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Intern or Employee? Another Federal Appeals Court Rejects DOL Test

Last month, the 11th Circuit Court of Appeals considered the proper test for determining whether an intern is an “employee” for purposes of the FLSA’s minimum wage and overtime rules. The court rejected the DOL six-factor test in favor of a more flexible “primary beneficiary” approach to modern internships. In doing so, the court joined two other appeals courts that weigh an internship’s benefits to the intern against those to the employer to determine employee status. While employers in those jurisdictions may now have more leeway in program design, they should continue to approach unpaid internships with caution.

Background

The Fair Labor Standards Act (FLSA) requires employers to pay “employees" a minimum wage, and overtime at time and one-half for hours worked in excess of 40 per week. The FLSA broadly defines “employee” as an “individual employed by an employer,” “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee” and “employ” as “to suffer or permit to work.” Whether individuals in unpaid internship or training programs are “employees” for purposes of the FLSA and state wage and hour laws has been the subject of much recent debate and litigation.

In 2010, DOL guidance laid out a six-factor test to determine the employment status of interns at for-profit businesses under the FLSA. Under that test, interns are employees who must be paid unless all six factors are satisfied. On July 2, the 2nd Circuit Court of Appeals rejected the DOL’s all-or-nothing approach in favor of a more flexible “primary beneficiary test” that weighs the internship’s benefits to the intern against those to the employer. (See our August 19, 2015 *For Your Information*.) The 6th Circuit Court of Appeals previously rejected the DOL test, similarly concluding that the proper test for determining whether an employment relationship exists in a training or learning situation is which party derives the primary benefit of the work performed.

11th Circuit Weighs In

Last month, the11th Circuit Court of Appeals considered the proper test for determining an intern's employee status under the FLSA. In *Schumann v. Collier Anesthesia, P.A.*, this court — like the 2nd Circuit — rejected the DOL test as "too rigid." The case involved registered nurse anesthetists pursuing masters' degrees from a for-profit college. State law required students to participate in a clinical program, or internship, to receive their degrees, certifications and licenses. Generally, students fulfilled the clinical hours requirement by working at Collier-staffed facilities, often on a full-time basis. Applying the DOL test, the lower court concluded they were not employees for purposes of the FLSA and dismissed the case. The students appealed.

On appeal, the 11th Circuit concluded that the DOL test was neither persuasive nor entitled to deference. Rather, the court embraced the 2nd Circuit's more flexible approach that considers a non-exhaustive list of key factors in determining the primary beneficiary of the relationship, including the extent to which:

1. The intern and employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee — and vice versa.
2. The internship provides training similar to that given in an education environment, including the clinical and other hands-on training provided by such institutions.
3. The internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The internship's duration is limited to the period in which it provides the intern with beneficial learning.
6. The intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The intern and the employer understand that the internship is conducted without entitlement to a paid job at the end of the internship.

Adopting this approach, the 11th Circuit made clear that intern classification is to be determined on a case-by-case basis weighing and balancing the relevant factors. The court did not, however, decide whether these students were "employees" for purposes of the FLSA. Instead, it set aside the lower court's earlier ruling and sent the case back to that court to apply the above factors in making that determination.

Increasing Protections for Interns

Last year, both NYC and New York state extended protections from workplace harassment and discrimination to unpaid interns. (See our *For Your Information* issues from **April 30** and **August 15, 2014**.) Other states like Oregon and California have similar protections in place. Last month, Texas **amended** its labor code to protect unpaid interns from sexual harassment. This month, **Connecticut** and **Maryland** extended statutory protections against workplace harassment and discrimination to unpaid interns in their states.

In Closing

Unpaid internships — particularly in for-profit companies — have come under increasing scrutiny for alleged violations of federal and state wage and hour laws. In response, some employers have opted to end their programs

while others have decided to pay their interns. Even in the face of what may be a developing consensus that the rigid DOL test is outdated, employers that offer internships still face potential FLSA concerns. While employers that continue to participate in these programs may have more design flexibility in some jurisdictions, they should approach unpaid internships with care.

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