

Internships and Federal Law -- Are Interns Employees?

May 25, 2010

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Employers cannot avoid the requirements of federal law by simply labeling employees as "interns" or "trainees." As a general rule, those engaged in legitimate internships or training programs are not covered by federal employment law. But if the would-be intern or trainee is actually an employee by another name, an employment relationship exists, and the intern or trainee is entitled to all the benefits and protections of federal law. Including the rights to minimum wage, overtime, and a discrimination free workplace.

The issue, then, is whether an employment relationship in fact exists; whether, despite the title, the would-be intern or trainee is actually an employee. Unfortunately, none of the primary federal employment laws, specifically the Fair Labor Standards Act and the anti-discrimination statutes, provide any meaningful guidance on the distinction between employees and interns or trainees. Thus, the question has been left to the Department of Labor and the federal courts. And as is normally the case in such situations, the DOL and the courts have developed a highly fact specific analysis, and even then, whether an employment relationship exists is not always clear. Instead, whether an intern or trainee is entitled to such things minimum wage and overtime compensation will often depend upon whether the individual is receiving training without displacing other employees or providing any real benefit to the employer.

Internships and the Fair Labor Standards Act -- Six Factors for Avoiding Liability

The primary issue employers face in this area, is whether an intern or trainee is entitled to minimum wage or even overtime compensation. The answer, of course, depends upon whether the individual is covered by the FLSA. The FLSA requires, among other things, that employers pay all employees at least the minimum wage. The difficulty is determining whether an intern or trainee is actually an employee.

The FLSA's definitions are of little help. The Act simply defines an employee as "any individual employed by an employer." An employer, in turn, is "any person acting directly or indirectly in the interest of an employer in relation to an employee." And to "employ," means only to "suffer or permit to work." That is, an employer is anyone who employs an employee, and an employee is anyone employed by an employer. Under a strict reading of these circular definitions, anyone who performs any work whatsoever, is likely an employee, and consequently entitled to minimum wage and overtime compensation.

The Supreme Court, however, has long recognized that Congress did not intend the FLSA to require that all individuals who work for an employer be paid minimum wage. In *Walling v. Portland Terminal Co.*, the Court found that, under certain circumstances, such as where individuals choose to work for their own advantage, an employer may provide training to unpaid volunteers, without violating the FLSA.

Briefly, the issue in *Walling* was whether the employer, Portland Terminal Co., was required to pay its trainees minimum wage. At the time, Portland Terminal's policy required that any individual who sought

employment as a brakeman, was first required to attend and complete a practical training course. The course typically lasted anywhere from seven to eight days, and all prospective employees were required to complete the course. Portland Terminal would not consider any applicant who either refused to take or failed to complete the training course.

Once prospective brakemen completed the initial training course, they were then assigned to work on a yard crew. According to Portland Terminal, the purpose of this second assignment was so that the prospective employees could learn the necessary routines and activities through observation. Only after completing the course were the trainees finally put to work, and only then under very close scrutiny. The prospective employees were not compensated during this training period.

After an examination of the scope and purpose of the FLSA, the Supreme Court ultimately concluded that the trainees were not employees, at least for purposes of the FLSA, during the training period. The Court noted that the trainees did not displace any regular employees, nor did Portland Terminal receive any immediate advantage from the trainees during the training period -- indeed, the evidence indicated that the trainees actually hindered the company's productivity. Just as importantly, the trainees entered the arrangement without any expectation of compensation; they knew they would not be paid.

Accordingly, because the Trainees were not employees, they were not entitled to the protections of the FLSA, and Portland Terminal was within its rights to refuse to provide any compensation at all. The Court reasoned that although the FLSA is an exceedingly broad statute, Congress could not have intended "to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." Otherwise, as the Court analogized, "all students would be employees of the school or college they attended, and as such entitled to receive minimum wages."

Instead, the purpose of the FLSA "was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage." According to the Court, the Act was not designed to prevent employers from providing free instruction, or to penalize them for doing so. Thus, where an individual "who, without promise or expectation of compensation, but solely for his personal purpose or pleasure," works on the premises of another, the FLSA does not require that the individual receive minimum compensation.

Although the Supreme Court decided *Walling* in 1947, it has remained the seminal case in this area. Following the *Walling* decision, the Wage and Hour Division of the Department of Labor devised a six part test to guide its determination as to whether an employment relationship exists for purposes of the FLSA. Specifically, the DOL considers whether:

1. the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. the training is for the benefit of the trainees;
3. the 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 trainees and on occasion his operations may actually be impeded;
5. the trainees are not necessarily entitled to a job at the completion of the training period; and
6. the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Unless all six factors are met, the DOL will find that an employment relationship exists. The agency has applied these six factors in several opinion letters. Most recently, on May 17, 2004, the DOL found that college students participating in a summer internship program may be covered by the FLSA. According to the information provided by the potential employer, college students would be invited to participate in an internship, with the purpose learning "marketing, promotion, and statistical analysis in a real world setting."

