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Back to School: Debunking the Unpaid Intern Myth

Many of us grew up working as unpaid interns. Having "intern" listed on a resume was perceived to be a great way to distinguish oneself from the competition. It wasn't so bad for the business either. The employer built good will by giving an invaluable learning opportunity to a job-seeker in need, not to mention getting some work done for free. The paradigm I've just described, however, is a relic to the past. Today, it is very difficult to legally hire an unpaid intern. Granted, this it may seem nonsensical, particularly in this rough economy where thousands of unemployed workers would relish the opportunity to obtain on the job experience and avoid resume gaps. Nonetheless, both state and federal law prohibit unpaid internships except in limited circumstances. Employers should heed the advice below in order to avoid being subject to costly litigation.

Legally, the word "employee," means anyone who provides services for an employer. Though this definition is circular, the take-away is that most employees must be paid at least minimum wage and time and a half for hours worked in excess of 40 per week. The exceptions that put a worker into the category of "intern" rather than "employee" exist only if the worker is providing services (1) to fulfill an educational or training program requirement; (2) for a charity, or; (3) for a public-sector employer.

Educational, or Training, Exemption: The key here is that the internship experience must provide an educational or training benefit. For example, before sitting for the electrician's licensing exam, the electrical student must fulfill a certain number of "on the job" training hours. This work can be performed for free. As a second example, a private employer could hire a college student as an unpaid intern if the intern was obtaining college credit for participating in the internship. Every year, hundreds of Northeastern University students work as unpaid interns. And that is kosher because the internship is part of the student's academic experience.

Simply calling an internship "educational," will not make it so. If you want to offer an unpaid internship under the "education" exception, you must meet each of the following 6 criteria. (1) the training is primarily for the benefit of the intern, not the employer; (2) the intern does not do the work of paid employees but rather receives regular supervision by at least one staff member; (3) both employer and intern understand that the internship is unpaid; (4) the employer does not immediately benefit from the intern's work; (5) the intern is not necessarily guaranteed a job at the end of the internship; and (6) the internship takes place in an educational environment. These criteria are meant to prohibit an employer from "hiring" an intern to perform the duties that the company otherwise would pay an employee to do. For example, if a company hires employees to do data-entry, it cannot hire interns to do that same job for free, even if the intern would learn from the experience.

Notably, the Department of Labor distinguishes between interns at for-profit entities and volunteer services provided to nonprofit charities and government agencies. I'll explain more about this at the end of this article.

Non-Profit, Charitable or Religious Exemption: Interns working for a non-profit, charitable or religious organization need not be paid *if* the internship *further*s the purpose of the organization. For example, an intern at a religious organization may do missionary work on an unpaid basis, but she cannot assist the priest in cleaning and organizing his office. Why? Presumably, missionary work furthers the purpose of the church. Having a neat and organized office does not fulfill any mission (unless there's a non-profit out there to help the hopelessly unorganized!)

Public Sector Exemption: Perhaps unsurprisingly, the state and federal government have exempted themselves from the unpaid internship requirements that apply to private employers. That is, any governmental body may hire an intern to work on a volunteer basis without compensation, even if the 6 criteria applied in the Educational Exemption are not met. The only requirements are that the volunteer (1) understand that s/he will not be paid; (2) the volunteer's employer is not forcing the volunteer to perform the work; and (3) the volunteer is not already employed by the public agency to render the same type of services. In plain English, this means that there has to be a "meeting of the minds" between the intern and the employer that the intern is working for free. Furthermore, an employer cannot force an employee to give up his or free time to volunteer for a state agency. Finally, if an employee works for a state or local agency, he or she cannot also volunteer for that same agency.

With regards to unpaid interns, it is important to remember that an employee's right to minimum wage and overtime is not waivable. An employer cannot contract around the wage and law provisions even if the employee would be willing to do so. Thus, if an employer violates an employee's right to compensation, no matter the lack of understanding or good intentions, by law, the employee is entitled to triple damages (what the employer should have paid the employee multiplied by 3, plus attorney's fees and costs.