INTERNSHIPS: THE LEGAL ASPECTS

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1.0 What constitutes an "internship"?

1.1 Attributes

- An internship is an opportunity for a student to gain practical work or career-related experience to complement their formal education.

  - ✓ Academic programs may require an internship.

  - ✓ Businesses now organize internships that are independent of school sponsored or required programs – benefits to the business include recruiting opportunities, "try before you buy" and marketing.

- The term "internship" may be used to refer to a variety of different situations: paid or unpaid work; academic credit or not; full or part-time.

  These programs typically are structured in a number of different ways: (i) interns attend classes and work during the day; (ii) interns work (full or part-time) during the day and attend classes at night; or (iii) interns co-op by attending school full-time for a semester and then work full-time the next semester, alternating throughout the education program.

- Interns are utilized in a number of different ways. *E.g.*, assist experienced employees; handle short-term assignments that are not feasible for assignment to added regular headcount; assist during peak activity periods; serving as technical assistants on research or project teams.

- Labeling a student work opportunity an internship is not determinative for legal purposes. Rather, all of the facts and circumstances surrounding the student's involvement in the workplace must be reviewed to determine compliance with and applicability of certain federal employment laws.

1.2 Best Practices

- ✓ Jennifer E. Brooks & Jacqui Cook Greene, *Benchmarking Internship Practices: Employers Report on Objectives and Outcomes of Experiential Programs*, 59 J. CAREER PLAN. & EMP. 37 (1998) (reporting results of two surveys conducted to determine how employers structure internship programs, qualities they look for in student interns, and how many interns they eventually hire).

2.0 Do Employment Laws Apply to Interns?

- Wage and hour, discrimination, workers compensation and other employment laws generally are for the protection of employees. Application to interns is not addressed. Therefore, whether or not interns are protected by these laws turns on whether they qualify for "employee" status.

- Not all federal employment laws share common definitions of "employees." Thus, an individual's status must be determined separately under each law and may vary.

- Whether an intern is an employee and, thus, entitled to the protection of such laws is a very fact-specific determination.

  - ✓ The test for employee status will be governed by the law in question.

  - ✓ An intern's status as an employee or not must be determined from all of the circumstances surrounding the person's activities on the premises of the employer.

3.0 Compensation: Paid v. Unpaid Internships

- Recent surveys indicate that half of all student internships are unpaid.

- Determining whether to sponsor an unpaid v. paid internship has significant legal and business ramifications.

  - ✓ Unpaid internships must meet federal (FLSA) and applicable state law requirements for unpaid status.

- ✓ According to some commentators, unpaid internships are contributing to a class divide in qualifications for entry-level workers.

- ✓ Paid internships will increase the likelihood that the intern will qualify for employee status thereby triggering application of employment laws.

3.1 Fair Labor Standards Act ("FLSA) – Wage and Hour Considerations

The Fair Labor Standards Act ("FLSA") only covers employees. FLSA defines an employee as "any individual employed by an employer;" someone who performs activities controlled or directed by an employer. A person may be an employee for FLSA purposes even if the employer does not require, but only "permits," the work.

If an intern can be classified as a trainee, volunteer, or independent contractor, he is not an employee entitled to the protections of the FLSA.

3.1.1 Trainees are not Entitled to Minimum Wage or Overtime Protection

- According to Department of Labor ("DOL"), Wage and Hour Division guidelines, if **all** of the following factors are present, the intern is a trainee and not an employee:

  1. the employer's training of the student is similar to that which would be given in a vocational school;

     Receipt of school credit for the internship will enhance the likelihood that the intern will not be deemed an employee.

  2. the training is for the benefit of the student;

     The internship should be set up primarily as a learning experience and not as a means to get free labor. If the intern will perform productive work from which the employer benefits, DOL will be more likely to deem the intern an employee.

3. the student does not displace a regular employee and the student works under close observation of an employee;

   If the intern is doing the work of a regular employee, DOL will be more likely to deem the intern an employee.