The students could participate only if they simultaneously received college credit, and a faculty supervisor was responsible for consulting with the company regarding the performance of the student interns. The company, however, assumed the responsibility for direct supervision of the interns.

The would-be employer further explained that the internship was structured like a college marketing course, and the student interns would work flexible schedules of between seven and ten hours per week. Their duties would include wearing clothing embossed with the company's logo, and distributing stickers and flyers on campus. The interns would also be responsible for evaluating student responses to the promotional items, collecting data on the composition of the campus population and surrounding city, utilizing on-line chat rooms to track the effectiveness of certain web sites, obtaining information on the most popular campus locations, surveying at least 50 people on campus, and ultimately compiling data to predict trends both locally and nationally.

Based on these facts, the DOL concluded that it could not definitively state that an employment relationship did not exist. That is, even under these facts, it was possible that the interns were employees under the six part test, and thus entitled to compensation. The DOL found that the interns clearly satisfied the first criteria, as the training program was similar to what the interns would learn in school. Likewise, the second, fifth and sixth factors were satisfied, since the program clearly inured to the benefit of the interns, the interns were not guaranteed jobs at the conclusion of the internship, and the interns neither received nor expected compensation.

But based upon the information provided by the company, the Department of Labor could not determine whether the employer satisfied the third and fourth factors. Given the intern's duties it was at least possible that they displaced other employees (although, the Department of Labor noted that this appeared unlikely), and that the company derived some immediate benefit from the intern's activities.

The federal courts, however, are less inclined to strictly follow the six factor approach. For example, the Fourth Circuit has repeatedly held "that the general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees' labor." *Wirtz v. Wardlaw*, 339 F. 2d, 785 (4th Cir. 1964), *Isaacson v. Penn Community Services, Inc.*, 450 F.2d 1306 (4th Cir.1971), and *McLaughlin v. Ensley* 877 F.2d 1207 (4th Cir.1989). Likewise, the Tenth Circuit adopted a "totality of the circumstances" test, under which the Department of Labor's six factors provide helpful guidance, but are not dispositive. *Reich v. Parker Fire Protection Dist.*, 992 F. 2d 1023 (10th Cir. 1993). And the Fifth Circuit, in *Donovan v. American Airlines, Inc.*, 686 F. 2d 267 (5th Cir. 1982) cited the six factor test with approval, but did not expressly adopt the test, nor require that all six factors be met in order to avoid an employment relationship under the FLSA.

Internships and the Anti-Discrimination Laws

A lesser, but nevertheless important consideration, is whether interns and trainees are entitled to the protections of the anti-discrimination statutes, including the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Like the FLSA, these anti-discrimination statutes generally apply to the employment relationship. And like the FLSA, these statutes provide broad, if somewhat unhelpful, definitions of employment -- each of one defines an "employee" as simply "an individual employed by an employer."

The federal courts have traditionally applied common law agency principles to determine whether an employment relationship exists for purposes of federal anti-discrimination laws. Since the Supreme Court's decision in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), courts have generally applied the following thirteen factors to determine whether an employment relationship exists.

1. the hiring party's right to control the manner and means by which the product is accomplished;
2. the skill required by the hired party;

3. the source of instrumentalities and tools;
4. the location of the work;
5. the duration of the relationship between the parties;
6. the hiring party's right to assign additional projects;
7. the hired party's discretion over when and how long to work;
8. the method of payment;
9. the hired party's role in hiring the paying assistants;
10. whether the work is part of the hiring party's regular business;
11. whether the hiring party is in business;
12. the hired party's employee benefits; and
13. tax treatment of the hired party's compensation.

As with the federal court's treatment of the six factor test, no single element is dispositive. Instead, the courts once again look to the totality of the circumstances. Nonetheless, even a cursory glance shows that this test assumes that the putative employee was "hired" in the first place.

The second circuit addressed the application of this analysis to student interns *O'Connor v. Davis*, 126 F.3d 112 (2nd Cir. 1997). There, the issue was whether an unpaid student intern could bring suit under Title VII for sexual harassment. The employer argued that the intern was not an employee, and thus not covered by the anti-discrimination laws. The Second Circuit agreed, noting that the considerations articulated by the Supreme Court in *Darden*, assume an economic relationship; that the would-be employee was "hired" in the first place. And the Court reasoned that, absent some economic value in exchange for services, a "hire" had not occurred. That is, compensation is an essential element of employment. Importantly, other courts have found that benefits such as insurance may constitute compensation, and thus require an application of common law test. *Haavistola v. Community Fire Co.*, 6 F. 3d 211, 221 (4th Cir. 1993).

Thus, if an intern or trainee is not an employee under the FLSA, then he or she is not entitled to minimum wage, or indeed any compensation. And if the intern or trainee is not compensated, then he or she is likely not an employee for purposes of the federal anti-discrimination laws. If, however, an intern or trainee is compensated, then the courts will apply the thirteen factors set-forth by the Supreme Court in *Darden* to determine whether an employment relationship exists. It is entirely possible that an individual may be an employee for purposes of the FLSA, but not for purposes of the anti-discrimination laws.