When "Free" Is Too Good To Be True: Rethinking Interns And Volunteers Under Wage & Hour Laws

Insights
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Educational institutions of all kinds often utilize the services of volunteers or so-called interns to assist with coaching sports or other extracurricular activities, and to participate in programs that are mutually beneficial. But the United States Labor Department (DOL) has issued clear guidance with respect to unpaid internships and the circumstances under which an educational institution's current staff may be converted to volunteers, or others may serve as volunteers for certain purposes.

Given the liquidated (double) damages and potential personal liability possible under federal wage and hour laws, any institution that goes forward with any program for volunteers or interns does so at its peril if not mindful of these guidelines.

Interns

Failure to comply with the DOL's rules permitting nonemployee intern status can be particularly costly. Just last summer, a New York federal court ruled that Fox Searchlight Pictures had violated the federal Fair Labor Standards Act (FLSA) as well as New York State's minimum wage laws by not paying its production interns for their work on the movie set for "Black Swan."

The judge concluded that two interns worked essentially as regular employees and that the environment offered for these interns by Fox Searchlight Pictures did not foster educational advancement or otherwise meet the six-prong test for nonemployee status under wage and hour laws. The FLSA makes clear that *all six* of the following criteria must be met, or an intern will be regarded as an employee, entitled to at least minimum wage for all regular hours worked, and possibly overtime at a rate of time and one-half:

1. The training is similar to that which would be provided in a vocational school;
2. The training is primarily for the benefit of the student or trainee;
3. The trainee or student does not displace regular employees and works under close observation;
4. The employer derives no immediate advantage from the activities and on occasion, its operations may actually be impeded or impaired by the presence of the intern;

5. The trainee or student is not necessarily entitled to a job at the conclusion of the internship period; and
6. The employer and the trainee understand the latter is not entitled to wages for time spent in alleged training.

The judge in the Fox Searchlight Pictures case easily concluded the interns were employees because their duties were primarily clerical, including taking lunch orders, answering phones, arranging other staff's travel, and otherwise undertaking activities that ordinarily would have been performed by regular employees.

Mindful of the DOL's aggressive posture in enforcing its standards, every institution considering an internship program should adopt these safe harbors:

- make sure that every intern or trainee should be enrolled in a legitimate educational program or course of study directly related to the internship;
- pay the intern at least minimum wage for all hours worked, unless the internship is for college or higher-education credit and there is an express written agreement with the college, university, or institution of advanced learning offering the program of study agreeing to the principles set out by the DOL;
- remember that an internship is not an "entry-level job," or a source of free labor; and
- focus the thrust of the internship program on education and learning of the trainee.

If there is any doubt whatsoever about the six DOL factors being met, interns and trainees should be paid at least minimum wage for all regular hours worked.

Volunteers

There has similarly been abuse with volunteers providing services in a school setting. In passing and amending the FLSA, Congress made clear it had no desire to discourage volunteer activities undertaken for civic, charitable, or for humanitarian purposes. But Congress has created an important distinction between persons volunteering time to a public school or school system versus persons volunteering time for private, for-profit schools.

Not only does the FLSA itself exclude from the definition of "employee" those working for public agencies including government-operated schools, but the regulations under the FLSA make it virtually impossible for employees of a private, for-profit entity to donate their services to that concern. While there might be the occasional exception when employees or supporters of for-profit educational entities may be permitted to volunteer or donate services, the DOL has never identified any such circumstances, and it would be very dangerous for any for-profit institution to assume donation or volunteering of its employees' or parents' services is a prudent idea.

Although not arising from a school setting, we can obtain some guidance from a 1996 Opinion Letter of the DOL involving non-profit community and church groups offering to provide volunteer members to provide gift-wrapping services for a for-profit concern. Despite the holiday-season setting, the DOL was not convinced the volunteers from nonprofit agencies could perform the gift-wrapping services without being paid, finding that they should be regarded as employees.

Even in circumstances involving public schools or not-for-profit educational entities, there are very limited circumstances under which a school's employees, parents or supporters may serve as volunteers. First, the activities must truly be undertaken for the individual's own personal, humanitarian, charitable, religious, or public-service motives. Secondly, the services must be of the kind typically associated with volunteer work (such as parents helping out in the classroom or lunchroom, or reading to students in the library). Moreover, the volunteer may not displace regular employees or impair employment opportunities for others. In those cases where the person providing the volunteer service is also an employee, the services provided must be completely unrelated to the employment relationship.

Thus, a member of the coaching staff at a not-for-profit school or public school could not provide volunteer coaching assistance at a basketball clinic offered on the weekend. Such services would merely be an extension of the employment relationship. Similarly, a secretarial or clerical employee of a not-for-profit or public school could donate his or her services, but not if the donated services are primarily clerical in nature.

Our Advice

Best practice tips include advice to schools to thoroughly evaluate all volunteer relationships. In the case of for-profit educational institutions, there is virtually no set of circumstances under which volunteers should be permitted to perform core school activities for which persons would ordinarily be paid as employees. In the case of employees of public and not-for-profit schools, it is imperative their volunteerism not resemble the duties and responsibilities they are regularly paid to undertake.

Similarly, the DOL might make a finding of employment status if a volunteer is undertaking activities that were formerly performed by employees or if the activities consist of general office work or similar tasks which are an integral part of the school's core functions.

While DOL guidance does permit some limited circumstances under which volunteers may receive nominal compensation for mileage or may be provided a free cafeteria lunch, for example, a commitment to best practices dictates that volunteers should not be compensated at all. Just as providing any compensation to volunteers could convert them to employment status, a school's exercising rigorous control over the activities of the volunteers could similarly suggest an employment relationship. Schools should consider whether their need for volunteers to follow a strict schedule and to be largely controlled by school administration in the performance of their volunteer services mandates re-consideration of the volunteer relationship.

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For more information, contact the author at TGallion@fisherphillips.com or 813.769.7500.