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WSGR ALERT

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INTERNS FILING A NEW WAVE OF CLASS ACTIONS HEADING INTO SUMMER

With summer fast approaching, many companies are considering establishing internship programs or engaging unpaid interns to take on specific roles for the duration of the summer. Although students have pursued these positions as a way to enhance their resumes and gain real-world experience in their chosen fields, companies that hire unpaid interns have recently come under fire. Most notably, a series of putative nationwide class action lawsuits have been filed by former interns claiming that companies have been using the unpaid interns to supplement their workforces in a cost-effective manner during a difficult economy. These suits allege that unpaid internship programs run afoul of federal and state labor laws by failing to compensate interns for the work they perform. In the wake of these suits and ramped-up enforcement efforts by the United States Department of Labor (DOL), now is the ideal time for employers to evaluate their unpaid internship programs.

In order to comply with federal law, an unpaid internship program must meet a strict, six-prong test developed by the DOL. The six requirements include the following:

- The internship must be similar to training that would be given in an educational environment, even though it includes the actual operation of the employer's facilities
- The internship experience must be for the benefit of the intern
- The intern should not displace regular employees, but works under the close supervision of existing staff
- The employer providing the training should derive no immediate advantage from the activities of the intern and, on occasion, its operations actually may be impeded
- The intern should not necessarily be entitled to a job at the conclusion of the internship
- The employer and the intern understand that the intern is not entitled to wages for the time spent performing the internship

In New York, five more factors must be met in addition to the six DOL factors above:

- Any clinical training must be performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed
- The intern must not receive employee benefits
- The training must be general so as to be applicable in a similar business, as opposed to specifically designed for a job with the employer offering the program
- The screening process for the internship should not be the same as for employment and does not appear to be for that purpose, but instead involves only criteria relevant for admission to an independent educational program
- Advertisements, postings, or solicitations for the program are couched clearly in terms of education or training rather than employment, although employers may indicate that qualified graduates will be considered for employment

Both Texas and Washington State generally follow the requirements identified by the DOL. Other states, like California, adhere to the DOL requirements but also look at additional indicia in evaluating the DOL factors under a "totality of the circumstances" approach.[1] Under California, Texas, and Washington law, providing interns with academic credit will dramatically enhance an employer's claim that its program is structured around an academic environment.

In any event, the internship program must mirror an educational environment closely and exist for the benefit of the intern, rather than the employer. Further, companies must be clear from the outset that the intern will not be receiving wages and that the intern is not entitled to a job at the conclusion of the internship. The more a program resembles an academic experience, provides the intern with a variety of skills that can be used in different employment settings, and provides shadowing opportunities, the more likely it is that the employer may maintain the unpaid

[1] Additional information regarding California's approach to the DOL factors was included in a prior WSGR Alert, which is available at http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_unpaid_internships.htm.

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internship program. In contrast, the more an intern position resembles that of a regular, rank-and-file employee of the company, the more likely it is that the intern must be paid as an employee.

Indeed, the main thrust of this new wave of lawsuits is that interns are being used to perform the tasks of, and take the place of, employees who otherwise would be paid for the work performed. According to the plaintiffs, this practice provides an immediate advantage to the employer without any corresponding educational benefit to the intern, who generally is performing low-level administrative tasks. As a result, the plaintiffs claim that the defendants falsely classified them as "interns" in order to avoid paying wages and exploit the interns' desire to gain job experience. Although the current crop of lawsuits focuses on practices within the media and entertainment fields, these suits have gained widespread attention and are likely just the precursor to a host of new lawsuits that challenge this practice in other industries.

If a company does not meet all of the criteria for operating a bona fide unpaid internship program, it is potentially liable for years of unpaid wages and other violations for failure to pay the minimum wage and overtime rate. Beyond simply the exposure for unpaid wages, companies may face additional penalties under federal and state law, including both New York and California. Under California law, additional penalties under the California Labor Code and the Private Attorney General Act (PAGA), as well as premiums for failure to provide meal and rest periods, may be sought. In the context of a class action suit, the liability in all states for this type of violation could be quite substantial.

For more information about these legal issues, please contact Fred Alvarez, Charles Tait Graves, Laura Merritt, Ulrico Rosales, Marina Tsatalis, Alicia Farquhar, or another member of the firm's employment law practice.

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