UNPAID STUDENT INTERNS UNDER THE FAIR LABOR STANDARDS ACT

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On April 2, 2010, the *New York Times* published an article by Steven Greenhouse entitled "The Unpaid Intern, Legal or Not." The article noted that increasing number of unpaid internships is "leading federal and state regulators to worry that more employers are illegally using such internships for free labor." Specifically, the article noted that "many employers failed to pay even though their internships did not comply with the 'six federal legal criteria' that must be satisfied for internships to be unpaid." Accordingly, in response to the *N.Y. Times* piece, coordinators in parks and recreation university curricula have questioned whether undergraduate students should be assigned to unpaid internships in public park and recreation agencies as part of their academic program requirements.

Upon written request, the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) will issue opinion letters regarding the application of the Fair Labor Standards Act (FLSA) in matters not involving pending litigation or an investigation/litigation by the WHD/DOL. As the term suggests, "opinion letters" of an agency express administrative opinions as to "the application of the law to particular facts presented by specific inquiries." As such, these opinion letters constitute an agency "ruling," i.e., an agency interpretation made by the agency as a consequence of individual requests for rulings upon particular questions. 29 CFR 790.17

An employer who conforms and relies on the information contained in a requested opinion letter would offer the agency's ruling as good faith evidence of compliance with the FLSA. Although unlikely, subsequent court decisions or changes in the law could, however, lead the WHA Administrator to publish a statement in the Federal Register rescinding all previous interpretations and rulings, including opinion letters, to the contrary.

DOL INTERN LETTER OPINION

In an opinion letter dated, May 17, 2004, the Fair Labor Standards Team within the Office of Enforcement Policy of the U.S. Department of Labor (DOL) responded to a "request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to college students participating in your client's internship program" (FLSA2004-5NA). In this particular instance, the stated purpose of the internship was to "teach marketing, promotion, and statistical analysis to students in a real world setting" and was described as follows:

> [The] internship will be structured like a college Marketing course complete with program description, outline, syllabus and assignments." The student interns work a flexible, part-time schedule of approximately 7-10 hours per week. They perform the work of a field marketing representative on-campus and are expected to assume the role of regular staff members of the company.

> The duties of the student interns include wearing items of clothing embossed with the company logo while distributing stickers and flyers and evaluating the response of other students; collecting data on the composition of the campus population and that of the surrounding city; utilizing on-line chat rooms to track the effectiveness of certain web sites and the ability to drive on-line traffic to different sites; obtaining detailed contact information for five of the most popular club/bars, coffee shops, bookstores, record shops, beauty salons, clothing stores, and skate shops; and surveying 50 people on campus and compiling data to predict trends in the area and nationally.
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> Students may participate as interns only if they obtain college credit for the internship. While Marketing and Communication majors are preferred, any student will be accepted if his/her academic advisor approves the course. A faculty coordinator is responsible for advising the student interns and consulting with the company supervisor on a regular basis regarding the student's performance. The company assumes responsibility for direct supervision of the student interns. A company supervisor consults with the faculty coordinator about any problems the student encounters and submits an evaluation of the student at the completion of the program. The company is not obligated to hire the student interns, and the students are under no obligation to accept employment with the company.

As noted by DOL, the FLSA defines an employee as "any individual employed by an employer." 29 U.S.C. 203(e)(1). Similarly, the FLSA definition of "employ" includes "to suffer or permit to work."

In 1947, in the case of *Walling v. Portland Terminal Co*., 330 U.S. 148, the United States Supreme Court had held that "the FLSA definition of 'employ' does not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another." On the contrary, the Supreme Court's decision in *Portland Terminal* identified the following "six criteria" for determining whether the FLSA would allow a trainee to work without compensation:

> 1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
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> 2. The training is for the benefit of the trainee;
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> 3. The trainees do not displace regular employees, but work under close observation;
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> 4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded;

> 5. The trainees are not necessarily entitled to a job at the completion of the training period; and
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> 6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.

As noted in the DOL opinion letter, "[t]he Department of Labor has consistently applied this test in response to questions about the employment status of student interns." Moreover, in determining "[w]hether student interns are employees under the FLSA," DOL acknowledged it would "depend upon all the circumstances surrounding their activities." In so doing, however, DOL indicated that it would "not assert that an employer-employee relationship exists for purposes of the FLSA" for student interns "where certain work activities are performed by students that are simply an extension of their academic programs."

> Thus, provided the six criteria listed below are met, where educational or training programs are designed to provide students with professional experience in the furtherance of their education, and the training is academically oriented for the benefit of the students, it is our position that the students will not be considered employees of the firm to which they are assigned.

Applying these principles to the above described scenario for marketing student interns, DOL found it was "not clear that each of the six criteria above is satisfied." In this particular instance, DOL found the marketing internship satisfied the first criteria:

> The company's training program is similar to that which would be given in a school. The internship involves the students in real life situations and provides them with an educational experience that they could not obtain in the classroom, which generally is related to their course of study.

