In the Compliance Spotlight: "Unpaid" College Interns

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Wage and hour compliance continues to be a hot spot for employers, with increased enforcement efforts by the U.S. Department of Labor (DOL) as well as a rising trend of private Fair Labor Standards Act (FLSA) lawsuits. One area of increased litigation is the application of the FLSA to unpaid "volunteer" workers, including interns. The last year has seen high profile wage and hour cases brought by interns and other volunteer employees against Fox Searchlight and even Major League Baseball for wages "earned."

While many similar suits have been brought against companies who utilize college students for unpaid internships, colleges themselves are not immune when they utilize interns who are either unpaid, or paid an amount that works out to less than the minimum wage.

Last December, Hamilton College in New York was hit with a class action lawsuit brought by a former athletic department intern who alleged that the school, with insufficient funds to pay full-time assistant coaches, filled the gap with unpaid interns, circumventing the FLSA in the process. A motion to conditionally certify the lawsuit as a class is currently pending, with extensive (translation: time consuming and expensive) discovery taking place in the interim.

Similarly, Wolford College in Naples, Florida, was also recently hit with a class action lawsuit brought by former students who were working as interns in the College's Nurse Anesthesia Program. The students alleged that they should have been compensated as employees since the Program was dependent on their work for its daily operations and utilized them to fill a gap in its workforce. The College unsuccessfully attempted to dismiss the case early on by arguing that the students did not have any expectation of compensation or were not economically dependent on the Nurse Anesthesia Program. The District Court disagreed, allowed the case to proceed, and held that student interns may qualify as employees under the FLSA when their work economically benefits the employer.

Both the DOL and courts have provided guidance on when an intern is an employee entitled to wages under the FLSA, and the key consideration is the primary beneficiary of the internship. If the relationship is primarily for the benefit of the intern (education and training), then the intern is much less likely to be deemed an employee. If, on the other hand, the relationship primarily benefits the institution, the intern is likely entitled to wages and the other protections of the FLSA, irrespective of whether the intern had any expectation of being paid.

The final result in cases like those brought against Hamilton College and Wolford College will most likely turn on the individual facts and circumstances of the particular internships at issue. Determining the primary beneficiary in a particular circumstance will require a fact intensive inquiry.

Recognizing that internships are a traditional and valuable transitional step from academia to the workforce, what should prudent institutions do to reduce their risk?

- **Educational Experience** - Confirm that internships are an extension of a student’s educational experience as opposed to being a necessary component of a department’s operations. Interns should receive more than just on-the-job training, and the institution should derive no more than a de minimis immediate benefit from the intern’s work.

- **Filling the Gap** - Ensure that interns are not being used to substitute full or part-time employees or to augment the existing workforce during specific periods of time.
Supervision - Ensure that interns are receiving a level of supervision above that which employees receive on a daily basis. The more supervision an intern requires, the less likely they will be perceived as negatively impacting existing employment opportunities.

Get it in Writing - Create written descriptions of internship programs and ask participants to sign agreements that confirm that the program is primarily for the benefit of the intern, and wages will not be paid for program participation.

If you have additional questions about interns or the FLSA, please do not hesitate to contact the author or any member of Waller.

Waller is pleased to have partnered with TICUA to bring you this series of Legal Notes. If you have questions or suggestions for future topics, please contact Claude Pressnell (pressnell@ticua.org) or Waverly D. Crenshaw, Jr. (waverly.crenshaw@wallerlaw.com).

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