Wage & Hour Insights
Guidance & Solutions for Employers

When are Student Assistants "Employees" Under The FLSA?

By Bill Pokorny on November 17, 2011

Last month, a federal judge in New York granted preliminary approval for a settlement in which Hofstra University agreed to pay up to $485,000 to a class of 256 undergraduate and graduate students who allegedly were not paid minimum wage and overtime in violation of the Fair Labor Standards Act. The plaintiff class included both students who the University classified as hourly employees and others who received stipends as undergraduate and graduate assistants. Because the case was settled, the court never reached a judgement as to whether the students who received stipends were "employees" entitled to minimum wage and overtime under the FLSA. That begs the question, when must a student be considered an "employee" for purposes of minimum wage and overtime?

Chapter 10 of the U.S. Department of Labor's Field Operations Handbook (.pdf) provides some guidance on this subject. In Section 10b18, the manual states the following:

Graduate Students - research assistants.

In some cases graduate students in colleges and universities are engaged in research in the course of obtaining advanced degrees and the research is performed under the supervision of a member of the faculty in a research environment provided by the institution under a grant or contract. Normally the graduate students involved in these programs are simultaneously performing research under the grants or contracts and fulfilling the requirements of an advanced degree. Under such circumstances, WH will not assert an employee-employer relationship between the students and the school, or between the student and the grantor or contracting agency, even though the student receives a stipend for their services under the grant or contract.

In Section 10b24, the manual states:

University or College Students.

(a) University or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the Act. In addition to the examples listed in FOH 10b03(e) [which relates to students participating in activities such as drama, musical groups, radio stations, and athletics], students serving as residence hall assistants or dormitory counselors, who are participants in a *bona fide* educational program, and who receive remuneration in the form of reduced room or board charges, free use of telephones, tuition credits, and the like, are not employees under the Act.

(b) On the other hand, an employment relationship will generally exist with regard to students whose duties are not part of an overall educational program and who receive some compensation. Thus, for example, students who work at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories in anticipate of some compensation (money, meals, etc.) are generally considered employees under the Act.

Unfortunately, there is little other guidance from the U.S. Department of Labor or the courts regarding when, exactly, a student worker must be considered an employee and paid as such under the FLSA. Further complicating matters, there is an ongoing pitched battle over whether graduate assistants, teaching assistants and similar student employees should be considered "employees" permitted to form unions under state and federal labor law. Several states, including Illinois, have recognized graduate student unions at state universities. At the federal level, the National Labor Relations Board has taken shifting positions, holding in 2000 that graduate students were employees, and reversing itself in 2004. Now, it appears that the pendulum may swing back once more.

So what does this mean for colleges and universities?

- Students who perform work that is closely tied to the institution's educational program, such as research assistants, can often be treated as non-employees even if they are paid a stipend or receive other compensation such as tuition credits or reduced room and board charges.
- However, titles are not controlling. Students who perform work that does not directly relate to the institution's program of instruction may be regarded as "employees" and entitled to minimum wage and overtime even if they are classified as non-employee graduate or undergraduate assistants. As a general rule, the less educational value the job has for the student, the more likely it is that the student will be considered an employee for wage and hour purposes.
- Student assistants who are unionized or who are otherwise recognized as employees by a college or university for other purposes should be treated as such for purposes of minimum wage and overtime compliance.
- Colleges and universities should pay close attention to developments not only in wage and hour law, but also traditional labor law, as the status of student assistants as employees remains in dispute.