Similarly, DOL found the program appeared to satisfy the second criteria. "The internship inures to the benefit of the students, who receive college credit for performing the internship, although it is not a required program."

According to DOL, there was insufficient information "to determine whether the internship program satisfies the third and fourth criteria."

> While it does not appear likely that the student interns displace regular employees, since they work a maximum of 10 hours per week, they are "expected to assume the role of regular staff members of the company." You did not describe how closely the students are supervised and whether at any time the company's operations are impeded by virtue of the internship program.
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> We also do not know whether the employer may derive an immediate benefit from the activities of the students, who analyze trends on campus and develop marketing information in a number of areas, including a list of contacts for a large number of area businesses, data on the "guerilla marketing" of the company's

> product on the internet, a detailed analysis of the population of the campus and the city, and a prediction of local and national trends.

In the opinion letter, DOL found further that "[t]he internship program does appear to meet the fifth and sixth criteria because the student interns are not necessarily entitled to a job with the company at the end of their internship, and they are not compensated during the internship period." As a result, on the basis of the information provided and the application of the Department of Labor's six criteria, the DOL opinion letter concluded that it could not determine "definitely whether an employment relationship exists under the FLSA between the company and the student interns." On the other hand, the DOL letter expressed the "hope that you are able to use this information to review the program in light of the relevant criteria."

UNPAID ON THE JOB TRAINING

In the case of *Carter v. Mayor & City Council of Baltimore City* (Dist. Md. 3/2/2010), the plaintiffs were current and former apprentices in a Baltimore City Fire Department (BCFD) three-year Firefighter/Paramedic Apprenticeship Program. As part of their apprenticeship, plaintiffs alleged that "they were required to attend class and perform on-the-job practical training on an ambulance and in the hospital without compensation in violation of the [Federal Labor Standards Act] FLSA."

One of the duties of a Firefighter/Paramedic is to provide emergency medical care, including Advanced Life Support. State law, Md. Code Regs. 30.01.01.20, required licensure as a Cardiac Rescue Technician (CRT) in order to provide Advanced Life Support, Maryland state law designates the State Emergency Medical Services Board (EMS Board) to approve CRT courses, conduct examinations, and issue CRT licenses. Md. Code Ann., Educ. § 13-516(a)(2).

To obtain a CRT license, the EMS Board required "successful completion of a Cardiac/Rescue Technician/EMT Intermediate/99 (CRT-I) course." In addition, to obtain a CRT license, the EMS Board also required twelve months experience "in providing patient care as an EMT-B or at least 150 documented ambulance responses."

The Maryland Institute for Emergency Medical Services Systems (MIEMSS) issued regulations governing the content of Advanced Life Support (ALS) education programs. Md. Code Regs. 30.04.02.01 et seq. In addition to classroom training, these regulations required ALS students to "complete a supervised clinical experience, which includes the practice of skills within clinical education facilities, and a supervised field internship, which includes the practice of skills while functioning in a prehospital ALS environment."

During the clinical and field training, regulations require that students be supervised by clinical and field preceptors. In the field portion of the training, the ratio of students to preceptors must be one to one.

Upon entering the fire academy, apprentices signed an Apprenticeship Agreement in which they agreed to the terms of the Apprenticeship Standards filed with the Maryland Apprenticeship and Training Council. The Standards include a requirement that apprentices will complete a

minimum of 144 hours per year of related instruction and that these hours will not be considered as hours worked when given outside regular working hours. In addition to the CRT-I course, apprentices were required to undergo enhanced training, including courses in pump operations, aerial operations, hazmat tech, arson awareness/sprinkler, and rescue technician.

During the second portion of the apprentices' training, they worked an eight day cycle, with 4 days on and 4 days off. Training to obtain their CRT licensure was sometimes scheduled on the apprentices' days off. Apprentices were not compensated during the off-duty training times.

Plaintiffs contended that they should have been compensated for this off-duty training time under the FLSA.

As cited by the federal district court, the FLSA requires that covered employers pay their employees not less than one and one-half times the regular pay rate for all overtime hours worked. 29 U.S.C. § 207(a)(1). Plaintiffs alleged that the City violated this provision by refusing to pay them overtime for the hours spent in training outside their regular workweek.

In the case of *Walling v. Portland Terminal Co*., 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947), the U.S. Supreme Court focused on whether the trainees were to be considered employees and thus protected by the FLSA. The FLSA defines employ as "to suffer or permit to work." 29 U.S.C. § 203(g). Despite this broad definition of "employ" in FLSA, the Supreme Court in *Walling* held that it could not "be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction." Rather, the Supreme Court held "the general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees' labor."

Applying these principles to the facts of the case, the federal district court held "the firefighter trainees were not employees because they obtained training comparable to a vocational school and the defendant was not immediately benefited by the trainees' activities." In addition, because "their training activities were supervised," the court found the trainees "did not assume the duties of career firefighters." Further, the court noted that the benefit to the defendant from the plaintiffs' supervised training activities was *de minimis*," i.e., inconsequential, insignificant.

