look at case law and federal and state rules before doing so.

Lisa Fagan • Jun. 12, 2019

Summer is rapidly approaching. Many employers hire interns during the summer to help out around the office. Interns can gain valuable work experience to include on their resumes – but some employers do not intend to pay them. This could be a costly mistake if the unpaid interns are entitled to pay under either federal or state wage and hour laws.

Employers who are considering offering an unpaid internship program should take a look at case law and federal and state rules before doing so. In 2010, the DOL's Wage and Hour Division (WHD) issued a fact sheet (https://bit.ly/1sayFho) to help

employers determine whether interns must be paid minimum wage and overtime.

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.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Primary beneficiary test

The tide began to turn against the six-factor test and towards a test that examined who was the primary beneficiary of the internship relationship with the U.S. Court of Appeals for the Second Circuit's opinion in *Glatt v. Spotlight Searchlight Pictures, Inc.* in 2015. In that case, involving interns at a movie production company, the court declined to follow DOL Fact Sheet #71 to determine whether the interns should have been paid. It pointed out that the fact sheet is based on a 67-year-old federal case on unpaid railroad brakemen trainees that didn't apply to all workplaces. For example, the interns in *Glatt,* unlike the brakemen, were enrolled in or had recently completed a formal course of post-secondary education.

Instead, the *Glatt* court enumerated a list of factors that put more reliance on who the primary beneficiary in the relationship. This new test said that the court should look at factors such as the extent to which:

1. The intern and employer understand that there is no expectation of compensation (any express or implied promise of compensation supports a finding that the intern is an employee);
2. The internship provides training that would be similar to that which would be given in an educational environment;
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 the internship provides

More court decisions followed that adopted the "primary beneficiary test," including *Mark v. Gawker Media, LLC,* DC NY, (2016); *Schumann v. Collier Anesthesia, P.A.,* CA 11, (2015); and *Benjamin v. B&H Education, Inc.,* CA 9, (2017).

DOL adopts primary beneficiary test

The DOL subsequently issued a revised Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (https://bit.ly/1sayFho), in 2018. The revised Fact Sheet adopts the factors set forth in the *Glatt* decision. The Fact Sheet explains that if analysis of these circumstances reveals that an intern or student is actually an employee, then he or she is entitled to both minimum wage and overtime pay under the FLSA. On the other hand, if the analysis confirms that the intern or student is not an employee, then he or she is not entitled to either minimum wage or overtime pay under the FLSA.

The bottom line is that any internship applications or job offer letters should specifically state it is an unpaid internship, and that the intern is not entitled to a job at the end of the internship. The application and job offer letters should be different from those provided to regular employees.

=========

Lisa Fagan is Editor of Tax Products for Thomson Reuters. This article first appeared on the Thomson Reuters blog: https://tax.thomsonreuters.com/blog.

Payroll