by Phil Antis

The Fate of the Unpaid Intern—The Saga Continues

The best internship programs provide invaluable experiences, challenging assignments, and real-world immersion not found in the classroom. The worst are glorified mailroom or data-entry positions disguised as internships for employers looking for free or cheap labor. Regardless of the quality of the experience, private-sector entities must place strict guidelines on unpaid internship programs to comply with the Department of Labor's (DOL) rules or consider paying interns at least minimum wage. Otherwise, entities risk significant exposure to wage claims from their interns.

Are interns for private-sector, for-profit entities entitled to protection by the federal Fair Labor Standards Act (FLSA)?[1] Any individual covered by the FLSA must be compensated for the services performed. Thus, interns working in a for-profit private-sector entity who qualify as FLSA employees must be paid at least the minimum wage and overtime.

The FLSA does not define the term intern, nor is there any exception to the FLSA for interns. The FLSA does define employee broadly as "any individual employed by an employer," and defines the phrase "to employ" as "to suffer or permit to work."[2] The U.S. Supreme Court long ago tackled the breadth of this definition and its application to trainees in *Walling v. Portland Terminal Co.*[3] In *Portland Terminal*, a railroad held a week-long training course for prospective brakemen, and the Court held that the plaintiffs were mere trainees and not covered employees under the FLSA. The trainees in *Portland Terminal* did not displace any of the regular railroad employees who supervised the trainees, and at times, the trainees actually impeded the company business. The Court held that the FLSA's definitions "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction."[4] Employers should not be penalized for providing free training benefitting trainees, which the trainees otherwise would have received from an educational institution. The railroad did not receive any "immediate advantage" from the work done by the trainees, and the Court held that they were not "employees" within the meaning of the FLSA.[5]

In April 2010, the DOL issued Fact Sheet #71, entitled "Internship Programs Under the Fair Labor Standards Act," to give guidance on whether interns are FLSA employees who must be paid minimum wage and overtime.[6] Based upon *Portland Terminal*, the DOL developed six factors to evaluate whether an intern is considered an employee. In the DOL's view, if *all* of the following six factors are met, an intern will *not* qualify as an employee under FLSA:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

But how do courts apply these factors? Unfortunately, there is not much guidance from federal courts, and the opinions that do exist are somewhat inconsistent. For example, in two cases decided only a month apart and involving similar scenarios, two judges in the Southern District of New York reached different conclusions on the scope and application of the DOL's six-factor test when applied to interns.

First, in *Wang v. The Hearst Corp.*,[7] unpaid interns at defendant's various publications sought class certification on their wage claim. U.S. District Judge Harold Baer denied the interns' motion to certify a class and the motion for summary judgment on whether the interns were employees under the FLSA and similar state law. Judge Baer rejected the interns' request that the court strictly apply *Portland Terminal's* "immediate advantage" test and require that the internships meet each factor laid out by the DOL to qualify for that exception. Instead, the court accepted the defendants' argument that the court "balance the benefits" to each party and evaluate the "economic reality" of the relationship, and agreed that the DOL's six factor test should not be applied as a rigid checklist. Specifically, the court held that whether the defendant received any "immediate advantage" was only one factor to evaluate. While noting that the DOL's six factors "ought not to be disregarded," those factors suggest only a "framework for an analysis." The court held

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that it must evaluate the "totality of the circumstances" and analyze who was the "primary recipient of benefits from the relationship."[8] In the end, the court determined there was an issue of material fact, because the defendant established that there was "*some* educational training, *some* benefit to individual interns, *some* supervision, and *some* impediment" to the defendant.[9]

