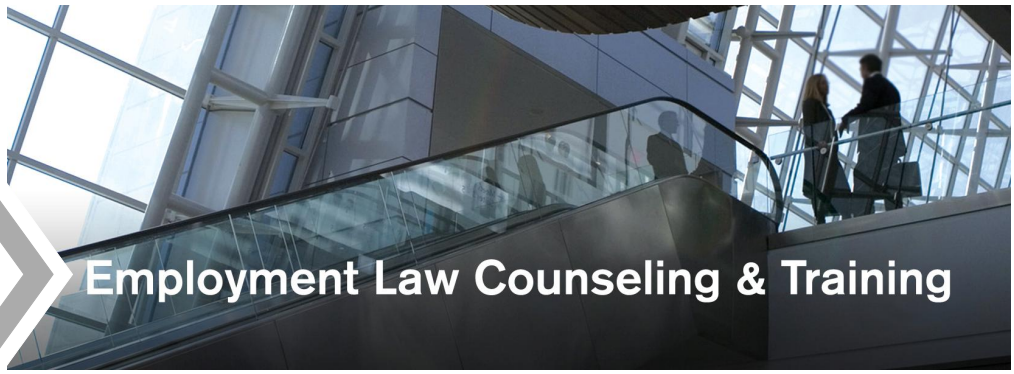
Proskauer

newsletter



Employment Law Counseling & Training

June 2011
in this issue

Published by Proskauer Rose, the "Employment Law Counseling & Training Tip of the Month" provides best practice tips to assist employers in meeting today's challenging workplace environment. Our Employment Law Counseling & Training Practice Group counsels employers with respect to the interplay of multiple federal, state, and local laws governing today's workplace, helping them avoid workplace problems, and improve employee satisfaction.

Tip of the Month: Interns, Volunteers, and Employees: Are You in Compliance?

Tip: Now is the time of year when many employers look forward to the arrival of summer interns or volunteers, often students, but not infrequently, college graduates, many of whom are willing to forgo a paycheck, and are instead eager to give their time in exchange for getting "real world" experience. Ascribing the term "intern" or "volunteer" to these positions, however, does not automatically exempt the employer from federal and state minimum wage overtime requirements. Indeed, unless the positions meet certain statutory and regulatory criteria, these individuals will be subject to the same wage-hour requirements as employees. The stakes for failing to compensate an employee properly are high – an employer's liability can include back wages, overtime, and liquidated and punitive damages. In addition, under federal and New York law, possible criminal liability and attorney fees are also available. Employers must therefore be mindful of the criteria set forth by the federal Fair Labor Standards Act ("FLSA") and applicable state laws when they engage workers as unpaid interns and volunteers.

Unpaid Interns

Whether an intern may properly be considered a "trainee" and not an "employee" under the FLSA (and a number of state laws) often requires a fact-specific inquiry, and will depend on all the circumstances surrounding the intern's duties. Where educational or training programs are designed to provide interns with professional experience in furtherance of their education, and the training is academically oriented for the benefit of the interns, the interns generally are not considered employees. The U.S. Department of Labor ("USDOL") has established the six criteria listed below to guide courts and employers in determining whether trainees, students, interns and the like are considered employees under the FLSA:

1. The individual receives training similar to what would be given in a vocational school or academic educational instruction;
2. The training is for the benefit of the intern or trainee;

3. The interns or trainees do not displace regular employees, but work under close observation;

4. The employer that provides the training derives no immediate advantage from the activities of the individuals and on occasion the employer's operations may actually be impeded;

5. The interns or trainees are not necessarily entitled to a job at the conclusion of the training period; and

6. The employer and the individual understand that no wages are paid for the time spent in the internship.

See USDOL Fact Sheet #71: *Internship Programs under the Fair Labor Standards Act*. The USDOL requires that all six of these criteria must be satisfied for an individual to be deemed an "intern" under the FLSA.

A number of states have set forth similar, and in some cases more stringent, criteria to determine the existence of an employment relationship for interns and trainees. For example, both California's Division of Labor Standards Enforcement and New York's Department of Labor have established five *additional* criteria to the USDOL's six, to be used in determining whether an individual is an "employee" under each state's labor standards. These additional criteria are essentially the same in both California and New York:

1. Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed.[1]

2. The interns do not receive employee benefits.

3. The training is general, so as to qualify the interns to perform work for any similar employer, rather than designed specifically as preparation for a job with the employer offering the program.

