"Kitchen Tryouts Start Today"...Or Maybe Not

Insights
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Hospitality employers sometimes wonder whether it's possible for individuals to participate in kitchen activities as unpaid interns or on a tryout basis, typically as chefs or cooks. Among the many questions this raises is whether such people would be "employees" who are subject to the federal Fair Labor Standards Act's requirements.

The Ground Rules

Passed in 1938, the FLSA is a strict, inflexible, unforgiving law that is in many ways poorly-suited to the modern working world. One of the law's main purposes is to see that those it covers are paid the sums it requires. Whether people are found to be FLSA employees depends upon the so-called "economic realities" revealed by all of the facts and circumstances of a situation. If individuals are really employees, they are not allowed to agree to forgo the wages they are entitled to, whether they do so expressly or by acquiescing in being treated as non-employees.

No single consideration necessarily makes the difference, but the U.S. Labor Department and the courts tend to find "employee" status when people perform activities that result in an immediate economic benefit to the recipient of their efforts. For example, if individuals do things that result in labor-cost savings for a business or that help it make money, a decision maker might very well see this as FLSA-covered employment.

What About Interns

In limited situations, a person *can* be a non-employee intern for FLSA purposes. DOL and the courts have, for instance, sometimes concluded that students were not employees of the entity permitting them to conduct internships called for by a school's curriculum. Generally speaking, whether interns are FLSA employees is decided against the background of six factors:

1. Whether the training is similar to that given in a vocational school;
2. Whether the training is for the benefit of the interns;
3. Whether the interns do not displace regular employees, but instead work under their close observation;
4. Whether the employer providing the training derives immediate advantages from the activities of the interns, and whether its operations might sometimes actually be impeded by their presence

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the interns, and whether its operations might sometimes actually be impeded by their presence;

5. Whether the interns are not necessarily entitled to a job at the conclusion of the training period; and
6. Whether the understanding is that the interns are not entitled to wages for the time spent (although, again, no waiver of FLSA rights has any legal force).

The risks of incorrectly applying these factors increased significantly this year. In April, pronouncements from a variety of governmental sources and others suggested that future FLSA-based internship challenges are more likely. A high-level DOL official was quoted as saying, "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the [FLSA]."

Consequently, before management takes on cooks or chefs as unpaid interns, it should think candidly about whether, for instance, it could prove that:

- The arrangement did not displace regular employees. (As examples, did the interns reduce the number of employees needed, free the business to lay employees off, allow management not to replace employees who left, or decrease the number of hours that acknowledged employees worked?); or
- The interns' activities were of little or no economic benefit to the business. (For instance, did they prepare revenue-generating dishes and other items served to patrons, facilitate labor-cost savings through performing other productive work, or increase the efficiency or productivity of acknowledged employees by freeing *them* to do other work?).

Moreover, would there be evidence that the arrangement was truly meant to be, and predominantly was, a learning-oriented activity designed to impart significant, substantive knowledge relating directly and principally to the intern's educational pursuits (preferably in connection with a school's curriculum)? It would probably be disastrous if the intern instead spent most of the time dicing vegetables, slicing bread, washing dishes, cleaning preparation areas, and bussing tables.

Let The Competition Begin

Similar considerations provide insight into how participants in tryouts might be viewed under the FLSA. Especially relevant would be those relating to whether the business (on one hand) or a candidate (on the other) was the principal beneficiary of the individual's efforts. As illustrations:

- Would tryouts be continuous, or at least frequent or regular, such that the business's contingent of chefs or cooks typically would include candidates?
- Would candidates displace other employees or otherwise contribute to cost-savings (such as in the ways mentioned earlier)?
- How and to what extent would candidates contribute to revenue-generating activities?

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- Would a candidate devote an appreciable amount of time and effort to the arrangement over a period of several days to a week or more?
- In what ways, how often, and to what extent would a candidate impede a kitchen's activities?
- What benefit would flow to the candidate beyond just having a chance at a job?

The FLSA's principles pay little heed to concepts of personal responsibility or to agreements between consenting adults. Instead, the latitude to provide what the parties might see as a mutually-beneficial internship or tryout opportunity while at the same time acting consistently with the FLSA is limited. It might be possible to structure one of these arrangements in a way that has a chance of passing muster under the FLSA, but this is a go-slow matter calling for caution.

If you'd like to discuss specifics of how these laws apply to your own situation, give us a call.

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