As characterized by the court, the required classroom training which took place outside of regular working hours "was neither integral nor indispensable to the apprentices' principal activity," i.e. the regular 40 hour work-training week as a firefighter/paramedic. As a result, the federal district court found the City "should not be made liable for overtime pay for time its employees spend as students, rather than as workers."

In this particular instance, the court found "the classes and on-the-job training required of the apprentices can be broken down into four categories":

> 1) initial classroom training to obtain CRT licensure; 2) classroom enhanced training; 3) clinical training with an ambulance medic team and in the hospital to

> obtain CRT licensure; and 4) mandatory repeat classroom training to obtain CRT licensure when a student has failed any of the required exams.

In the opinion of the court, "the hours spent in all four categories of training are not compensable as hours worked under the FLSA" because "[a]ll of the classroom and practical training required to obtain the CRT license."

> Plaintiffs are apprentices in an apprenticeship program approved by the Department of Labor and as part of that program were required to take the CRT Training, which required both classroom and clinical training. As the CRT license was required in order for Plaintiffs to conduct their duties as firefighters/paramedics, the City could have required the Plaintiffs to obtain the license before hiring them. In fact, similar training is provided at Baltimore City Community College and Community College of Baltimore County.

Moreover, the court found plaintiffs were "the primary beneficiaries of the training" because they "were not able to perform any of the ALS duties until they obtained their license." Accordingly, the court found "the training was not an integral and indispensable part of their paid work duties during the period of their training."

As cited by the court, Department of Labor regulations interpreting the FLSA "exclude from the computation of 'hours worked' the time spent in certain kinds of training." Specifically, the court cited 29 C.F.R. § 553.226(b) which provides that the following situations are "considered to be noncompensable" for "time spent by employees of State and local governments in required training":

> (1) Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.
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> (2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees), does not constitute compensable hours of work.

Accordingly, the federal district court held that EMT training necessary to maintain certification need not be counted as hours worked if the training takes place during non-working hours.

> While time spent in attending training required by an employer is normally considered compensable hours of work, attendance outside of regular working hours at specialized or follow-up training which is required by law for certification of employees of a governmental jurisdiction, does not constitute

> hours of work under the FLSA. See Section 553.226 of Regulations, 29 CFR Part 553.

Similarly, the court noted that the Department of Labor had issued a regulation as to apprenticeship training which provided as follows:

> [T]ime spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if…. (b) such time does not involve productive work or the performance of the apprentice's regular duties. If the above criteria are met the time spent in such related instruction shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that it is hours worked. 29 C.F.R. § 785.32.

While plaintiffs did not claim the initial and enhanced CRT training were compensable under these regulations, plaintiff claimed the required clinical training was compensable time "because it was productive work and constituted performance of their regular duties." The federal district court rejected this argument. As noted by the court, a regular medic unit was staffed by two individuals. Moreover, when plaintiffs were assigned to a medic unit as part of their training, there was always two staff provided. As a result, the trainee would then be a third person on the team. Further, the court found plaintiffs had "not established that any benefit the City may have received from the trainee's presence is anything more than de minimis or that it outweighed the benefit to the trainee in completing a required component of the CRT training." Accordingly, the federal district court granted the City's motion for summary judgment, effectively dismissing plaintiffs' claims to compensation under FLSA.

CONCLUSION

Application of the *Portland Terminal* "six criteria" to unpaid student internships is necessarily fact specific. In the event of an inquiry or investigation, WHD/DOL will examine all the pertinent facts and circumstances on a case by case basis to determine whether the FLSA would allow a particular type of trainee to work without compensation. As a result, the existence of other factual or historical background information in a given student internship situation could result in a different conclusion than the one expressed in the opinion letter described above.

Accordingly, it would be inappropriate to offer any general conclusions as to how these "six criteria" might necessarily relate to the myriad of situations involving unpaid student interns and public parks and recreation agencies. While the "six criteria" described herein certainly provide a starting point and some guidance regarding issues to be considered, advice on a particular situation should come in the form of a WHD/DOL "opinion letter" and/or legal advice from local counsel.

That being said, assuming an unpaid internship is closely supervised, it will likely satisfy the "six criteria" in *Portland Terminal*" if it incorporates the following characteristics:

> (1) real life situations provide interns with an educational experience which is generally related to their course of study and unavailable in the classroom; (2) the employer derives no immediate advantage and may, in fact, be disadvantaged by supervising the intern's activities; and (3) the interns activities will not displace regular employees,

On the other hand, in the unlikely event of an WHD/DOL inquiry and/or enforcement investigation, a violation of FLSA is much more likely to the extent the agency benefits from what could be reasonably characterized as "free labor" with little or no educational/vocational benefits to the unpaid student intern performing routine job tasks or maintenance work.

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