4. The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program.

5. Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

See N.Y. Dep't of Labor Opinion Letter, RO-09-0189, Dec. 21, 2010; *Cal. Div. of Labor Standards Enforcement,* 1998.11.12. Further, both states require that *all* of the above five criteria plus the six established by the USDOL be satisfied in order to exempt the internship program from the state's minimum wage and overtime requirements. *Id.*

---

[1] This language is used by the New York State Department of Labor. In California, this criterion requires that "any clinical training be part of an educational curriculum."

In a recent opinion out of the U.S. Court of Appeals for the Sixth Circuit, however, the court affirmed the district court's decision *not* to follow the USDOL's 6-factor test guidelines in assessing whether students receiving vocational training at a private, not-for-profit boarding school were "employees" under the FLSA. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, No. 09-6128, 2011 U.S. App. LEXIS 8585 (6th Cir. Apr. 28, 2011). As part of the curriculum, students spent four hours per day learning practical skills and were assigned various duties, including in the Sanitarium's kitchen and housekeeping departments. In affirming the district court's opinion, the Circuit Court opined that the USDOL's 6-factor test is "a poor method for determining employee status in a training or educational setting." *Id.* at *19. The Circuit Court held that "the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship." *Id.* at *30–31.

Use of the "primary benefit" test in *Laurelbrook* represents a minority view, and in this case was specific to individuals performing duties in a training or educational setting. Yet, at the same time, it is worth noting that the USDOL "interns" test gets somewhat different levels of deference by courts in connection with "trainees" where employers create training programs (often non-compensable) of very short duration (*e.g.*, 2 weeks) to identify future employees. While most courts hold that the USDOL 6-factor test is entitled to substantial deference, a number of other courts have held that not all 6 factors need be met, others apply a "totality of circumstances" assessment permitting the courts to better evaluate the "economic reality," while others apply a "primary beneficiary" test evaluating whether the trainee or employer is the primary beneficiary.

Volunteers

Under the FLSA, "volunteers" are treated somewhat differently than interns or trainees, although, again, employers must be wary. Most notably, for *public* agencies, the FLSA provides an exemption that excludes "volunteers" from the definition of "employee," provided certain criteria are met. For public sector employees to volunteer with their employing public agency and maintain "volunteer" status for their "volunteer" activities, the individuals must:

1. perform hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered – although a volunteer can be paid expenses, reasonable benefits, or a nominal fee to perform services;
2. offer services freely and without pressure or coercion; and
3. not otherwise be employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

See 29 U.S.C. § 203(e)(4)(A); 29 C.F.R. §§ 553.101, .103, .104, .106. This volunteer exemption, however, is limited to public sector employers. Under no circumstance will an individual be deemed a "volunteer" when providing services to private, *for-profit* employers. Any individual providing services for such an employer may do so only as an intern/trainee (provided the necessary criteria are met) or an employee.

Private, *not*-for-profit employers, on the other hand, have been treated somewhat differently by the USDOL than private, *for*-profit employers. The USDOL's enforcement position has generally been that volunteer work for a private, not-for-profit employer is *not* considered compensable under the FLSA so long as certain criteria are met (e.g., the absence of coercion on the individual and the services donated are not the same type of services as those the individual performs as an employee for that very organization). *Field Operations Handbook* § 10b03(d). Nevertheless, successful lawsuits have been brought against not-for profit organizations for suffering or permitting work of "volunteers." Thus, in the U.S. Supreme Court's landmark *Alamo* decision, the USDOL sued a religious foundation for violations of the FLSA, where individuals provided services for the foundation's commercial activities and, in exchange, expected to receive in-kind benefits, such as food, clothing and shelter. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985). In affirming the opinion of the U.S. Court of Appeals for the Eighth Circuit, that the individuals were in fact "employees" under the FLSA, the Supreme Court held that protestations of workers that they are *not* employees and do not expect compensation is not dispositive of whether they are employees covered by the FLSA; rather, the test of employment under the under the FLSA is one of "economic reality". *Id.* at 300–01.

