by Louis P. DiLorenzo, Esq., Bond, Schoeneck & King, PLLC

Rites of spring: The hidden dangers of unpaid internships

The calendar turns to spring, and you know what's coming. It's that time of year when employers are swamped with requests from college students for unpaid internships.

Thousands of students want a chance to build their résumés, find a mentor and get an edge on the competition when graduation finally comes. They call, e-mail and write, begging for a chance to learn the ropes. And they don't ask for much in return—often not even a paycheck.

The benefits of the symbiotic relationship are obvious. An internship provides the student with an opportunity for real-life experience, résumé enhancement and perhaps a leg up on a paying position with the employer after graduation. The employer receives the chance to evaluate a new applicant, at no cost.

The legal risks, however, are not so obvious.

Interns *may* be employees

One area of risk is the Fair Labor Standards Act (FLSA), which requires nonexempt employees receive the minimum wage for all hours worked. Nonexempt employees also must receive one-and-a-half times their regular rate of pay for all hours in excess of 40 in a workweek.

The $64,000 question, however, is whether the unpaid intern is an "employee" within the meaning of this and other federal and state statutes. The U.S. Labor Department has adopted six criteria for evaluating this issue.

To be a true internship, the conditions must meet the following criteria:

1. The internship should be similar to the training given in a vocational school.
2. The training must be primarily for the benefit of the intern, not the employer.
3. The intern must not displace any regular employees, but must work under close supervision.
4. There should be no immediate advantage to the employer—and in fact, operations may be impeded by the training.
5. The intern must not be entitled to a job at the completion of the internship.
6. The intern and the employer must understand that the intern shall receive no pay for the training.

Labor Department's opinion

In one case, a company requested an opinion letter from the Labor Department addressing whether unpaid interns who received college credit to work seven to 10 hours per week as field marketers were employees. There was a coordinator who advised the students and communicated regularly on their progress. There was no obligation to hire them.

The Labor Department found that four of the six criteria were established:

- Training similar to vocational school
- No expectation of compensation
- Training primarily for the benefit of the intern
- No obligation of hiring.

On the two remaining questions—displacing regular employees and whether the company derived an immediate benefit—the Labor Department indicated the record was not clear. This opinion letter indicates employers should not assume the Labor Department will not carefully scrutinize internship relationships.

Remember, a determination that an unpaid intern is, in fact, an employee can have impact beyond minimum wage and overtime.

A misguided classification can lead to problems involving discrimination laws, workers' compensation, state and federal taxes, benefits and unemployment insurance coverage. An intern who turns out to be an employee may cost your company thousands of dollars in unpaid wages, overtime, fines and other costs.

Be careful out there!

Protect yourself from internship pitfalls

If your organization uses unpaid interns, make sure you:

- Have an agreement or letter making it clear there will be no pay and no guaranteed job.
- Adopt a policy that sets up strict supervision and assigns a mentor.
- Ensure the primary benefit of the internship is for the student, not the employer. Minimize assigning the same duties regular employees perform. Do not use interns to displace any employees. If possible, require that the student receive college credit.
- Arrange for a structured program of internal and, if possible, external instruction in the type of work your organization does.

Don't get stuck with 'dud' interns

If you use summer interns, it's hunting time. When interviewing prospective interns, experts suggest asking the following questions to determine how students make decisions and manage work and deadlines:

- Why did you pick your current major?
- How do you manage a heavy course load?
- How would this internship fit into your career path?
- What do you hope this internship will teach you?
- What's your post-graduation plan?
- What is an intern's role in a company?
- What did you learn at your past work experiences?
- What's your most rewarding school experience so far?