

Special Feature

With summer comes the cost of unpaid internships

By Christina L. Lewis
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Summer officially starts on June 21. For employers, it's the season for hiring interns, an opportunity to evaluate new talent and gain temporary help. Eager for the chance to gain real-world experience and bolster their resumes, many students forgo the monetary motive for taking a position and accept unpaid internships.

And while many view unpaid internships as symbiotic for the company and the intern, there are strict legal requirements governing unpaid internships at both the federal and state level.

At the federal level, unpaid internships are acceptable for public/governmental agencies or charitable, religious or other non-profit organizations when the intern has no expectation of compensation.

In the for-profit sector, the U.S. Department of Labor examines six criteria in determining whether an intern can be unpaid:

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.

The DOL takes the position that each of the six criteria must be satisfied. If they aren't, the intern must be classified as an employee.

Massachusetts law, on the other hand, is even stricter than federal law. In Massachusetts, interns must be paid unless they are performing services as part of "training programs in charitable, educational or religious institutions."

The Massachusetts Department of Labor Standards formally adopted the DOL's six-factor criteria to determine whether charitable, educational or religious institutions can properly utilize unpaid interns. If the six

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criteria outlined above are not met, the interns must be paid, even if the employer is a non-profit, educational or charitable institution. This also applies if a student receives school or academic credit, which is not, in itself, enough to justify not paying the student.

Employers in Massachusetts that are not charitable, educational or religious institutions must pay interns, even if the interns meet the six criteria outlined under federal law. If an employer fails to do so, the employer risks owing back wages, penalties, treble damages and attorneys' fees.

Some Massachusetts-based employers opt to avoid strict state legal requirements in a variety of ways. Before considering these tactics, however, employers and their legal counsel must understand them fully and plan accordingly.

Label the intern an "independent contractor."

Simply calling an intern an "independent contractor" does not make him one, especially in Massachusetts. Section 148B of the Massachusetts' Independent Contractor Statute is arguably the strictest in the country.

The statute sets forth a three-prong test. Each prong must be satisfied; otherwise, the individual will be considered an employee. The test requires that:

1. The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
2. The service is performed outside the usual course of the business of the employer; and,
3. The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

It is highly unlikely, if not impossible, that any true "internship" could satisfy both the six-factor DOL criteria and Section 148B.

Label the intern a "volunteer."

Similar to independent contractors, substance beats form when it comes to classifying interns as "volunteers." Volunteers are permitted only in the non-profit sector or in charitable organizations, and even then will depend on:

- The nature of the entity receiving the services;
- The receipt by the worker of any benefits, or expectation of any benefits, from his work;
- Whether the activity is less than a full-time occupation;
- Whether regular employees are displaced by the "volunteer";
- Whether the services are offered freely without pressure or coercion; and
- Whether the services are of the kind typically associated with volunteer work.

Have the intern sign an agreement waiving his right to payment.

Freedom of contract only goes so far. If the internship doesn't fit into the narrow

categories that would allow for unpaid interns in Massachusetts, then employers cannot attempt to avoid the requirements of the Wage Act by having individuals enter into agreements waiving the employer's compliance. Such agreements are void or otherwise unenforceable.

Pay the intern "in cash" or "under the table."

Paying an intern some amount of money is not the same as complying with the Wage Act. If an intern does not qualify to be unpaid, then the employer must treat the employee as it would any other, and make all the proper state and federal deductions and withholdings. The employer should also be aware of minimum wage and overtime requirements.

Locate the intern in a different state.

Just because the intern is located out of state does not mean that the Wage Act does not apply. Under certain circumstances, the Supreme Judicial Court has held that out-of-state employees of Massachusetts-based employers could state claims for misclassification or other violations of the Wage Act. That may be the case if there is an agreement that states that Massachusetts law will apply or if it is determined that Massachusetts has a significant connection to the employment relationship.

As the school year comes to a close, employers and their legal counsel should be aware of the risks of hiring unpaid interns.

Despite the attractiveness of unpaid interns, Massachusetts "for profit" employers have little choice but to classify interns as paid employees. Those who fail to do so risk paying the price later. **MLW**