In *Glatt v. Fox Searchlight Pictures Inc.*,[10] U.S. District Judge William Pauley granted the plaintiff interns' motion for summary judgment, finding that the interns were "employees" covered by the FLSA and similar state law, and granted their motion to certify class and collective actions. In this case, the plaintiffs were unpaid interns working on production of the film "Black Swan." As in *Hearst*, the *Fox* defendants also asked that the court apply the primary beneficiary test, which examines whether the internship program's benefit to the intern outweigh the benefits to the entity. The *Fox* court recognized some circuit court decisions (the court identified opinions from the Second, Fourth, Sixth, and Eighth Circuits) applying the primary beneficiary test, but opined that the test found little support in *Portland Terminal* because the Supreme Court had not weighed the benefits to the trainee and the entity in that case. Rather, the *Portland Terminal* Court relied on findings that the training served only the trainees' interests, and the employer received no immediate advantage from the trainees' work and impeded regular business. The court opined that *Portland Terminal* created a very narrow exception to the FLSA's expensive definition, and the primary beneficiary test was too broad.

The court in *Fox* gave deference to the DOL's factors, and in considering the totality of circumstances, found in favor of the interns because:

- The unpaid interns worked as paid employees worked, providing immediate advantage to the employer by performing low-level tasks not requiring special training;
- Any benefit received by the intern (e.g., knowledge of how a production office functions) was a result of having worked as any other employee would have worked, not from a "uniquely educational" internship; and
- Interns received nothing like the education they would receive in an academic setting.

Just recently, on March 20, 2014, the Second Circuit agreed to hear interlocutory appeals of both the *Fox* and *Hearst* cases in tandem. Briefs have been submitted by the *Hearst* plaintiffs and the *Fox* defendants.

The application of *Solis v. Laurelbrook Sanitarium & Sch., Inc.*,[11] a recent case from the Sixth Circuit, is at issue in the *Fox* and *Hearst* appeal. In *Laurelbrook*, the court applied the primary beneficiary test to determine whether students who performed facility-related tasks as part of the vocational course of study at a sanitarium were employees under the FLSA. The Sixth Circuit found the DOL's six-factor test helpful in guiding the employee inquiry, but also found it to be "a poor method for determining employee status in a training or educational setting." The court in *Laurelbrook* read *Portland Terminal* as resting upon "whether the trainees received the primary benefit of the work they performed."[12] The Sixth Circuit affirmed the district court's decision that the students were not FLSA employees.

But in an even more recent case from the Eleventh Circuit, the court gave more deference to the DOL's six-factor test. In *Kaplan v. Code Blue Billing and Coding, Inc.*,[13] the plaintiffs were enrolled as

students in a medical billing and coding educational program and were required to complete an externship for their degrees. Plaintiffs did not receive payment for the work. In determining whether the externs were employees for purposes of the FLSA, the Eleventh Circuit considered the economic realities of the relationship, including whether the work conferred an economic benefit on the defendants. The court cited to the *Portland Terminal* Court's instruction that if a person works for his own advantage, and his work provides no immediate advantage for his alleged employer, he is not an employee under the FLSA. Although the externs enjoyed some benefit, in the form of hands-on work, academic credit, and eligibility for their degrees, the defendants received little if any economic benefit. The externs' presence made the business run less efficiently and caused some duplication of effort. The court also held that the externship programs met each of the DOL's six factors for guidance on whether a trainee qualifies as an employee, because:

- The training provided was similar to that which would be given at the externs' vocational school, and they received the benefit of academic credit;
- The externs were supervised closely and did not displace employees;
- Defendants' operations were impeded by the efforts to train and supervise; and

- The externs admitted that they were not entitled to a job after their externships and that they understood that the externship would be unpaid.

In the end, even though the court seemed to take a more narrow view of *Portland Terminal* and the DOL's test, the Eleventh Circuit affirmed the ruling and agreed that the plaintiffs were not FLSA employees. The U.S. Supreme Court denied writs on Nov.12, 2013.

Considering the ambiguity surrounding the applicable standard to determine whether an intern must be compensated in accordance with the FLSA, what's an employer to do? Suits by putative classes of interns seem to be increasing in frequency, and FLSA liability (e.g., back pay, liquidated damages, penalties, attorneys' fees, and costs) can be significant—especially on a classwide basis. That, together with the cost to defend a class action—even if successful—results in a hefty price tag.

