Fine Print

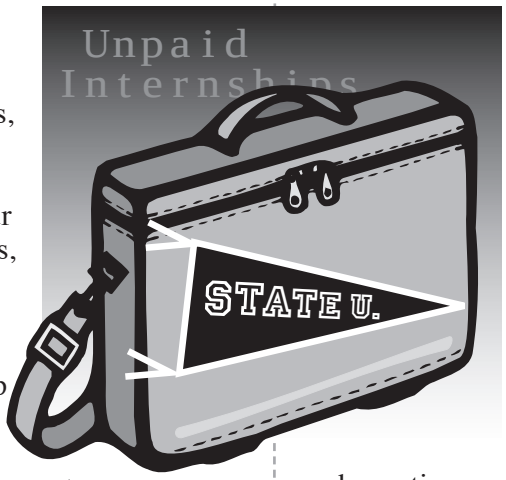
A Quarterly Publication of The Ohio State Bar Association and Our Members

Issue 53 • Fall 2012

Businesses Should Use Caution When Using Unpaid Interns

By Scott Lawson, Esq.

Increasingly, recent graduates and "near-grads" are seeking unpaid internships in the "for-profit" sector to gain additional skills, experience and contacts. Depending on your type of business, using student interns can be very beneficial. Interns can help with research, or with developing and implementing new programs, products or services. Also, beyond whatever assistance an intern may provide, employers who use their services gain the satisfaction that comes from imparting knowledge and teaching new skills to those who will soon enter the work force.



Employers need to be cautious, however, when inviting interns to join their businesses. In particular, employers must be careful not to run afoul of federal wage and hour laws when using interns. To help prevent such problems, the U.S. Department of Labor (DOL) has published guidance for employers. Under this guidance, if an internship is structured to be an extension of the intern's academic experience, and provides the intern with skills that can be used in a variety of settings, then the program will not likely violate federal law. If, on the other hand, the intern is engaged in the operations of the business or is performing productive work (such as filing, clerical work, or assisting customers), then the internship could be subject to federal minimum wage and overtime requirements.

The DOL has developed six factors that employers must use to determine whether an internship complies with federal wage and hour laws:

- The intern should not displace regular paid workers and should work under close supervision.
- The training that the intern receives should be similar to what would be given in an academic setting.
- The internship should be for the benefit of the intern.
- The employer should not gain immediate advantage from the activities of the intern, and on occasion, the employer should expect that its operations may actually be impeded by the internship.

Cont. on page 2

Protecting the Manufacturer: Limiting Obligations Through Indemnity Agreements

By Jordan C. Butler, Esq.

Let's say you run a manufacturing company. Your product vendors will worry about protecting themselves against products liability or infringement lawsuits. Ohio law gives vendors an implied right of indemnification unless there is an agreement between the manufacturer and its vendors to address the issue. For this reason, you should clearly and specifically define, in a written indemnification agreement, your company's obligations to vendors and the procedures to be followed when a vendor seeks indemnification.

The indemnity provisions should specifically describe your product liability responsibilities. You can reasonably exclude from liability the claims

Cont. on page 2

OHIO STATE BAR ASSOCIATION
EST 1880

For additional copies of Fine Print, or further information, please contact OSBA Public Relations, 1700 Lake Shore Drive, Columbus, Ohio 43204, or by phone, 800/282-6556 and 614/487-2050.

Interns, cont. from page 1

■ The intern should not be guaranteed a job at the conclusion of the internship. In other words, the internship should not be used as a trial period for persons seeking employment.

■ Both the intern and the employer should understand before beginning the internship that the intern is not entitled to wages for the time spent during the internship.

If a proposed unpaid internship meets all of these requirements, the employer will be in compliance with federal law, and the intern will be considered a "trainee" rather than an employee.

If, however, the internship does not qualify for unpaid status according to the factors listed above, then the intern must be paid a minimum wage and, as applicable, overtime pay. The business also could be obligated to pay back wages, workers' compensation and unemployment insurance benefits, and could also be subject to federal and state discrimination laws, back tax liability, fines and significant legal bills. Employers should carefully structure any existing or future unpaid internship programs to make sure they comply with the above factors in order to avoid legal liability.

Scott Lawson is the managing attorney of The Lawson Firm, LLC in Cleveland.

Indemnity, cont. from page 1

of any third party that are based on any product alteration or modification the vendor may make or that may arise due to the vendor's product representations that differ from the manufacturer's representations. Therefore, your agreement should state that your company will have no indemnification obligation if a vendor makes warranties that are inconsistent with your manufacturing company, or takes any other action that voids the manufacturer warranty. The agreement should also provide that the vendor will indemnify your company if the cause of the injury in a products liability suit was due to vendor conduct with respect to the product.

"The true value of an indemnification agreement comes from defining the manufacturer's rights and liability limitations."

The agreement also should state that your company will indemnify and hold harmless a vendor for any patent, copyright, trademark, or other intellectual property right infringement. The agreement should limit your company's liability if a vendor's or third party's modification to the product has infringed rights. Also, the agreement should state that, if your company is sued for infringement caused by the vendor, the vendor will indemnify your company.

Defining the acts or occurrences that require manufacturer indemnification is important, but the true value of an indemnification agreement comes from defining the manufacturer's rights and liability limitations, and the procedures to be followed if a vendor seeks indemnification. As a manufacturer, your company should consider:

■ ***Explicit notice requirements.*** The agreement should state that the manufacturer will not be liable unless it receives written notice of a pending claim within a specified period of time.

■ ***Settlement procedures.*** The agreement should state that all settlement negotiations and decisions will be made by the manufacturer. This prevents a vendor from settling too quickly or inadequately. The agreement should also state that no indemnity payments will be made until all litigation is final, all appeals exhausted, all settlements finalized, and the vendor actually pays all amounts.

■ ***Costs.*** Costs to be reimbursed should be spelled out. Typically, these include amounts to satisfy judgments or settlements, attorney fees and other costs of defending against a claim. However, the agreement should limit the payment obligation to amounts not recovered by the vendor from its own insurance.

Before entering into an indemnification agreement, you should review your manufacturing company's insurance policy to ascertain whether indemnity payments will be reimbursed to you. Other vendor agreements should also be reviewed to ensure no conflicts.

While purchase orders, distribution agreements and other agreements between a manufacturer and vendor typically contain indemnity provisions, such provisions are often inadequate. A manufacturer is best protected by a separate agreement aimed at defining its rights, limiting its liability and outlining the procedures to be followed when vendors seek indemnity.

Jordan C. Butler is an attorney with Mallory Law Office, LLC in Columbus.