

LOWENSTEIN SANDLER PC CLIENT ALERT

EMPLOYMENT & LABOR

ATTORNEY ADVERTISING

UNPAID SUMMER INTERNSHIPS: A BOON TO THE BOTTOM LINE OR A COMPLICATION FOR THE COMPANY?

By: Amy Komoroski Wiwi, Esq. and Kelly Lloyd, Esq.

April 29, 2010

I. Introduction

Now more than ever, students need work experience that sets them apart from their peers. As a result, companies are flooded with applications from eager high school, college, and even graduate students looking to pad their resumes with a summer internship. Many applicants are even willing to work for free. For companies trying to increase productivity in the current economic climate, or even those motivated to help students facing a bad job market, an unpaid summer internship may seem a win-win solution; the intern gets some front line experience and the company gets a worker without spending a dime.

Not so fast! Private sector, for-profit companies may violate the Fair Labor Standards Act ("FLSA") and/or applicable state wage and hour laws by accepting volunteer services from unpaid interns. A company's obligation to pay interns largely depends on the nature of the internship, the role the intern will play at the company, and the supervision the intern will receive. The United States Department of

Labor ("DOL") recently issued fact sheet guidance to help for-profit businesses determine whether they may accept unpaid services from summer interns, or whether they must pay these students as regular employees in accordance with minimum wage and overtime laws.

II. The Obligation to Pay an Intern Turns on Whether the Intern is an "Employee"

The FLSA broadly defines "to employ" to include "suffer or permit to work." Accordingly, private sector for-profit companies are required to pay all individuals whom they "suffer or permit to work" in accordance with the minimum wage and overtime laws. The U.S. Supreme Court has recognized, however, that those who work for their own advantage or benefit are not entitled to the minimum wage and overtime protections of the FLSA. Accordingly, whether a company must pay its interns depends on whether those interns — as opposed to the company — will be advantaged by the internship. The DOL fact sheet issued this month specifies six factors that must apply to a particular internship before it may be unpaid.

III. The Six Factor Test

For an internship to be excluded from the FLSA minimum wage and overtime laws, it must meet all six of the following factors:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
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 activities of the intern; and on occasion its operations may actually be impeded;
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 the internship.

A. An Internship Teaches and Benefits the Intern

The more academically structured a placement is, the less likely it is to be considered employment. An internship program that involves the students in real life situations and provides them with a practical educational experience related to their course of study will be considered educational in nature.

Indeed, the intern's receipt of academic credit for completing the internship will weigh heavily against employment status.

The character of the skills acquired and duties performed by the student also weigh into the education or work analysis. Skills applicable in multiple work environments are likely to indicate an educational environment, while the performance of functions geared toward the company's particular business are likely to be deemed employment-related. Similarly, when the company's business depends on the student's performance and directly benefits from it, the placement is more akin to employment.

B. An Intern is Not a Temporary Employee

A company cannot use an unpaid intern to supplement or replace its regular workforce. In other words, if the company would have hired an additional employee if not for the intern, that intern is entitled to payment. On the other hand, if an intern participates in an activity such as job shadowing, but performs little or no actual work, she will not be considered an employee.

C. An Internship is Not an Audition for Employment

A true internship will span a pre-determined time period, and not resemble a "temp to perm" employment relationship. Indeed, an employer may not use an unpaid internship placement as a trial period for employment, and an unpaid intern should have no expectation or entitlement to a job at the end of the internship.

IV. Conclusion

Companies must analyze carefully any planned summer internships to determine whether its interns must be paid under both federal and state wage and hour laws. A company may

not use unpaid interns to relieve the workload of current employees or to supplement the workforce on a temporary basis. Unless the internship experience clearly will be educational for the intern, and not more than marginally beneficial to the company, employers are well advised to treat summer interns as employees subject to the wage and hour provisions of FLSA and applicable state laws.

If you have any questions about unpaid student internships, please call any of the following members of the firm's Employment & Labor practice group: David M. Wissert, Amy Komoroski Wiwi or Kelly Lloyd, at 973.597.2500. We also would be pleased to provide you with assistance with respect to other employment practices and workplace compliance issues.

Lowenstein Sandler makes no representation or warranty, express or implied, as to the completeness or accuracy of the Alert and assumes no responsibility to update this Alert based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. Readers should consult legal counsel of their own choosing to discuss how these matters may relate to their individual circumstances.

www.lowenstein.com

New York

1251 Avenue of the Americas
New York, NY 10020
212 262 6700

Palo Alto

590 Forest Avenue
Palo Alto, CA 94301
650 433 5800

Roseland

65 Livingston Avenue
Roseland, NJ 07068
973 597 2500