

Employment, Labor and Benefits Alert: DOL Signals Intent to Increase Oversight of Unpaid Interns

4/29/2010

By [Martha J. Zackin](#)

With unemployment at a near-record high, many people are finding it extremely difficult to find gainful employment in their chosen field and would willingly accept unpaid internships to develop their skills and build their resumes. Employers should be cautious, however, to ensure that any unpaid internship meets the law's rigorous requirements, especially now that the Department of Labor (DOL) has shown increased interest in this issue.

The federal Fair Labor Standards Act (FLSA) and similar state laws require employers to pay covered employees at least the applicable minimum wage and, except in certain circumstances, overtime pay of at least one-and-one-half-times the regular rate of pay. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. Such arrangements for private sector, for-profit employers are only permissible, however, if specific criteria are met.

According to a [fact sheet](#) recently published by the DOL, the following six criteria must be applied to determine whether individuals who participate in "for-profit" private-sector internships or training programs may do so without compensation:

- The internship is similar to training that would be given in an educational environment.
- The internship experience is for the benefit of the intern.
- The intern does not displace regular employees, but works under close supervision of existing staff.
- The employer providing the training derives no immediate advantage from the activities of the intern; indeed, on occasion its operations may actually be impeded.
- The intern is not necessarily entitled to a job at the conclusion of the internship.
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In general, the more an internship program is structured around a classroom or academic experience, providing interns with general skills that can be used in a variety of employment settings, the more likely the employer will be excused from paying wages. In contrast, if the interns are learning skills specific to the employer's operations, are engaged in the routine 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 educational benefit will not exclude them from the FLSA's minimum wage and overtime requirements.

Damages and penalties for violations of the wage and hour laws can be significant. Individuals who are employed as unpaid interns in situations that do not qualify for such treatment may bring civil actions for unpaid wages and overtime. Under the FLSA, damages can be tripled in many circumstances and the employee can also recover attorneys' fees and costs. In addition, willful violators may be prosecuted criminally and fined up to \$10,000; a second conviction may result in imprisonment. The remedies available to employees are even more draconian under the law of many states. For example, under Massachusetts law, treble damages are mandatory, and damages and attorneys' fees may be awarded not only against the company employing the intern, but also against the company's president, treasurer, and any officer or agent involved in the management of the company. Fines may also be imposed under Massachusetts law, from up to \$10,000 for a first, unintentional offense to as much as \$50,000 for subsequent, willful offenses. Massachusetts law also provides for imprisonment, although this penalty is rarely, if ever, imposed.

Action Items for Employers

Labor organizations nationwide are trying to increase government oversight and regulation of unpaid internships. Given the Obama administration's focus on the enforcement of worker protection laws, this effort is likely to be successful.

Accordingly, all employers—but especially those in the “for-profit” sector—should ensure that the design of any program for unpaid internships fits squarely within the DOL guidelines, and comports with any applicable state-specific requirements. Furthermore, employers should periodically review the operation of such programs to confirm that, in practice as well as in design, interns are actually receiving general training in an educational environment, rather than performing services for the benefit of the employer, and are otherwise meeting the requirements articulated by the DOL.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

MEMBERS

David Barmak

(202) 585-3507

DBarmak@mintz.com

Andrew J. Bernstein

(212) 692-6742

AJBernstein@mintz.com

Richard H. Block

(212) 692-6741

RHBlock@mintz.com

Bret A. Cohen
(617) 348-3089
BCohen@mintz.com

Raymond D. Cotton
(202) 434-7322
RDCotton@mintz.com

Micha “Mitch” Danzig
(858) 314-1502
MDanzig@mintz.com

Robert M. Gault
(617) 348-1643
RMGault@mintz.com

James R. Hays
(212) 692-6276
JRHays@mintz.com

H. Andrew Matzkin
(617) 348-1683
HMatzkin@mintz.com

Jennifer B. Rubin
(212) 692-6766
JBRubin@mintz.com

Donald W. Schroeder
(617) 348-3077
DSchroeder@mintz.com

Henry A. Sullivan
(617) 348-1746
HASullivan@mintz.com

OF COUNSEL

Martha J. Zackin
(617) 348-4415
MJZackin@mintz.com

ASSOCIATES

Michael S. Arnold

(212) 692-6866

MArnold@mintz.com

Katharine O. Beattie

(617) 348-1887

KOBeattie@mintz.com

Gregory R. Bennett

(212) 692-6842

GBennett@mintz.com

Jessica W. Catlow

(212) 692-6843

JCatlow@mintz.com

Jennifer F. DiMarco

(212) 692-6260

JFDiMarco@mintz.com

Kelley L. Finnerty

(617) 348-1819

KFinnerty@mintz.com

David M. Katz

(212) 692-6844

DKatz@mintz.com

Paula Lyons

(617) 348-1831

PLyons@mintz.com

James M. Nicholas

(617) 348-1620

JNicholas@mintz.com

Maura M. Pelham

(617) 348-1851

MMPelham@mintz.com

Tyrone P. Thomas

(202) 434-7374

TPTThomas@mintz.com

Brandon T. Willenberg
(858) 314-1522
BTWillenberg@mintz.com