The FLSA does provide a narrow volunteer exemption in the private, not-for-profit employer context. This exemption is for individuals who provide volunteer services to not-for-profit organizations, such as food banks, solely for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation. *See* 29 U.S.C. § 203(5); 29 C.F.R. § 553.101(a). Other volunteer services covered by this exemption include:

- services to shelters;
- personal services to the sick or elderly in a hospital or nursing homes;
- services to a school library or cafeteria;
- driving a school bus for a football team or band trip;
- working as firefighters or auxiliary police;
- working with certain disabled or disadvantaged youths;
- helping with youth-based programs as camp counselors;
- soliciting contributions or participating in civic or charitable benefit programs or educational programs.

See 29 C.F.R. § 553.104(b); Field Operations Handbook § 10b03(c), (d).

Avoiding "Intern" and "Volunteer" Misclassifications

The exclusion from the definition of employment by the FLSA is narrow in order to underscore the public policy remedial objectives of the law. Individuals who are "suffered or permitted" to work, in most instances, must be compensated by the employer. That said, the reach of "employ" under the FLSA is not unlimited. There are steps employers can take to be proactive in reducing the risk of FLSA and/or state misclassification

violations. *First*, employers should ensure that the intern, and not the business, obtains the primary benefit of the internship experience. *Second*, employers are well advised to maintain documentation regarding the structure and features of the internship program. *Third*, the more an internship program is structured around a classroom, school credits, or academic experience, as opposed to the company's actual operations, the more likely the intern or trainee will *not* be considered an "employee."

In addition, documentation should include, for example, an agreement detailing the parties' mutual intent that: (1) their relationship will not be one of employment but rather an internship for the individual's benefit, (2) the intern does not expect employment or compensation, and (3) the relationship is to provide the intern with skills that can be used in multiple settings. *Finally*, employers should review their internship and volunteer programs with special care to determine how the program is actually working in practice – looking at the design of the program alone (or the labels used to describe it) is not sufficient.

As the above discussion demonstrates, distinguishing between "intern" and "employee" often requires an intensive and fact-specific analysis. Given the potential penalties an employer faces for misclassifying its employees, interns, trainees, and volunteers, compliance with the FLSA and corresponding state laws must be taken seriously.

If you have any questions about the manner in which your company has classified its employees and/or interns, please contact your Proskauer relationship lawyer or any of the Co-Chairs of Proskauer's Employment Law Counseling Practice Group.

The Proskauer Rose Employment Law Counseling and Training Practice Group is a multidisciplinary practice group throughout the national and international offices of the firm which advises and counsels clients in all facets of the employment relationship including compliance with federal, state and local labor and employment laws; review and audit of employment practices, including wage-hour and independent contractor audits; advice on regulations; best practices to avoid workplace problems and improve employee satisfaction; management training; and litigation support to resolve existing disputes.

For more information about this practice group, click here or if you have any questions regarding the matters discussed in this Newsletter, please contact any of the lawyers listed below:

NEW YORK

Fredric C. Leffler
212.969.3570 – fleffler@proskauer.com

Marc A. Mandelman
212.969.3113 – mmandelman@proskauer.com

Katharine Parker
212.969.3009 – kparker@proskauer.com

Kristine K. Huggins
212.969. 3939 – khuggins@proskauer.com

NEWARK

Wanda L. Ellert
973.274.3285 – wellert@proskauer.com

John P. Barry
973.274. 6081 – jbarry@proskauer.com

BOSTON

Mark W. Batten
617.526.9850 – mbatten@proskauer.com

WASHINGTON, D.C.

Lawrence Z. Lorber
202.416.6891 – llorber@proskauer.com

Leslie E. Silverman
202.416.5836 – lsilverman@proskauer.com

BOCA RATON

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

NEW ORLEANS

Charles F. Seemann
504.310.4091 – cseemann@proskauer.com

LOS ANGELES

Harold M. Brody
310.284.5625 – hbrody@proskauer.com

CHICAGO

Nigel F. Telman
312.962.3548 – ntelman@proskauer.com