Risks Of "Internship" Claims And Liability Still Increasing (Updated 05/08/13)

Insights
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We have warned for some time now that businesses and other organizations should think carefully if they are considering the possibility of permitting unpaid internships. What might be described as the internship "season" is fast-approaching, so the time to consider whether and under what circumstances to get involved in these relationships is ***now***.

The Current Landscape
The latest big-splash lawsuit surfaced last week. A former unpaid intern filed a collective-action/class-action complaint for "at least $50 million" against Elite Model Management Corporation under the federal Fair Labor Standards Act and similar New York state laws.

This comes in the wake of an agreement by Charlie Rose and his show's production company to pay around $250,000 to settle an internship-related lawsuit brought last March. A developing cottage-industry among lawyers is now on the lookout for opportunities to assert claims on behalf of unpaid interns, "even if [the intern] received school credit for the internship . . .."

Those who are in a position to provide unpaid internships should also recall the thinking exemplified in last year's advice given by "The Ethicist" at the New York Times in response to a reader who asked, "Is there anything I can demand of this company in exchange for my slave labor?" This "ethicist" saw it as being laudable to "take the internship and then call the Labor Department — something you or your colleagues can do confidentially."

And indeed there are signs that educational institutions, vocational-training organizations, and similar entities are finding it harder to place their enrollees in unpaid internships. This is hardly surprising, because word is spreading that making these opportunities available entails vulnerability to wage-hour claims.

It Is Wise To Be Cautious
There is neither a simple checklist nor any concise, all-encompassing legal test for reliably knowing whether a particular unpaid internship is consistent with the FLSA. Nevertheless, prudence suggests keeping in mind our prior observations. Whether an unpaid internship would occur under the auspices of an educational institution or otherwise, ask yourself this: If there is a later FLSA claim, will the circumstances clearly, provably, and readily show (i) that the relationship was for the purpose of providing education, instruction, and training that imparted significant

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was for the purpose of providing education, instruction, and training that imparted significant, substantive, transferrable knowledge of a broadly-applicable kind; and (ii) that what actually occurred was consistent with and carried out this purpose?

If the intern's activities establish instead that the idea and/or the outcome was to have the person perform work, then the risks of FLSA liability are likely to be substantial. For example, if management's motivation is along the lines of, "We could sure use a summer intern," this does not bode well for successfully defending against an unpaid intern's later FLSA claim.

UPDATE 05/08/13: The lawsuit parade continues. A former photography intern for the "Pittsburgh Power" Arena Football League team has now sued the team and two owners, claiming that he was not paid for his internship activities (link to complaint below). He is alleging among other things that there was "a corporate policy or practice of minimizing labor costs by knowingly misclassifying certain employees as unpaid interns in order to deny them compensation in violation of the FLSA and the [Pennsylvania] Minimum Wage Act." He is also raising his claims as collective-action and class-action ones on behalf of, he contends, "more than 60" interns.

Boyle v. Swann, Inc.pdf (198.28 kb)

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