



Is There An Intern In Your Future?

Insights

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There was a significant increase in the number of class-action lawsuits in 2012 brought by former interns, many of whom were in unpaid positions working in the business sector. But recently the educational community received a wake-up call when Hamilton College was hit with a class-action lawsuit involving its paid interns.

The Facts

In the Hamilton College case, former employee Benjamin Kozik, representing a class of over 40 former interns of the athletic department, claimed that his role as an intern as Intercollegiate/Assistant Football Coach did not qualify as exempt internship (for which minimum wage and overtime requirements did not apply); that he was not an exempt educational employee; and that the stipend he received each month was not enough to properly compensate him for all the regular and overtime hours he worked.

As a result, Kozik is seeking unpaid overtime wages of up to 40 hours per week, liquidated (double) damages, interest, and attorneys' fees. Kozik is also asking the court to award similar amounts for each of the other members of the intern class. While no total damage figure is provided, these claims could easily reach over \$5,000,000. This figure does not include the possible award of attorneys' fees and other litigation costs which could add another \$1,000,000 to the total.

The Hamilton College case serves as a stark reminder that internship programs – even paid ones – come with risk and should be carefully constructed and periodically reviewed to ensure that they do not run afoul of state and federal wage and hour laws. As we reflect on the new scrutiny of internship programs, several critical lessons arise.

Lesson #1: Many “Interns” Must Be Paid Minimum Wage And Overtime Pay

In most cases, workers are entitled to be paid at least minimum wage for all hours they work, *and* overtime pay for those hours above 40 in a workweek. Unfortunately, there is not a simple and easy-to-apply test to determine when this rule may be ignored and the internship treated as an unpaid position. In broad terms, to qualify as a legitimate unpaid (or minimally paid) internship program, its purpose must be educational. The program must provide learning, instruction and training that imparts broad, significant, substantive, and transferrable knowledge. In addition, the program must

create an experience that is consistent with these purposes.

What this means in practical terms is that, if an intern is asked to perform routine or productive work that directly benefits the organization or that would otherwise have been performed by an employee, it will not qualify as a legitimate unpaid internship. As a result, if an intern is asked to assist the soccer coach with training drills (productive work), help clean up the school after an event (routine work), or travel with students to school events or games (productive work), the viability of the internship program could be placed at risk and, as a result, *all* time worked by the intern could be subject to minimum wage and overtime requirements.

Lesson #2: Mistakes Are Costly

Pay mistakes are expensive in even the most limited situations. The cost of these mistakes quickly compounds, however, when legal requirements are misunderstood or where an internship program is structured properly but administered in a manner that does not comply with wage-hour rules.

In these situations, a former intern may be able to assemble a group of other interns who had a similar experience and, with the assistance of counsel, create a class action claim based on similar allegations, harm, and damages. The risk to schools is increased because of the high cost of litigating these matters in addition to the increased risk that claims can become more believable if multiple people are telling similar stories.

Lesson #3: Records Are Critical – Especially If Something Goes Wrong

If your internship program is challenged, having key records will be important in responding to a claim and putting together your defense. For example, a memorandum of understanding (MOU) that is presented to and signed by the intern can be a compelling piece of evidence if it confirms facts that make an internship program legitimate, such as:

- the unpaid nature of the internship or the limited pay provided;
- that a position is not guaranteed after completing the internship;
- the educational purpose of the internship and the intent to benefit the intern (and not the school);
- the limited scope of activities that will be performed by the intern; and
- the intern's obligation to promptly report any assignment of duties or activities that are outside the identified scope.

In addition, time records may also become critical should interns be successful in arguing that they were not part of a qualified internship program and were instead entitled to at least minimum wage and overtime.

Without such records, interns will be permitted to estimate the hours worked. If your school disagrees with the estimate, it must do more than dispute the claimed hours – it must prove the

inaccuracy. This is because the employer, not the intern, is required to maintain time records. When accurate time records are not created and maintained, the employer is ultimately responsible.

Lesson #4: Follow Best Practices In Deploying Your Internship Program

If you have made it this far and still plan to adopt or continue an internship program, it may be helpful to review the following best practices and identify those that target your area of vulnerability and may assist in reducing your risk of liability:

Consider an Audit

If you have an existing internship program, an audit can be a helpful tool in determining if you have an appropriate educational purpose for the internship and if the activities the intern performs will benefit the intern rather than the school. In addition, the audit can help confirm that the activities of the intern are not the same as the duties that are or would be performed by another employee.

Train Supervisors Who Work With Interns

Even the best program can be derailed by a supervisor who does not understand the importance of selectively assigning experiences and activities to interns. Training can help supervisors utilize interns appropriately and prevent expansion of responsibilities into areas that may disqualify your program.

Seek Another Solution If Necessary

If you discover that your program cannot be brought into compliance, consider discontinuing it or converting it to a paid program that complies with wage and hour requirements.

Document Key Aspects Of Your Internship Program

This is your chance to create self-serving documentation about your program, its purpose, and the narrow scope of intern activities that are authorized. You may also want to include references to the training provided to those supervising the intern and the care taken to ensure the program is in compliance.

Secure Signed MOUs or Internship Agreements

As noted above, an MOU can be a powerful tool to clarify intent and secure agreement to report activities that are inconsistent with the educational purpose of the internship program. An intern's failure to timely report deviation from the agreed activities can help a school refute an allegation that it intentionally created a noncompliant program or allowed supervisors to misuse interns.

Create Checklists

Interns can also assist with the documentation process by keeping a checklist of agreed activities they are involved with during the course of the internship as well as confirming what they learned as a result.

To Sum It Up

Internship programs, whether paid or unpaid, create risks for schools if they are used as a substitute for low-cost or no-cost workers. Schools that take the time to plan and construct internship programs that are focused on the intern and provide them with an enriching educational experience have far less risk of challenge down the road.

Hopefully the lessons arising out of the Hamilton College dispute will help you navigate the initial decisions and create a program that is designed to minimize liability and create the best educational experience for your interns.

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