

UNPAID TRAINEES/INTERNS - SUMMER AND OTHERWISE AND NH'S "RETURN TO WORK" PROGRAM

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With students, new graduates and laid-off employees all competing in our country's current tough job market for a foot in the door, or experience and references they can list on their resume to sell themselves to other employers, it is very easy for a private for-profit employer to fall into the "No good deed goes unpunished" trap by simply allowing individuals to work unpaid for the "experience." This can be especially problematic during summer when employers are often solicited/pressured by friends to help out their son or daughter who is out of school and can't find a job, not to mention helping out the parent who if their child can't get paid work at least wants them out of the house doing something productive.

Unlike public and non-profit employers who in many circumstances can allow an individual to work as an unpaid volunteer or intern without running afoul of wage hour laws, the Fair Labor Standards Act ("FLSA") and state wage laws **generally prohibit private for-profit employers from allowing anyone to "work" for them for less than the applicable hourly minimum wage and overtime pay.** This prohibition includes "volunteers" and "interns."

Recognizing that the current economy and tight labor market has led many individuals, especially teens and young adults who have been hit particularly hard by unemployment, to offer/beg to work as an unpaid intern to gain experience the U.S. Department of Labor ("DOL") recently announced that it is cracking down on employers illegally using unpaid interns stating "[i]f you're a **for-profit employer... there aren't ... many circumstances where you can have an intern... (that isn't) paid and ... be in compliance with the law.**" The fact that a student can get school credit for their "work" does not in and of itself exempt the employer from having to pay the individual minimum wages and overtime for their time spent at "work."

Somewhat opposite to this approach to the stagnant economy and labor market, in January of this year New Hampshire Governor John Lynch

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proposed legislation to assist individuals to “**Stay at Work, Return to Work and Get Ready for Work.**” The NH legislature passed this bill and sent it to Governor Lynch in early May, and on May 12th he signed it into law. The “Stay at Work” and “Return to Work” provisions of the bill went into effect immediately, and “Get Ready for Work” will go into effect on January 1, 2011. “Return to Work” and possibly the “Get Ready for Work” components of this law allow NH employers to provide structured, supervised unpaid training to individuals in NH.

Under “Return to Work” NH employers can provide individuals collecting unemployment with approved unpaid on-the-job training for up to 24 hours per week, to a maximum of six weeks per trainee. In setting the criteria for its “Return to Work” program NH worked with the U.S. DOL to ensure that training under this program meets the FLSA’s stringent criteria for unpaid training/internship with a private for-profit employer to be lawful. Under the FLSA, a lawfully unpaid “trainee” must meet all of the following seven factors:

1. The training must be similar to what would be given in a vocational school;
2. The training must be for the benefit of the trainee;
3. The trainee must not displace a regular employee;
4. The trainee must work under close supervision;
5. The employer providing the training must receive no immediate advantage from the activities of the trainee, and on occasion the employer’s operations may even be impeded;
6. The trainee is not necessarily entitled to a job at the conclusion of the training; and
7. The employer and the trainee understand that the trainee is not entitled to wages for the time spent in training.

Only if all of the above factors are met is the individual a “trainee” under the FLSA, and therefore **doesn’t have to be paid** by a private for-profit employer for their training time. Misclassifying an individual as an unpaid “intern/trainee” can result in significant wage liability for an employer. In addition, it could unexpectedly obligate the employer to pay worker’ compensation and unemployment benefits, as well as subject the employer to fines and legal costs. While not a guarantee that you can avoid liability, it is advisable to have the intern/trainee sign a statement before they begin their internship/training outlining the arrangement and including their agreement to the above seven factors.

In addition to the above seven criteria, while not required to hire the trainee at the end of training NH’s “Return to Work” program requires that the employer have a full-time opening available, and the person being trained must not cause any current employee to lose a promotion opportunity. Both the employer and employee participating in this program must sign a detailed agreement affirming their adherence to the program’s requirements. This program is intended as a “no strings attached” opportunity for employers to assess an individual’s potential job abilities and skills, work ethic and fit with

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the company. NH Employment Security is covering workers compensation for approved individuals in the program.

However, employers should be aware that an individual in NH's "Return to Work" program in a given situation could try to claim coverage under other employment laws, such as prohibitions against employment discrimination. A company faced with such a claim would certainly assert that it should be dismissed on the basis that the person was not an "employee," but the claim would need to be defended and it is impossible to predict with absolute certainty whether the "trainee" might be considered an employee for discrimination law purposes. As with most everything in business a company considering this program will need to weigh the potential benefits against possible risks. Any employer wanting to offer unpaid on-the job training to unemployed individuals through this program must apply to the NH Department of Employment Security for pre-authorization. Employers interested in NH's "Return to Work" program should go to www.nh.gov/nhes/nhworking for more information.

The FLSA does have other provisions that under very specific circumstances allow an employer to pay young workers, learners, student-learners and apprentices, each as defined by the FLSA, and individuals in a School-to-Work Program under the School-to-Work Opportunities Act of 1994 to be paid less than minimum wage. An employer paying an individual less than minimum wage under any of these exemptions should check very carefully that the circumstances meet all the requirements of the law under the specific exemption(s) being claimed.

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