

## Firms must exercise care in hiring unpaid interns

By Correy E. Stephenson  
Staff writer

Summertime means vacations, dinner on the grill and summer interns at the office.

For sole practitioners and small firm lawyers in a tight economy, it's tempting to hire an unpaid intern looking for resume experience.

But recent guidance from the Department of Labor serves as a reminder to lawyers and law firms of the pitfalls of using unpaid interns, cautioned Paul DeCamp, a partner at the Reston, Va. office of employment firm Jackson Lewis, where he leads the firm's Wage and Hour practice group.

"There are very few circumstances under which an unpaid intern can be used in a for-profit business," DeCamp said.

The issue is receiving more attention because of an across-the-board increase in enforcement activity at the DOL, noted William E. Hannum, an employment lawyer at Schwartz Hannum in Andover, Mass.

The economy is also contributing to a rise in unpaid internships, Hannum said.

He has received more inquiries from clients over the last 12 months about using unpaid interns.

"Students need something on their resume, employers don't have a lot of funding for summer jobs and like the idea of free labor – it's a win-win for everybody except for the DOL, apparently," Hannum said.

### Six factors

Laura B. Friedel, a partner with Levenfeld Pearlstein in Chicago who focuses her practice on labor and employment matters, explained that whether an individual needs to be paid as an employee is a question of law.

"An individual cannot agree to be an unpaid intern," she emphasized.

The DOL guidance lists six factors that make an unpaid internship acceptable for a private sector, for-profit business – all of which it says must be met, said Friedel.

The factors themselves are nothing new (they were set forth in a 1947 U.S. Supreme Court case, *Walling v. Portland Co.*, 330 U.S. 148), but the



William E. Hannum

analysis comes down to one primary question, said Hannum: is the internship primarily for the employer's benefit, or the intern's benefit?

Here are the criteria that must be met for an unpaid internship to be appropriate:

- The training provided, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction;

- The training must be for the benefit of the trainees;

- The trainee must not displace regular employees, but work under their close observation;

- The employer that provides the training must derive no immediate advantage from the activities of the trainee, and on occasion the employer's operations may actually be impeded;

- The trainee is not necessarily entitled to a job at the conclusion of the training period; and

- The employer and the trainee understand that the trainee is not entitled to wages for the time spent in training.

Friedel said law firms should ask whether there would be a need to hire another employee or have a current employee work more hours if the intern weren't being used.

"If the intern is displacing a current or prospective employee, chances are they need to be paid," she said.

An internship should never be used as an introductory or probationary period prior to an individual's being hired, Friedel cautioned.

"If a firm plans on hiring the associate in the fall and offers an unpaid internship for the summer, that is a problem," she said.

Law firms that use unpaid interns who generate work product should examine the real nature of the work the interns perform, DeCamp suggested.

For example, if an intern spends 10 hours working on a summary judgment brief that a firm associate could finish in two hours, and the associate spends time going over the brief with the intern and then has to re-write most of it, the firm isn't deriving an immediate benefit, he said.

"There is a good argument that the brief is primarily a learning opportunity for the intern and a chance to get experience writing a brief and going through the editing process," DeCamp said.

A firm has a stronger argument if the intern is doing things to increase his or her skill set and not functioning as a clerk who spends all day running the copy machine, he added.

Law firms have to be cautious, Hannum emphasized, because it's possible for a law student to provide some value by performing research and writing a memo, for example. On the other hand, if an intern is spending his or her time carrying a briefcase to client meetings or observing a trial from the back of a courtroom, that isn't adding much value from the firm's perspective.

If a firm genuinely believes that all six criteria are satisfied, "consider putting the key facts in writing," Friedel suggested. "Include acknowledgements of the parameters of what the firm is expecting, [state] that it is an educational experience, set a definite duration with specific dates and be sure to note that he or she will be unpaid."

**Another option: minimum wage**

For law firms, the possibility of billing clients for an intern's time and work product may be tempting.

But if a firm is billing for an intern's work, "it will have a hard time arguing that the intern shouldn't be paid," Friedel said, because the firm is clearly deriving a benefit from the intern's work.

DeCamp said he advises clients to pay their interns and bill clients for the time, which in some situations even puts the law firm ahead, cost-wise.

"A firm doesn't have to charge a very high rate to make up for [an intern's salary]," he noted. "At the very least a firm can break even and not have to worry about the DOL."

In addition to federal law, firms need to check state law on intern status, as some states have more stringent requirements, noted Friedel.

If a firm decides to pay minimum wage, it's important to pay overtime if the intern works more than 40 hours a week (or more than 8 hours per day in some states), she said.

Both the DOL and a potential judge or jury will have much less tolerance for lawyers who get the law wrong, DeCamp cautioned, and having your firm named in a press release issued by the DOL for a Fair Labor Standards Act violation isn't going to bring in a lot of clients.

"Especially for a law firm, it's important to comply with the law," he said. "It's hard to credibly hold a firm out to a client to watch their interests when it can't manage its own."

---

Questions or comments  
can be directed to the writer at:  
correy.stephenson@lawyersusaonline.com