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OUTSIDE COUNSEL

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Reviewing FLSA Rules on Volunteers and Interns

Addressing the nation on Nov. 8, 2001, President Bush said:

> Many ask, "What can I do to help in our fight?" The answer is simple. All of us can become a September the 11th volunteer....

This article will discuss the use of volunteers and interns/trainees vis-à-vis the Fair Labor Standards Act (FLSA).

A volunteer performs services "for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation," free from pressure or coercion from any employer. 29 C.F.R. §§553.101(a) & (c). An intern/trainee performs services primarily for his or her own benefit, does not displace a regular employee, produces little or nothing of value for the employer, and is not entitled to a job. Neither is an employee under the FLSA.

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. §203(e)(1). It permits public sector volunteers by excluding from the definition:

> [A]ny individual who *volunteers* to perform services for a *public agency* ... if —
> (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
> (ii) such services are not the same type of services which the individual is employed to perform for such public agency.

29 U.S.C. §203(e)(4)(a) (emphasis added).[1]

"There are no limitations or restrictions ... on the types of services which private individuals may volunteer to perform for public agencies." 29 C.F.R. §553.104(c).

"On the other hand, there is no permissible volunteering of services to a for-profit employer in the private sector. All work must be paid work." *The Fair Labor Standards Act* (E. Kearns Ed.) BNA Books (1999), p.95. This prohibition, however, does not apply to persons who are not employees.

In 1985, the U.S. Supreme Court addressed

the status of workers engaged in the commercial businesses of a non-profit religious foundation. "Associates" who worked in the businesses received no wages, but the foundation provided them food, clothing, and shelter. Despite the associates' testimony that they considered themselves volunteers and worked strictly for "religious and evangelical" purposes, the Supreme Court held they were employees.

> The test of employment under the Act is one of "economic reality".... Whereas in *Portland Terminal* [discussed infra], the training course lasted a little over a week, in this case the associates were entirely dependent upon the Foundation for long periods, in some cases several years. [A]ssociates must have expected to receive in-kind benefits — and expected them in exchange for their services .... [T]hat the compensation was received primarily in the form of benefits rather than cash is in this context immaterial. These benefits are ... wages in another form.

Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 209, 301 (1985) (citations and quotations omitted).

In *Holzapfel v. Town of Newburgh*, 145 F.3d 516 (2d Cir.), cert. denied, 525 U.S. 1055 (1998), plaintiff police officer sought compensation for off-duty hours spent training a fellow officer's police dog. The Second Circuit found plaintiff volunteered his time because the department did not control or require the work, and did not make plaintiff's job contingent upon the work.

Similarly, the court in *Roman v. Maietta Constr., Inc.*, 147 F.3d 71 (1st Cir. 1998), found that no employment relationship existed. Beginning in 1985, plaintiff held the unpaid position of crew chief for racing cars Michael Maietta owned. In 1987, Michael asked his father to hire plaintiff at the senior Maietta's construction company, which the father did. During most of plaintiff's time with the construction company, he continued to serve as crew chief for Michael's race team on weekends.

After plaintiff's employment with the construction company ended, he sued for wages for the time spent as crew chief. The First Circuit found he volunteered such services.

> [N]othing in the record supports the claim that Maietta Construction required Roman to serve as crew chief as part of his job. [T]he work performed by Roman at the race tracks was not primarily for the benefit of Maietta....
> Roman served as crew chief for his personal enjoyment rather than for the benefit of Maietta.

Id. at 75.

Todaro v. Township of Union, 40 F. Supp. 2d 226 (D.N.J. 1999), provides an excellent analysis of the use of volunteers.

> Congress did not intend ... the applicable definitions of "employee" and "volunteer" to ..., discourag[e] volunteerism. However, ... [t]he definition fails to reflect the fact that a person who volunteers services may be motivated ... by reasons of "personal purpose or pleasure" that are other than "civic, charitable, or humanitarian." Among myriad other motivations that do not qualify ... a person may volunteer in order to acquire employment contacts, gain experience, or obtain school credit....
> Accordingly, the Court has concluded that the definition of "volunteer" must be applied in a common-sense way that takes into account the totality of the circumstances.... The regulatory definition does not require that the individual

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be exclusively, or even predominantly, motivated by "civic, charitable, or humanitarian reasons"; therefore, the Court understands this phrase to be modified by an implied "at least in part."

Id. at 229-30 (citations omitted). The court held that a town's unpaid special law enforcement officers were volunteers because they performed such work in hopes of securing paid, private security work.[2]

Interns/Trainees

The FLSA does not speak of interns or trainees, instead the courts and Department of Labor developed the exclusion. Generally, an intern/trainee 1) performs services primarily for his or her own benefit, 2) does not displace a regular employee, 3) produces little or nothing of value for the employer, and 4) is not necessarily entitled to a job when the training ends.