With the recent high-profile litigation surrounding internship programs, and the possibility of a narrowing construction of the exception from *Portland Terminal*, entities with legitimate internship programs that provide excellent opportunities for real-world exposure and practical experience may simply opt to cancel or avoid an unpaid-intern program altogether. Rather than force employers into such a position, the DOL should consider adopting a specific safe-harbor exemption that allows legitimate internship and externship programs to continue providing exposure and opportunity to students and others interested in a new field. The safe-harbor should include components of well-established, legitimate internship programs, such as:

- Limited durations (three to six months) or matching with school semesters, with specific start and end dates agreed to before the internship begins;
- Limited working hours per week or per day if the internship occurs during the school semester;
- No guarantee of full-time employment after the internship, although interns may go through the employer's regular application process for full-time employment;
- Prohibition from engaging the same student in multiple internships;
- Matching interns with a professional who has expertise and professional background in the field of the experience, with routine, scheduled feedback by the professional; and
- Providing equipment, resources, and facilities necessary for the internship training.

Even without additional guidance, entities can manage the risk faced in the current environment. They may consider partnering with a school or university internship program that provides academic credit and matches the traditional classroom with real-world experience at the employer. Strict adherence to the DOL's six-factor test does not assure protection by the FLSA exemption, but compliance with the six-factor test should be the goal, and entities should:

- Provide skills training that can be used in multiple settings, as opposed to skills particular to one employer's operation;
- Ensure the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the intern;
- Provide job shadowing opportunities (as opposed to replacing or substituting for regular employees) that allow an intern to learn under the constant supervision of regular employees, and not the same level of supervision as the regular workforce;
- Record that its operations are impeded by the intern, for example, that existing employees spend time supervising and training, causing some loss of production or duplication of effort;
- Make the program a fixed duration, established prior to the outset;
- Not use the internship as a trial period for regular employment at the conclusion of the internship period; and
- Document a clear understanding and acknowledgement that the intern does not expect wages or compensation for the internship.

The program guidelines should be in writing, including a description of the responsibilities and duties of both the entity and the interns, and be acknowledged by the interns.

Entities shouldn't be punished for providing legitimate internship programs that enrich educational experiences in the classroom and provide practical training. While employers could manage risk by paying interns minimum wage and overtime, such a solution seems unreasonable as employers would be paying to train someone for a job they are unlikely to have in the long term. For now, the most reliable option to avoid FLSA liability for an unpaid internship program is to attempt strict compliance with the DOL's guidelines. ⊙

Endnotes

[1]This article focuses on FLSA liability. The scope of employer liability to unpaid interns under other federal, state, and local employment discrimination laws is widening in some jurisdictions. For instance, after the court in *Wang v. Phoenix Satellite Television US, Inc.*, No. 13-cv-00218 (S.D.N.Y. Oct. 13, 2013), dismissed the intern's hostile work environment claim and held that protections of the New York City Human Rights Law did not extend to an unpaid intern, the New York City Council unanimously voted to extend coverage of the New York City Human Rights Law to unpaid interns.

[2]*See* 29 U.S.C. §§ 203(e)(1) and (g). The FLSA makes some special exceptions, such as individuals who volunteer to perform services for a state or local government agency. The DOL has also stated that "unpaid internships in the public sector and for nonprofit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible." DOL Fact Sheet #71.

[3]330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947).

[4]*Id.* at 152.

[5]*Id.* at 153.

[6]At www.dol.gov/whd/regs/compliance/whdfs71.pdf.

[7]No. 12-cv-793 (HB) (S.D.N.Y. May 8, 2013).

[8]*Id.* at *6 (citing *Velez v. Sanchez*, 693 F.3d 308 (2d Cir. 2012)).

[9]*Id.* at *7 (emphasis in original).

[10]No. 11-cv-6784 (WHP) (S.D.N.Y. June 11, 2013).

[11]642 F.3d 518 (6th Cir. 2011).

[12]*Id.* at 525.

[13]504 F. App'x 831 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 618, 187 L. Ed. 2d 400 (U.S. 2013).