

Massachusetts law on interns even tougher than federal rules

By David C. Henderson



On July 7, the U.S. secretary of labor filed an amicus brief asking that a federal appeals court defer to the Department of Labor's test for determining whether a trainee or intern is covered by federal minimum wage guarantees.

The DOL thus underscored yet again its longstanding position that, under the Fair Labor Standards Act, a workplace trainee or intern is an "employee" whose services trigger minimum wage and overtime pay obligations unless the employer satisfies a six-point test.

The recent restatement of the DOL's position is significant, as it comes in the context of heightened enforcement of wage-and-hour laws, increased willingness among plaintiffs' attorneys to take on wage-and-hour cases, significant penalties applicable to employers when they fail to pay required trainee or intern compensation, and growing use of paid and unpaid interns in the workplace.

According to the National Association of Colleges and Employers, about 63 percent of college graduates in 2013 held internships during their undergraduate years, 48 percent of the internships were unpaid, and 38 percent of the unpaid internships were in the private sector.

But the widespread publicity given to enforcement of federal trainee and intern compensation rules may be obscuring a more im-

David C. Henderson is a partner in the litigation department of Nutter, McClennen & Fish in Boston and a member of the firm's labor, employment and benefits practice group.

portant point: analogous state rules about paying trainees and interns can, from an employer's perspective, be even more stringent and punitive.

That is certainly the case in Massachusetts. An employer in Massachusetts can comply religiously with federal rules relating to minimum wages and overtime and yet still be liable under state law because of its underpayment of interns and trainees.

Massachusetts employers thus need to remember the following three points.

1. As the DOL emphasizes, the federal rules relating to paying interns and trainees are stringent, and the penalties for violating them are severe.

The DOL's longstanding view is that all people working for for-profit entities are "employees" entitled to the minimum wage and overtime compensation guarantees of the Fair Labor Standards Act unless they are subject to a specific statutory exemption or exclusion. The DOL formulated its six-part "employee" test as early as 1967, based on the U.S. Supreme Court's ruling 20 years earlier in *Walling v. Portland Terminal Co.* that the term "employee," as used in the FLSA, does not include someone working "for [his or her] own advantage on the premises of another" and "without any express or implied compensation agreement." According to the



The widespread publicity given to enforcement of federal trainee and intern compensation rules may be obscuring a more important point: Analogous state rules about paying trainees and interns can, from an employer's perspective, be even more stringent and punitive.

DOL test, the "trainee" exception to the FLSA definition of "employee" applies only when the employer can establish all six of the following criteria:

- 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;
- the training is for the benefit of the trainees or students;
- the trainees or students do not displace regular employees, but work under their close observation;

- the employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded;
- the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

The DOL's standard for paying trainees and interns, standing alone, thus is stringent. And the penalty for noncompliance can be severe. An employer violating the FLSA's minimum wage or overtime provisions is subject to a "fine of not more than \$10,000, or to imprisonment for not more than six months, or both," and is liable to the employees affected for their unpaid minimum or overtime wages and an "additional equal amount as liquidated damages."

Further, the court in such action "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

2. Massachusetts rules relating to paying interns and trainees are even more stringent, as Massachusetts law is more expansive in its definition of the "employees" who must be paid.

States generally have their own rules to determine who is and is not an "employee" covered by minimum wage and overtime compensation guarantees. In Massachusetts, any "individual performing any services, except as authorized by [the pertinent statute], shall be considered an employee" unless a strict, three-part independent contractor test is satisfied.

To be an independent contractor in Massachusetts, the individual must be (1) "free from control and direction in connection with the performance of the service"; (2) per-

forming a service that is "outside the usual course of business of the employer"; and (3) "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed."

Further, the Massachusetts Minimum Fair Wage Law generally requires that employers pay the state's minimum wage rate to all persons employed in an "occupation."

"Occupation" is defined as "an industry trade or business or branch thereof or class of work therein, whether operated for profit or otherwise, and any other class of work in which persons are gainfully employed, but shall not include professional service, agricultural or farm work, work by persons being rehabilitated or trained under rehabilitation or training programs in charitable, educational or religious institutions or work by members of religious orders. Occupation shall also not include outside sales work regularly performed by outside salesmen ... who do not make daily reports or visits to the office or plant of their employer."

There is no exception in the Massachusetts Minimum Fair Wage Law generally applicable to "interns." Rather, anyone "performing services" while undergoing "training" in an "industry trade or business or branch thereof" is considered to be an employee who is working in an "occupation" subject to the state's minimum wage guarantees, unless the work is "under ... [a] training program[] in [a] charitable, educational or religious institution."

Accordingly, interns and trainees performing services in Massachusetts workplaces must be paid minimum wage as a matter of state law unless they are under a training program in some type of charitable, educational or religious institution.

That is a key difference between Massachusetts and federal law. As is noted above, there is no federal requirement that an unpaid trainee or intern be working under a training program in a charitable, educational or religious institution.

Moreover, a second significant difference between Massachusetts and federal law is that

the former does not indicate that, as the labor secretary stated in her amicus brief about federal law, "[d]ifferent rules apply to individuals who volunteer or perform unpaid internships ... for non-profit charitable organizations."

As a result, the Massachusetts standard for when interns must be paid minimum wages applies across the board, in both the for-profit and the non-profit sectors.

Finally, also worth noting is that the Massachusetts Minimum Fair Wage Law does not define "training program."

The Massachusetts Department of Labor Standards, however, has adopted the six-part test used by the DOL to determine whether a particular program in an educational or charitable institution qualifies as a "training program" within the meaning of the state statute.

This means that, as a matter of Massachusetts state law, interns and trainees in Massachusetts workplaces generally must be paid state minimum wages unless the employer can satisfy two sets of criteria. The employer initially must satisfy the state's criteria, as explained above, and second, the employer must satisfy the six-part test used by the DOL for purposes of federal law.

And so the bottom line is this: Employers in Massachusetts who cannot successfully run both of those gauntlets need to be paying their interns and trainees minimum wages.

3. Penalties for noncompliance with Massachusetts rules relating to paying trainees and interns can be severe.

In Massachusetts, any person paid by an employer less than the minimum fair wage to which he is entitled "can bring a civil action for injunctive relief, for any damages incurred and for the full amount of the wages less any amount actually paid to him by the employer."

Further, "[a]n employee so aggrieved who prevails in such an action shall be awarded treble damages ... and shall also be awarded the costs of the litigation and reasonable attorneys' fees." 