In 1947, the Supreme Court examined a 7-8 day training program for prospective railroad brakemen. The unpaid prospects worked under close supervision, did not displace regular employees who performed most of the actual work, and their presence did not "expedite" the company's business, but instead hindered it. Those who successfully completed the program were eligible for hire, those who failed were not.

The Court held they were trainees.

> Section 3(g) ... defines "employ" as including "to suffer or permit to work... ." [It] was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another... . The Act's purpose ... was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of "employ" and "employee" are broad enough to accomplish this. But ... they cannot 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.

Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

The U.S. Court of Appeals for the Fifth Circuit reached a similar conclusion in *Donovan v. American Airlines*, 686 F.2d 267 (5th Cir. 1982). American required that applicants for flight attendant or reservation agent positions who had survived its initial screening process undergo between two and five weeks of training. Although American was not obliged to hire all applicants who successfully completed the training, in practice it did so.

> American's trainees do not displace any regular American employees. Although training benefits American by providing it with suitable personnel, the trainees attend school for their own benefit, to qualify for employment they could not otherwise obtain. [T]rainees gain the greater benefit from their experience... . American did not receive immediate benefit from the trainees' activities at the Learning Center. [T]rainees are not productive for American until after their training ends.

Id. at 272.

In contrast, Southern District Judge Sonia Sotomayor rejected defendants' claim of trainee status in *Acriche v. Grand Central Partnership, Inc.*, 997 F. Supp. 504 (S.D.N.Y. 1998). Plaintiffs were formerly homeless people employed at sub-minimum wages by defendant's Pathways to Employment program.

> If all of the following criteria apply, the trainees or students are not employees within the meaning of the Act:
>
> 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;
> 2. The training is for the benefit of the trainees or students;
> 3. The trainees or students do not displace regular employees, but work under their close observation;
> 4. The employer derives no immediate advantage from the activities of the trainees or students, and on occasion his operations may actually be impeded;
> 5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
> 6. The employer and the trainees or students understand that the trainees are not entitled to wages for the time spent in training.

Id. at 532 (citing Wage & Hour Manual (1980); *Donovan*, 686 F.2d at 273 n.7.) Judge Sotomayor noted that although plaintiffs received a benefit from the program, "defendants gained an immediate and greater advantage ... the ability to offer ... services at below market rates." 997 F. Supp. at 533.

Marshall v. Baptist Hosp., Inc. 668 F.2d 234 (6th Cir. 1981), involved students studying to become x-ray technicians, who spent a great deal of time performing unpaid clinical work. The U.S. Court of Appeals for the Sixth Circuit found they were employees.

> [T]he clinical training portion of the program is not a bona fide educational program because students are not adequately supervised and quickly become regular working members of the hospital's X-ray department, thereby displacing regular employees under circumstances in which the hospital receives more benefit from the arrangement than the students... . But for the trainees, ... Baptist would have had to hire other employees or require overtime work.

Id. at 235-36 (citations and quotations omitted).

Although these cases speak of trainees, the same analysis applies to student-interns.

Where educational or training programs are designed to provide students with professional experience in the (sic) furtherance of their education and the training is academically oriented for the benefit of the students [or] ... where students receive college credits applicable toward graduation when they volunteer for internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting ... [no] employment relationship exists.

May 8, 1996 Opinion Letter (reprinted at WHM 99:8048).[3]

Conclusion

Employers must exercise caution in accepting unpaid work because any worker who cannot qualify as a volunteer or intern/trainee must receive at least the minimum wage for all hours worked (unless they otherwise qualify for one of the minimum wage exemptions).

(1) Notwithstanding the proscription in subparagraph (ii), a public employee may volunteer for another agency with which his employer has a mutual aid agreement. 29 U.S.C. §203(e)(4)(b).

(2) See also Opinion Letters at WHM 99:8186; WHM 99:8191; WHM 99:8045; WHM 99:8054; and WHM 99:8035.

(3) See also O'Connor v. *Davis*, 126 F.3d 112 (2d Cir. 1997) (unpaid student intern not defendant's employee under Title VII); *Lippold v. Duggal Color Projects, Inc.*, 1998 U.S. Dist. Lexis 335 (S.D.N.Y. January 15, 1998) (same); *Pavlik v. Kornhaber*, 1996 U.S. Dist. Lexis 8732 (N.D. IL June 20, 1996) (same); *Tadros v. Coleman*, 717 F. Supp. 996 (S.D.N.Y. 1989), aff'd, 898 F.2d 10 (2d Cir.), cert. denied, 498 U.S. 869 (1990) ("wannabe" professor not employee of Cornell University because "at an unadorned minimum, a would be Title VII plaintiff must render the defendant some beneficial service").