it may implement an exclusive internship program; however, organizations should be extremely careful when doing so. If the program is deemed to be discriminatory, the potential liability to the organization is severe.

Discrimination Issues

Both federal and state statutes provide protections for individuals to be free from discrimination at the workplace. The key inquiry, however, to determine whether interns are protected is again whether they fall within the definition of an “employee” under the relevant statute.

Remuneration in exchange for services is an essential condition to the existence of an employer/employee relationship under anti-discrimination laws. As an initial matter, when an intern is supervised, provided direction, and paid compensation by the employer, there is little question that he or she is an employee for purposes of anti-discrimination statutes. The question is what happens where the individual is not provided with “pay” but with other types of compensation. In one key case, the New York Court of Appeals held that a student intern could not maintain a cause of action for sexual harassment because she was not an employee of the company. The intern was not provided with any salary, wages, health insurance, vacation, or sick pay, or any promise of indirect compensation from the company. As a result, she was not protected by the federal anti-discrimination statutes.

Courts have, however, determined that nontraditional benefits may amount to remuneration to establish an employment relationship. A minority of courts have stated that non-financial benefits that create or relate to career opportunities may suffice. By way of example, free training and educational opportunities (such as a corporate leadership course) may establish an employer/employee

relationship where the individual can demonstrate an economic dependence upon the training and not a mere pleasure from the “compensation.” Further, at least one court has found that where a volunteer was provided with a “clear pathway to employment” deriving from her position as a volunteer, she could establish the plausibility of an employment relationship under federal anti-discrimination laws. As such, even if an intern is not provided with the traditional form of compensation, a court is likely to find that the intern is afforded protections under federal and state anti-discrimination laws if he or she can show the internship provided a pathway to employment, a standard that is not hard to overcome in most instances.

Even if a student intern is not afforded protections under the “standard” anti-discrimination statutes (Title VII, the Americans With Disabilities Act and the Age Discrimination in Employment Act), he or she may bring a claim under 42 U.S.C. § 1981 if the claim is based upon his or her race or ethnicity. The protections afforded under Section 1981 are not limited to individuals solely upon the presence of an employment relationship. Under Section 1981, all persons have the same right to “make and enforce contracts...as is enjoyed by white citizens.” Even if an intern is unpaid, the argument can easily be made that the exchange of services for training and experience can satisfy the “contract” requirement of Section 1981 and the intern is therefore afforded protection under Section 1981.

Additionally, as mentioned above, both employers and universities can be subject to common law tort theories of liability. If the unpaid interns are unable to use the statutory protections, they may still file suit for intentional infliction of emotional distress for harassment or discrimination. As a result, employers should treat interns the same as regular employees in this regard and investigate all claims of discrimination promptly and effectively.

Recommendations

Given all the potential pitfalls surrounding the use of internship programs the employer should develop a detailed program that fits its specific needs. The program should determine whether the intern will be compensated, the workspace the intern will use, and what type of supervision will be provided. If the internship is sponsored by the educational institution, the company needs to coordinate with the school to determine any specific requirements mandated by the institution.

In addition, a company should implement an orientation program that defines the intern’s role within the organization. Specifically, the intern should be informed what training is provided, what projects will be assigned, and who he or she reports to. A clear definition of the intern’s role will limit any questions on his or her status within the organization (and may limit liability if an organization intends to provide the internship on an unpaid basis). Additionally, the company should review all of its policies and procedures with the intern during this period. This includes any requirements with respect to safety as well as the intern’s requirements under any non-disclosure or non-compete agreements.

Further, if the internship is paid, any “time-keeping” requirements should be discussed during this meeting. In today’s world, many organizations use virtual employment techniques outside of the workplace. An intern should be instructed in what constitutes working hours so proper compensation can be determined and the company is not exposed to liability under the FLSA.

Given the variety of issues that may arise and the different laws that may be applicable to a company, any internship program should be reviewed by counsel prior to implementation. 