4. the employer derives no immediate advantage from the activities of the student and, on occasion, the employer's operations may actually be impeded by the use or training of the student;

5. the student is not entitled to a job with the employer at the completion of the training period or internship; and

   If the intern is offered the promise of a job at the end of the internship, DOL will be more likely to deem the intern an employee.

6. the employer and the trainee both understand that the student is not entitled to wages for the time spent in training.

(U.S. Dept. of Labor, Wage and Hour Div., Opinion Letter, January 6, 1969).

- **Helpful Test:** As a general rule, the DOL considers students to be trainees and not employees for FLSA purposes when the student is involved in training programs that are "designed to provide students with professional experience in the furtherance of their education and training and are academically oriented for their benefit." DOL, Wage and Hour Div. Opinion Letter, January 28, 1988.

- For example, in the case of *Donovan v. American Airlines*, 686 F.2d 267 (5th Cir. 1982), trainees at the airline's school for reservation clerks and flight attendants were found to be outside of FLSA coverage. The Court applied the DOL's six-factor guidelines and appeared to rely on the facts:

  ✓ that the individuals acknowledged in writing that they were trainees, not employees;

- ✓ they were informed that training was a prerequisite to employment but did not guarantee it;

- ✓ and they did not displace regular employees during the training.

In the case of *Reich v. Parker Fire Dist.*, 992 F.2d 1023 (10th Cir. 1993), the Court held that in determining whether an individual was an employee or a trainee, not all of the six factors in the Department of Labor's guidelines had to be satisfied; rather, the totality of the circumstances would control. The *Reich* Court found that trainee firefighters were not employees during time in training at a firefighting academy.

- In the case of *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989), the Court focused on the question of who was the **primary beneficiary** of the arrangement and held that "trainees," who accompanied and assisted experienced employees during a week-long orientation period, were really employees and entitled to be paid as such. **The Fourth Circuit noted that all six factors in the DOL Guidelines must be met in order for there to be no employment relationship.** The employer, a snack food distributor, received the benefit of obtaining employees able to perform at a higher level when they began to receive pay, as well as the benefit of having the trainees assist his employees in driving and unloading trucks and restocking shelves and vending machines.

  Note that there appears to be a split of authority as to whether all six factors must be present or whether a totality of circumstances will control.

- Other examples of exempt student trainees include:

  - ✓ law students providing legal services to the indigent (Wage and Hour Opinion Letter, September 13, 1967);

  - ✓ interior design students working in exchange for an opportunity to receive supervised practical design

experience as part of the school curriculum (Wage and Hour Opinion Letter, March 31, 1970);

- ✓ paralegal students earning credits for working under attorney supervision (Wage and Hour Opinion Letter, March 8, 1977).

Payment of a stipend or school donation does not relieve the employer from FLSA obligations in cases where the intern is an employee.

Employer's Guide to the FLSA, Thompson Publishing Group.

- See attached article, "Student-Interns: FLSA Traps for the Unwary" and DOL, FLSA Advisor, "Trainees," www.dol.gov/elaws/ esa/flsa.

3.1.2 Volunteers are not Employees for FLSA Purposes

Volunteers donate their services for civic, charitable, or humanitarian objectives.

- Generally, an individual cannot volunteer services to a for-profit private sector employer.
- An individual can volunteer his services to a public sector employer, but an employee of the public sector employer may not volunteer to do the same work as that for which he is employed.

See attached DOL, FLSA Advisor, "Volunteers," www.dol.gov/elaws/esa/flsa.

3.1.3 Independent Contractors are not Employees for FLSA Purposes

- For FLSA purposes, whether an individual is an independent contractor or an employee is tested by "economic reality" and not necessarily the common law standards relating to master and servant. The totality of the circumstances control, but among the factors the Department of Labor considers significant are the following:

1. The extent to which the services rendered is an integral part of the principal business;

2. The permanency of the relationship;

3. The amount of the alleged contractor's investment in facilities and equipment;

4. The nature and degree of control by the principal;

5. The alleged contractor's opportunities for profit and loss.

6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor;

7. The degree of independent business organization and operation.

(U.S. Dept. of Labor, Wage and Hour Div., Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act," April 10, 2003)

- See attached DOL, FLSA Advisor, "Independent Contractors," www.dol.gov/elaws/esa/flsa.

