

DEPARTMENT OF LABOR TO CRACK DOWN ON UNPAID INTERNSHIPS

The Department of Labor announced last week that it will step up enforcement efforts against employers who offer unpaid internships. The Department has long taken the position that interns may be entitled to wages under the Fair Labor Standards Act (FLSA), but previous DOL interpretations of this rule have been flexible. In a 2002 opinion letter, for example, the Department said that whether an intern must be paid depends on whether "productive work performed by the [intern] would be offset by the burden to the employers from the training and supervision provided."

The Department's latest announcement, however, indicates this flexible approach is being abandoned in favor of a strict prohibition on unpaid interns. "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 law," said Nancy J. Leppink, director of the Department's Wage and Hour Division. The Department said it will step up enforcement efforts as well as educational efforts aimed at both employers and students.

For an unpaid internship to be lawful under the FLSA, the intern must be properly classified as a "trainee" rather than an "employee." The DOL's Wage and Hour Division has developed a six-factor test for determining whether an intern is a trainee. An intern is more likely to comply with the FLSA's requirements if:

1. The training is similar to what might be offered in an academic institution or vocational school.
2. The training is for the benefit of the trainees.
3. The trainees do not displace regular employees, but work under their close supervision.
4. The employer derives no immediate benefit from the training, and occasionally the employer's operations may be impeded by the training.
5. Trainees are not entitled to a job at the end of the training period.
6. The employer and trainees understand that the trainees are not entitled to wages for time spent in training.

Since most employers do not structure internships as formal training programs, very few internship programs with for-profit employers will be exempt from this rule.

Critics point out that the Department's strict approach is out of date, being based on a 1947 Supreme Court case involving train yard brakemen, and that it denies younger workers the opportunity to demonstrate their skills to prospective employers. Regardless, employers should now assume that all unpaid internships are unlawful, and should carefully tailor their training programs for new or prospective employees to avoid liability.

eLABORate

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