Moritt Hock Hamroff & Horowitz LLP
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STRENGTH IN PARTNERSHIP

ALERT

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THERE'S NO SUCH THING AS A FREE "EMPLOYEE"

Last month, the New York Department of Labor ("NY DOL") announced that "it is cracking down on [companies] that fail to pay interns properly", according to the New York Times.[1] The NY DOL has announced investigations into several companies' internship programs, while also acknowledging the need to educate employers, colleges and students on the law regarding internships.[2] Moreover, increasing numbers of employers are relying on interns, with the National Association of Colleges and Employers finding that 50% of students graduating in 2008 had held internships, up from just 17% in 2008.[3] The combination of increased reliance on interns and the NY DOL's stepped-up enforcement initiative suggests that it is an appropriate time for New York employers to review their internship programs.

Companies often use unpaid "interns" as a means of attracting new talent and offering students an opportunity to learn what life working at the company is like. New York employers, however, must be aware that in order to comply with the Fair Labor Standards Act ("FLSA") – the federal law regulating wages and hours – and applicable New York state law, the "interns" must meet certain criteria. Otherwise, the law will consider them to be "employees", entitled to be paid no less than minimum wage, and likely additional compensation for overtime work as well.

The FLSA circularly defines an "employee" as "an individual employed by an employer". The FLSA does not use the term "intern," and makes no express provision for wages to be paid to interns. Nonetheless, the criteria for distinguishing an "intern" (or "trainee") for purposes of the FLSA has been known since at least 1947, when the United States Supreme Court established a six-factor test that the United States Department of Labor ("US DOL") expressly referenced in a 2004 opinion letter.[4] To prove a lawful internship under the FLSA, the employer must prove that it has satisfied all of the following conditions:

(1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which 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.

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If even one of these criteria is missing, the internship program violates the FLSA. In addition, when employing "interns" in New York State, it is important to be cognizant of New York Labor Law, which may subject the employer to additional penalties. Potential penalties under the FLSA and/or New York State Law include: (i) criminal liability; (ii) past due wages; (iii) liquidated damages; (iv) punitive damages; and (v) attorneys' fees. In one interesting case, for example, the court addressed the worker's compensation claim of a *bona fide* student intern, who was working for the company pursuant to a formal "Clinical Education Agreement" with an accredited university. The agreement explicitly stated that the intern was not an employee. Nonetheless, after the intern was injured at work and filed a claim, the court held that "[t]he gratuitous statement in the agreement declaring that interns are not employees cannot overcome the strong public policy declared in the Worker's Compensation Law for the protection of employees.[5] Interestingly, the court did not apply the Supreme Court's six-factor test, presumably (although not explicitly) reasoning that the relevant issue was whether the plaintiff was an "employee," not whether she was an "intern."

In light of the recent media coverage, DOL enforcement crackdown and the employment implications of even the best-designed internship programs, it has become increasingly important that employers review not only how their internship programs are designed to work, but how they actually function, and whether they pass legal muster under the FLSA and state law. All six criteria must be observed, including the requirement that the intern be the primary beneficiary of the so-called internship program. The employer should also maintain a clear and well-documented understanding with the intern about their expectations out of the working relationship, using the DOL's six-step test as a guide. Such a writing may take the form of an "internship handbook," be contained in the employer's offer of an internship, or be memorialized in a formal contract. In many cases, employers work with accredited educational institutions in awarding college credits to students enrolled in internship programs, a practice that offers certain advantages to the employer. However, the internship "in-practice" is what the Courts will look at to determine compliance with legal requirements.[6]

For an individual, comprehensive analysis of your company's internship program, please contact the authors of this alert.

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We can assist you in understanding and complying with these new laws, including reviewing your existing internship program to determine if it complies with federal and New York legal requirements, or help you design a legally compliant program.

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[1] Steven Greenhouse, *The Unpaid Intern, Legal or Not*; N.Y. Times, April 2, 2010.
[2] Id.
[3] Id.
[4] Walling v. Portland Terminal Co., 330 U.S. 138 (1947). For a copy of the US DOL's 2004 opinion letter and its most recent fact sheet on the subject released in April 2010, please contact the authors of this Client Alert.
[5] Olsson v. Nyack Hosp., 193 A.D.2d 1006, 598 N.Y.S.2d 348 (3rd Dep't 1993).
[6] Id

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