3.1.4 Student Learner Program

- This program is for high school students who are at least 16 years old and enrolled in vocational education. An employer can obtain a certificate from the DOL that allows the student to be paid 75% of the minimum wage.

- See attached DOL, FLSA Advisor, "Student-Learner Program," www.dol.gov/elaws/esa/flsa.

3.1.5 Full-Time Student Program

- Full-time students may be employed in retail or service stores, agriculture, or colleges and universities and be paid

85% of minimum wage if the employer obtains the appropriate certificate from the DOL.

- Various restrictions and limitation apply to the Program. See attached DOL, FLSA Advisor, "Full-Time Student Program," www.dol.gov/elaws/esa/flsa.

4.0 Benefits for the Intern

Whether or not an intern is considered a "common law" employee is often a threshold issue for purposes of determining whether the individual is entitled to benefits under an employer's benefit plans. For tax and ERISA reasons, most employee benefit plans limit participation to common law employees and generally do not extend coverage to independent contractors or similar service providers.

4.1 If Intern is not an Employee, He is Generally not Entitled to Benefits.

For interns who are not considered common law employees and, thus, generally not eligible for benefits, **employers should be careful not to provide any materials or otherwise communicate anything suggesting that such interns are entitled to benefits.**

- **CAUTION:** One concern in excluding such interns from an employer's benefit plans is the possibility of having to provide retroactive benefits in the event the intern's employment classification is ever reversed. In such cases, the intern may have a claim to retroactive benefits under the company's benefit plans, including possible medical and COBRA coverage, and such a claim could result in significant liabilities to the employer. **One way for employers to help guard against such retroactive claims is to be sure their benefit plans include provisions excluding interns or other independent contractors from coverage, even if the interns are later reclassified by the IRS or others as common law employees.**

4.2 If Intern is Considered a Common Law Employee, Individual Benefit Plans may Govern.

- If an intern is considered a common law employee, **the employer must look closely at the specific terms of each of its benefit plans to determine whether interns are covered**. Many companies, for example, include minimum service and/or minimum age requirements in their plans which may exclude most interns even if the inters are considered common law employees. Other companies generally cover all regular employees without significant waiting periods or restrictions but may forget that interns who are considered common law employees may also have the right to receive benefits. In such cases, excluding an intern is essentially the same as excluding a regular employee from participation in the company's plans and may be in violation of IRS or ERISA regulations.

- Employers may have some flexibility in excluding specific groups of employees from coverage under their benefit plans. While the ability to exclude particular groups (*e.g.*, "all interns") is fairly broad with health and other welfare benefit plans, it may also be possible to limit eligibility of interns under 401(k) and other pension plans subject to various IRS limits.

- Employers may not necessarily have to provide benefits to interns they treat as common law employees, but they must be sure their benefit plans are properly drafted in order to allow such exclusions.

5.0 Immigration Considerations for Interns

- Non-U.S. citizens must have a visa that provides for work authorization in order to be employed by a U.S. employer. Most foreign students applying for internship programs will be F-1 visaholders (the most common type of student visa).

  ✓ The Immigration and Nationality Act provides two nonimmigrant visa categories for persons wishing to study in the United States. The “F” visa is reserved for nonimmigrants wishing to pursue academic studies and/or language training programs, and the “M” visa is reserved for nonimmigrants wishing to pursue nonacademic or vocational studies.

- F-1 students are generally restricted from working off-campus; however, the Bureau of Citizenship and Immigration Services ("BCIS") does allow for F-1 students to engage in "practical training" related to the student's course of study. An F-1 student is authorized to engage in up to 12 months of practical training, divided into two categories – "curricular" practical training and "optional" practical training. Curricular practical training involves programs offered by sponsoring employers through cooperative agreements with the F-1 student's school. The designated school official ("DSO") may approve a student's request for curricular practical training, without separate BCIS authorization.

