UNPAID INTERNS
THE DANGERS OF A SEEMINGLY "WIN-WIN' ARRANGEMENT

by

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In today's economy, all business owners are looking for ways to reduce their expenses and thereby, increase their profit. One method for doing so, that would appear on its surface to be especially advantageous to a business owner, is the use of unpaid "volunteer interns", who are seeking to gain experience in a particular industry or other field of work to enhance their resumes.

From the intern's perspective, what better way to gain such experience is there than to actually work for a business engaged in their preferred industry or other field of work. But the problem is how to get such a job with no prior experience. Why not volunteer to work for free for a specified period of time?

To a hard pressed business owner, the offer of free help by a willing and seemly capable person is almost irresistible. The business owner did not seek out this "volunteer intern" and has not offered him or her any incentive to work for free, except possibly a paying job at the end of the internship. What can go wrong?

As it turns out, plenty. By accepting the "volunteer intern's" unsolicited offer of free help, a business owner can end up being investigated by the United States Department of Labor (the "USDOL") and sued by both it and the intern for back wages and overtime pay under the Fair Labor Standards Act (the "FLSA"). The FLSA requires that all "employees" be paid at least the current minimum wage for every hour they work, plus overtime pay of one and one-half times their hourly pay rate for any hours worked in excess of 40 hours per week. An "employee" is anyone who is required or permitted to perform services for the benefit of a business engaged in or affecting interstate commerce, which nowadays covers almost every type of business activity.

The burden is on the business owner to prove that the "volunteer intern" was in fact a "trainee", who does not have to be paid anything for their services, and not an "employee", who must be paid at least the minimum wage for their services. The fact that the "volunteer intern" willingly agreed to perform the services in question without being paid any compensation is irrelevant, as the United States Supreme Court has held that an individual can not waive their rights under the FSLA. This principle permits a "volunteer intern" to decide, sometimes years later, that maybe they should have been paid for all the services they performed for a business owner, if for whatever reason they now need the money or have a grievance of any kind against the business owner.

In April 2010, the USDOL issued a Fact Sheet in which it explained what a business owner must show to prove that a "volunteer intern" is a "trainee." To begin with, unlike "volunteer interns" working for a non-profit or government organization, the USDOL will presume that such an intern working for a for-profit business is an "employee". To

overcome this presumption, the business owner must satisfy six criteria with respect to its relationship with such an intern. Those criteria are as follows:

1. The internship, even though it includes actual operation of the business owner's facilities, is similar to training provided in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern doesn't displace regular employees but works under the close supervision of existing staff;
4. The business owner derives no immediate advantage from the activities of the intern, and on occasion, its operations may actually be impeded;
5. The intern isn't necessarily entitled to a job at the conclusion of the internship; and
6. The business owner and the intern understand that the intern isn't entitled to wages for time spent in the internship.

A careful examination of the above criteria, in light of the USDOL's stated assumption that all "volunteer interns" working in a for profit business are "employees", reveals that it will be very difficult, if not impossible, for a business owner to satisfy those criteria and still achieve significant cost savings through the use of "volunteer interns". This fact is reinforced by the comments contained in the USDOL Fact Sheet about those criteria. Highlights from those comments follow:

1. The internship should be of fixed duration established prior to the beginning of the relationship.
2. There can be no expectation on the part of the business owner or the "volunteer intern" that upon a successful completion of the internship, the "volunteer intern" will be hired on a permanent basis.
3. The "volunteer intern" can not on a regular and recurring basis be used to perform routine or essential services on behalf of the business owner that the business owner would ordinarily have done by its employees or other paid personnel. Such services include clerical tasks like filing, data entry, retrieving and distributing the mail, and delivering documents or other items to third parties, as well as assisting the customers of the business owner.
4. The "volunteer intern" must be closely and constantly supervised by the business owner's employees and not left to "learn things on their own" or "by doing."

The comments contained in the USDOL Fact Sheet indicate that a true "volunteer intern" program is one that is "structured around a classroom or academic experience as opposed to the employer's actual operations", "provides the individual with skills that can be used in multiple employment settings as opposed to skills particular to one employer's operation", and provides "job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees" with the performance of "no or minimal work" on behalf of the employer.

If a business owner is not able to provide the above type of experience for a "volunteer intern", it should politely decline any offer of free services by such persons on that basis. If not, the business owner will be exposing itself to significant liability for back wages and potentially overtime pay, along with liquidated damages, civil penalties, and even criminal penalties if its actions are deemed to be in knowing and willful violation of the FLSA. This is not to mention the FICA tax that will be owed by the business owner on all such back wages and overtime pay and potential penalties and interest payable to the Internal Revenue Service for the late withholding of such tax from such wages and pay.

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