Qualifications of an Unpaid Internship

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Q: Our staff would like to start an unpaid summer internship program. Our president believes that interns must be paid based on a recent court case she read about. Is she correct?

A: Maybe. A recent court decision in favor of the unpaid interns that worked on the movie *Black Swan* highlights the difficulties and importance in crafting a legal unpaid internship program. The question is whether the "intern" meets the legal definition of an intern, or is really just an unpaid employee. As was widely reported in the press, the court confirmed that for workers to be exempt from minimum wage laws (i.e., a true "intern") they must meet the criteria established by the U.S. Department of Labor. However, unlike for-profits, nonprofits may have another path to legally maintaining unpaid internships — volunteerism.

Under the Fair Labor Standards Act, employees must be paid at least the applicable minimum wage as well as overtime. However, the U.S. Supreme Court has held that if an organization is aiding or instructing a worker, and that the individual's work serves only his own personal interest, that worker will not be deemed an employee of the organization providing the training. As such, persons who receive training for their own educational benefit need not necessarily be deemed employees if the training meets certain criteria. Therefore, whether an internship program qualifies for exemption from employment depends on the program's specifics. To qualify as an unpaid internship — exempt from the FLSA's requirements — *all* of the following criteria must be met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training given in an educational instruction;
2. The internship experience is for the benefit of the trainees;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the intern's activities, and on occasion its operations actually may be impeded (i.e., time and resources diverted from business operations to spend time training the intern);
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in training.

The FLSA's definition of "employ" is very broad and, as demonstrated by the aforementioned criteria, the exclusion for interns is very narrow. For example, a person whose work benefits the organization — such as writing a grant application or performing work that will be charged against a grant — generally doesn't qualify as an intern. However, if the organization is training the intern — for instance, teaching the intern how to write a grant application or training the intern how to perform the services in question — the worker could qualify as an unpaid intern under the FLSA. The determination must be based on the particular facts and circumstances of the relationship.

Nonprofits, however, have another option since volunteers also are exempt from minimum wage laws. As with interns, the FLSA and state wage and hour laws provide definitions on who qualifies as a "volunteer." The U.S. Department of Labor has recognized that individuals volunteering their time to religious, charitable, civic, humanitarian or similar nonprofit organizations as a public service — without compensation or expectation of compensation — are not covered by the FLSA and need not be paid for such services.

In determining whether an activity is "ordinary volunteerism," the DOL considers a variety of factors, including: (i) the nature of the entity receiving the services; (ii) the receipt or expectation by the worker of any benefits; (iii) whether the activity is less than a full-time occupation; (iv) whether regular employees are displaced; (v) whether the services are offered freely without pressure or coercion; and (vi) whether the services are of the kind typically associated with volunteer work.

While no expectation of compensation is an important factor in properly classifying a worker as a volunteer, the DOL regulations do permit volunteers to be paid expenses, reasonable benefits, a nominal fee or any combination thereof without losing volunteer status. Such nominal "stipends" cannot exceed 20 percent of what the organization would be required to pay an employee for the service and cannot be tied to productivity or hours worked. A stipend is intended to cover the out-of pocket costs of volunteering — not serve as compensation. Even if volunteers don't want to be paid and consider themselves volunteers, they can be construed as employees if they work in a commercial aspect of the organization's operations. For example, the Supreme Court held that workers in commercial activities of a religious nonprofit were employees under the law, even though the workers objected to that classification and considered themselves to be volunteers.

All organizations contemplating or currently using the services of any individual on an "unpaid" basis — whether as an intern or a volunteer — should carefully consider the facts and circumstances of the proposed relationship (and consult with legal counsel) to ensure that they do not violate the applicable federal and state wage and hour laws. The use of interns is subject to increasing scrutiny by the DOL, states, the IRS and the courts. Violations of the applicable wage and hour laws can result in an award of attorney's fees, interest, treble damages and/or penalties in many jurisdictions.