  ✓ The 12-month limit under the F-1 visa only applies to actual time spent in the "practical training" internship. Thus, a law student could clerk during summers while in law school and only use up 6 months of "training" time. The actual duration of the F-1 visa is for the duration of study plus a maximum of 14 months (to complete optional practical training), as long as the student remains in full-time status in good standing. Also, a student could get 12 extra months for a new "level" of study. If a foreign student gets an undergraduate degree in, for example, engineering, and uses up 12 months of engineering training and then comes back to the U.S. in F-1 status to go to law school, the student would be able to be employed for up to 12 months of legal "training."

- Optional practical training is available only after DSO recommendation and the issuance of an employment authorization document ("EAD") from BCIS. F-1 students are not eligible for optional practical training until they have been enrolled for one full academic year, and must complete all optional practical training within 14 months following the completion of their course of study. F-1 students may participate in optional practical training during the school year (up to a maximum of 20 hours per week), during the school's annual vacation, or after the completion of the course of study. The F-1 student and his or her school are responsible for all filings with BCIS.

  ✓ Some internships, such as foreign medical internships, can be arranged through the J-1 visa category, for "exchange visitors." J-1 programs require a formal sponsor that meets State Department requirements. The M-1 category applies to vocational students, who need an EAD from BCIS and must have completed their course of study before engaging in any temporary employment for

practical training. Temporary employment for M-1 students is limited to one month per four months of study, up to a maximum of six months.

6.0 Workers Compensation Considerations

6.1 Employers *want* Interns to be Considered Employees for Purposes of Workers' Compensation.

- If the intern is covered by the Workers' Compensation Act, then the Act, rather than tort law, is generally the intern's exclusive remedy for an injury occurring on the job.

6.2 Gratuitous Workers are Typically not considered "Employees" for Purposes of Workers' Compensation.

Lawson on Workers' Compensation, § 47.41

- However, a contract for hire can result in the worker being an employee even if unpaid (such as a student teacher, student nurse, or hospital intern). *Lawson*, § 47.43(a).

- Whether an oral or written "contract for hire" exists is determined by applying the common law test for finding an employer-employee relationship. This test includes things such as the employer's right to control the employee, authority to set work hours, assign duties, and establish a manner of performance. *Sutton v. Ward*, 92 N.C. App. 215 (1988) (county worker paid by the federal government under the Comprehensive Employment and Training Act (CETA) Program was under contract for hire where the county assigned him work, could terminate him, and controlled and directed his work).

6.3 The Definitions under North Carolina Workers' Compensation Statute, N.C. Gen. Stat. § 97-2 (2003), State That "Employee" Includes Workers Under a Contract for Hire and Apprentices

- It appears that the inclusion of "apprentices" is fairly unique to North Carolina's definition.

- Cases in North Carolina dealing with unpaid interns have found that the worker is an apprentice and, thus, is covered by workers' compensation.

- ✓ *Wright v. Wilson Mem'l Hosp.*, 30 N.C. App. 91 (1976) – college student worked for hospital under contract between Wake Tech and the hospital. Intern was unpaid, but received free laundry, room and board. The Court noted that the intern rendered service to the hospital for its pecuniary gain for the purpose of learning the trade and, thus, was an apprentice.

- ✓ *Ryles v. Durham County Hosp.*, 107 N.C. App. 455 (1992) – college student worked for hospital under contract between Durham Tech and the hospital. Noting that the patients were billed as if the intern were an employee, the Court held that the unpaid intern was an apprentice.

    - The Court focused on the fact that "plaintiff was not paid monetarily, but instead received the benefits of acquiring the practical skills required [in her course of study]. In turn, the defendant's hospital received the same benefit it would receive from one of its regular employees."

    - "This focus is more importantly the mutual benefit derived by the parties from the apprenticeship relationship."

- ✓ *McKinney v. IBM*, I.C. No. 132027 (September 26, 1996) – Without discussing why, the Industrial Commission treated an undergraduate student intern as an employee of IBM for workers' compensation purposes.

- ✓ *Stack v. Mecklenburg County*, 86 N.C. App. 550 (1987) – Without discussing why, treats college intern at a group home for minors as an employee for workers' compensation purposes.

- If an intern is covered by the Workers' Compensation Act, the employer cannot avoid liability under the Act by having the intern waive the benefits of the Act. N.C. Gen. Stat. §§ 97-3, 97-6, 97-17 (2003).

