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VIEWPOINT: Law & Accounting: New federal guidance for hiring interns

BY MATTHEW T. GOMES

Growing up in the 1980s and 1990s, many of my friends and I interned at various businesses, government agencies or religious organizations during summer vacations and while attending school. Many of these internships were unpaid, or paid at an hourly rate below minimum wage, but I personally felt that the skills, experience and contacts that I gained were far more valuable than any monetary compensation.

Imagine my surprise years later when I began practicing labor and employment law and learned that, according to the Fair Labor Standards Act (FLSA) – the nation's wage-hour law – interns may be employees and entitled to payment at the applicable minimum wage for all hours worked and overtime pay for hours over 40 in a week. In fact, many employers faced significant financial liability for not treating and paying their interns as employees under the FLSA.

The U.S. Supreme Court never ruled on this issue and likely contributed to the confusion. Lower courts stepped into the void, issuing often contradictory tests. As a result, some employers began scaling back or even eliminating their internship programs, depriving young people of a priceless real-world teaching tool.

In an attempt to provide clarity, the U.S. Department of Labor (DOL) in 2010 established a test for determining whether unpaid interns were employees under the FLSA. Under this guidance, an employer could prove that an intern was not an employee only if it could establish six factors. The test was all-or-nothing; if an employer failed to prove just one of the factors, then that intern – and all other similarly situated interns – were employees and entitled to minimum wages and overtime pay.

In 2011, a federal court of appeals rejected the DOL's test, holding that it was "overly rigid" and a "poor method for determining employee status in a training or educational setting." Instead, it concluded, "the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship."

Appellate courts in three other federal jurisdictions followed suit and rejected the DOL guidance on similar grounds. Each of these cases was decided unanimously by a three-judge panel. Interestingly, in three of the four cases, the panels were each comprised of two Democratic appointees and one Republican appointee. This represents perhaps the closest thing to consensus that we are likely to see in our current political environment.

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In response, in January 2018, the DOL issued new guidance for determining whether an intern is an employee under the FLSA. Courts now must determine which party is the "primary beneficiary" of the relationship by asking the following questions:

1. Do the intern and the employer clearly understand that there is no expectation of compensation?
2. Does the internship provide training that would be similar to that which would be given in an educational environment?
3. Is the internship tied to the intern's formal education program by integrated coursework or the receipt of academic credit?
4. Does the internship accommodate the intern's academic commitments by corresponding to the academic calendar?
5. Is the internship's duration limited to the period in which the internship provides the intern with beneficial learning?
6. Does the intern's work complement, rather than displace, the work of paid employees while providing significant educational benefits to the intern?
7. Do the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship?

Critically, no single factor is determinative. Rather, the determination whether an intern is an employee will depend on the unique circumstances of each case.

Hopefully this recent change will revive employer interest in unpaid internships. To comply with DOL guidelines, companies with, or desiring, an internship program should provide applicants with written documentation clearly stating that there is no compensation and no entitlement to a paid job at the conclusion of the internship. Savvy employers also should coordinate their programs with local high schools, vocational schools, colleges and graduate programs. This will provide them access to highly-motivated, qualified candidates, and should help ensure that: the internship experience is aligned with what the student would experience in the classroom; it parallels the school's calendar; and that it may qualify for course credits. Most importantly, employers must realize that they cannot use unpaid interns as a cheap labor source or to replace paid employees. Remember, the intern, not the employer, is supposed to be the primary beneficiary of the relationship.

Internships satisfying these elements represent a true win-win: the intern gains real-world skills and experience outside the classroom, and the employer gets to develop the next generation of workers and give back to the community. I'd like to think that's the goal of this surprisingly practical government guidance. I am optimistic that more companies will take advantage of this positive development to offer youth today the same opportunities that we had growing up.

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