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Litigator Q&A

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Ryan Hancock: If They Look Like Employees and Work Like Employees, Interns Need to be Paid Like Employees

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BLOOMBERG BNA: [Editor's note: The U.S. District Court for the Southern District of New York is currently overseeing a case where interns claim that the media company they worked for improperly classified them based on the work they actually performed, and thus failed to pay required minimum and overtime wages. In *O'Jeda v. Viacom, Inc.* (No. 1:13-cv-05658), former interns claimed the employer relied on them and other unpaid interns to perform tasks related to the maintenance and operations of its business, and were solely for the benefit of the company. The interns further claimed that the employer did not provide academic or vocational training, as is required under the FLSA. As a result, the interns claimed that the employer unlawfully minimized labor costs by denying wages for work done by at least 12,500 interns since 2007 that would have required additional paid staff. Although the employer argued in their answer that the interns' theories were legally incorrect, the parties recently reached a settlement agreement that would pay an approximate total of $7.2 million to settle all of the claims (a total which includes court costs, attorneys' fees and other fees and payments), and is currently awaiting approval by the court.]

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How has the role of unpaid interns evolved, both in the private or public sector, in the last few decades?

Hancock: It is clear that for-profit, non-profit, and public agencies are using a greater number of unpaid interns than ever before. In 2015, the National Association of Colleges and Employers ("NACE") found that 92% of employers surveyed utilized a formal internship program. In 2012, it was estimated that one-third to one-half of all internships were unpaid.

I believe this increase may be attributed to more individuals graduating from college than in years past while at the same time the economy was deflating or becoming stagnant. Further, employers are increasingly requiring work experience before hiring even for entry-level positions.

It is important to remember that the FLSA, unlike for-profit entities, specifically exempts unpaid volunteers at public agencies. See Section 203(e)(4)(A).

BLOOMBERG BNA: Would you say that recent trends have unpaid interns being viewed more like entry-level employees? Why or why not?

Hancock: I believe that empirical data has shown that interns are more often viewed as entry-level employees. As recent litigation around unpaid interns has shown, employers often treat their unpaid interns as entry-level employees. For example, the unpaid interns often get

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coffee, work in customer service positions, and handle mail functions.

BLOOMBERG BNA: Under the FLSA, what factors are the most important when determining whether interns need to be compensated for their work?

Hancock: According to the U.S. Department of Labor's Wage and Hour Division's Fact Sheet #71 (April 2010), the six most important factors are:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which 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.

The DOL's test was derived out of the U.S. Supreme Court decision of *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947). However, it is important to note that several circuit courts have adopted different tests to determine whether an individual is an ''employee'' or ''trainee'' for FLSA protections and what type of deference, if any should be given to the DOL's interpretation.

For example, the Fourth and Sixth Circuit Courts have adopted the ''primary beneficiary test,'' in which the main factor is whether it is the trainee or employer who is the primary beneficiary of the training. The Tenth Circuit Court has adopted a ''totality of circumstance'' test and the Second Circuit Court has adopted a hybrid test of the DOL test and the ''economic realities test.''

BLOOMBERG BNA: What role, if any, does the issue of students receiving school credit play in the analysis of whether unpaid internship programs meet FLSA requirements?

Hancock: The DOL's Fact Sheet #71 states: ''In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit).''

However, it is important to note that the providing of school credit only satisfies one of the six criteria laid out by the DOL and the DOL has consistently required employers to meet all six criteria to avoid minimum wage payments. I would also encourage practitioners to review the DOL's Wage and Hour Division 2004 ''Opinion Letter'' discussing the issue of FLSA status of interns.

BLOOMBERG BNA: How do employers most often get into trouble regarding unpaid interns in relation to the FLSA?

Hancock: Generally, the employers that are at most risk of running afoul of the FLSA are those that have not audited their unpaid intern practices in order to make sure that they comply with FLSA and the DOL regulations. Specifically, employers who treat unpaid interns as entry-level employees by allowing unpaid interns to handle general tasks that benefit the employer and not the unpaid intern.

For example, the more an ''unpaid intern'' answers the phone, files documents, and engages in tasks that paid employees also conduct could lead to a finding that the 'unpaid intern'' should be paid minimum wage. This is especially true, if the employer fails to give the unpaid intern(s) significant supervision.

BLOOMBERG BNA: One of the FLSA exemptions regarding interns occurs when the internship provides ''vocational training.'' How is providing ''vocational training'' distinguishable from treating someone as an entry-level employee?

Hancock: If properly certified, Section 14(a) of the FLSA allows employers to pay subminimum wages to student learners as part of a ''bona fide vocational training program.'' See 29 U.S.C. § 214. ''Bona fide vocational training program means a program authorized and approved by a state board of vocational education or other recognized educational body that provides for part-time employment training which may be scheduled for a part of the work day or workweek, for alternating weeks or for other limited periods during the year, supplemented by and integrated with a definitely organized plan of instruction designed to teach technical knowledge and related industrial information given as a regular part of the student-learner's course by an accredited school, college, or university.'' See 29 C.F.R. § 520.300.

In order to be certified, an employer must show:

(a) The training program under which the student-learner will be employed is a bona fide vocational training program as defined in subpart C of this part;

(b) The employment of the student-learner at subminimum wages authorized by the special certificate must be necessary to prevent curtailment of opportunities for employment;

(c) The student-learner is at least sixteen years of age, or at least eighteen years of age if employed in any occupation which the Secretary has declared to be particularly hazardous (see part 570, subpart E, of this chapter, but note the specific exemptions for student-learners in several of the orders);

(d) The occupation for which the student-learner is receiving preparatory training requires a sufficient degree of skill to necessitate a substantial learning period;

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(e) The training is not for the purpose of acquiring manual dexterity and high production speed in repetitive operations;

(f) The employment of a student-learner will not have the effect of displacing a worker employed in the establishment;

(g) The employment of the student-learners at subminimum wages must not tend to impair or depress the wage rates or working standards established for experienced workers for work of a like or comparable character;

(h) The occupational needs of the community or industry warrant the training of student-learners;

(i) There are no serious outstanding violations of the provisions of a student-learner certificate previously issued to the employer, or serious violations of any other provisions of the FLSA by the employer which provide reasonable grounds to conclude that the terms of the certificate would not be complied with, if issued;

(j) The issuance of such a certificate would not tend to prevent the development of apprenticeship programs in accordance with the regulations applicable thereto (subpart D of this part) or would not impair established apprenticeship standards in the occupation or industry involved; and

(k) The number of student-learners to be employed in one establishment is not more than a small proportion of its work force. See 29 CFR § 520.503.

Accordingly, the main difference between ''vocational training'' and entry level employment can be determined by whether the internship/employment relationship is for the benefit of the individual as opposed to the employer and whether the position provides the individual significant experiential value (or provides little to no educational benefit). In other words, who is the primary beneficiary of the work?

BLOOMBERG BNA: What effect, if any, do you believe that the recent expansion of state discrimination protections to unpaid interns will have on future interpretations of the FLSA regarding unpaid interns?

Hancock: The intent of state legislatures in amending state civil rights statutes is to offer protections against unlawful discrimination for unpaid interns that previously did not exist. The state statutes (and NYC's Administrative Code) generally adopt the DOL's FLSA factors for determining whether an unpaid intern is protected for employment discrimination purposes.

It is important to note that there are very different policy considerations driving each analysis and therefore I believe it would have little impact on future FLSA interpretations. Currently, Maryland, Illinois, New York, Washington, D.C., Oregon, and New York City have expanded their statute or ordinance to provide anti-discrimination protections to unpaid interns.