- Even if the intern may be treated as an employee under workers' compensation law, the employer must also determine whether an intern is covered under its workers' compensation insurance policy to ensure protection from liability.

6.4 What Employers Should Do?

- First, check with your workers' compensation insurance carrier to determine what types of interns would be covered by your insurance policy.

- Second, treat the intern as an employee or an apprentice to ensure coverage by the Act to limit the employer's liability.

7.0 EEO/Harassment Laws

7.1 If an Intern is Considered an Employee Under the EEO Laws (Title VII, ADA, ADEA) the Employer is Subject to Liability for Discrimination Based Upon Race, Color, Religion, Sex, National Origin, Age or Disability

- If an intern is covered by Title VII, he or she can waive or release claims for past acts of discrimination. However, waivers or releases regarding future acts of discrimination are invalid. Lindemann & Grossman, *Employment Discrimination Law*, 1916, 1921. Thus, while an employer can ask a covered intern to release claims based on discrimination that has occurred, it cannot ask a covered intern to waive his or her rights under Title VII prospectively.

7.1.1 College Placement Agencies

- If a college internship placement office is considered an employment agency under Title VII, it may be subject to liability for a recruited employer's violation of Title VII.

- Typically, college placement offices that place students in paying jobs are covered as employment agencies. See, *e.g., EEOC Decision,* 33 FEP Cases 1893 (EEOC 1983); *Kaplowitz v. University of Chicago,* 8 FEP 1131 (N.D. Ill 1974); *Watanabee v. Loyola University of Chicago*, 83 FEP Cases 768 (N.D. Ill 2000).

- Whether a college internship placement office would be considered an employment agency under Title VII most likely will turn upon whether a court concludes that the interns placed through the office are "employees" under Title VII.

- Schools also may be liable under Title IX for employer discrimination/harassment.

7.2 Harassment

7.2.1 An employer is clearly liable under Title VII if an intern participates in harassment, regardless of whether the intern is considered an employee under Title VII, because an employer has a duty to take immediate corrective action if it knows or should know that a non-employee is harassing employees. Lindemann, 248; 29 CFR 1604.11(e).

7.2.2 Whether an employer is liable under Title VII if the intern is harassed on the job depends on whether the intern is considered an employee under Title VII. Unfortunately, Title VII gives almost no guidance as to who is an "employee."

Case law shows that whether an intern is an employee is a very fact-specific determination.

- ✓ Some courts hold that a worker must receive compensation to be considered an employee. *Llampallas v. Mini-Circuits Lab., Inc.,* 163 F.3d 1236 (11th Cir. 1998).

- ✓ Compensation, however, can be in the form of benefits rather than salary. *Pietras v. Board of Fire Commissioners,* 180 F.3d 468 (2nd Cir. 1999); *Haavistola v. Community Fire Co. of Rising Sun,* 6 F.3d 211 (4th Cir. 1993).

- ✓ Other courts have focused on whether the intern is acting as an employee or an observer, regardless of compensation. *Hollander v. Sears, Robuck & Co.,* 17 FEP Cases 1348 (D.Conn. 1978).

- ✓ The Second Circuit has held that a college senior who interned at a mental hospital and received federal work-study funds was an unpaid volunteer rather than an

employee because she was not paid and was not a hired party. The Court also considered the factors traditionally used to determine whether a worker is an employee or an independent contractor. *O'Connor v. Davis,* 126 F.3d 112 (2nd Cir. 1997).

- o In this case, a college senior was placed by her college in an internship with a hospital for the mentally disabled.

- o The intern claimed that one of the doctors at the hospital sexually harassed her by, among other things, referring to her as "Miss Sexual Harassment" (later claiming that such was a compliment regarding her appearance); telling her that she looked tired, probably because she had a "good time" with her boyfriend the night before; suggesting that he, the intern, and other women present should participate in an "orgy"; telling her to take her clothes off for their meeting, asking "Don't you always take your clothes off before you go in the doctor's office?"; stating that unattractive female patients should be sterilized; and referring to a female incest victim, stating "the family that plays together stays together."

- o The Court held that the intern was not an employee under Title VII and, therefore, could not proceed with her Title VII sexual harassment claim.

✓ Without discussing the issue, the Seventh Circuit has treated a woman teaching art classes as an intern at a junior high school as an employee for Title VII purposes. *Molnar v. Booth,* 83 FEP Cases 1756 (7th Cir. 2000).

- o The intern-teacher complained that the school principal harassed her by, among other things, "ogling" her and "making appreciative noises"; putting on music during a meeting and offering to get her special perks if she gave him her phone number; and once pulling his "pants tightly over his crotch, making [the intern] think that he was calling attention to that part of his body."

- The Court, without addressing why the intern was covered by Title VII, held that the intern's harassment claims could proceed.

7.2.3 Even if intern is not an employee and thereby not covered by Title VII, the employer may be liable for harassment under state emotional distress laws.

7.3 Minority-Only Internships

7.3.1 Presumably, if an intern is considered an employee for Title VII purposes (as discussed above), use of minority-only internships will be governed by voluntary affirmative action rules.

7.3.2 Even if an intern is not an employee for Title VII, an employer may still face liability. The District Court of Connecticut has held that a prospective intern rejected due to race may still have a claim against the employer under 42 U.S.C. § 1981, which guarantees the right to contract without discrimination. *Hollander v. Sears, Roebuck & Co.,* 10 FEP Cases 473 (D. Conn. 1975).

- In this case, a Caucasian college student sued Sears, Roebuck & Co. for discrimination in failing to consider him for a position in the Sears Summer Internship Program for Minority Students.

- The Court later held that the interns, although paid, were really no more than student observers rather than employees. *Hollander v. Sears, Roebuck & Co.,* 17 FEP Cases 1348 (D. Conn. 1978). The interns did not fill regular employee positions, but observed the jobs and tried them out for short periods. Thus, the Court held that the program was neither a hiring program nor an apprenticeship program, but was a recruiting program. Accordingly, the internship was not a contract for services and was not covered by § 1981.

- The Court also noted that even if a contract existed, this was an affirmative action program that did not go so far as to become reverse discrimination.

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8.0 Best Practices and Practical Tips

- Determine fundamental attributes of program (Employers)
  - ✓ Paid v. unpaid
  - ✓ Independent v. school-sponsored
- Evaluate (or reevaluate) curriculum/internship requirements/offerings in light of industry trends, student demographics, financial assistance (Schools)
- Develop internship position descriptions
  - ✓ qualifications: gpa, educational requirements, experience, etc.
  - ✓ duties/function/supervision
- Coordinate with union officials (if applicable)
- Review and revise (if necessary) benefit plans, documents (including employee handbooks) to specifically exclude/include interns
- Review and revise workplace policies, handbooks, etc. to clarify application (or not) to interns
  - ✓ Development intern handbook and policy orientation
  - ✓ Develop reporting procedures (coordinate with school sponsored program)
- Develop internship agreement
  - ✓ Parties: employer, intern, school (if applicable)
  - ✓ Term of assignment (at-will disclaimer)
  - ✓ Position
    - > Unpaid internship positions should be described to establish qualifications for unpaid status (*e.g.*, reference to school sponsored program/credits, duties/functions clearly

distinguishable from regular employee position, benefit to intern, etc.).

- > Pay/benefits, specifically address what is/is not provided
- > Confidentiality, intellectual property assignment

- Develop evaluation procedure and tools
- Develop and conduct supervisor/staff training re: internship program (including learning objectives, permissible/off-limits duties, etc.); school-sponsored program, involve faculty liaison
- Develop exit interview tool
  - ✓ Coordinate with school-sponsored program

Appendices

http://www.smithlaw.com/publications/Employment_eTrends_May_2003.pdf?id=A0D23FDD-77B3-4267-B447FD5A9C5197CD

http://www.dol.gov/elaws/esa/flsa/docs/trainees.asp

http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp

http://www.dol.gov/elaws/esa/flsa/docs/contractors.asp

http://www.dol.gov/elaws/esa/flsa/docs/slplink.asp