



New York State Department of Labor
David A. Paterson, *Governor*
Colleen C. Gardner, *Commissioner*

December 21, 2010

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: Request for Opinion
Educational Internship Program
RO-09-0189

Dear [REDACTED]:

This letter is written in response to your request for an opinion letter regarding the educational internship program operated by [REDACTED], aimed at developing fundamental job skills for 18-24 year olds, primarily from underserved communities. Specifically, you seek an opinion as to whether the program participants are within the coverage of the New York State Minimum Wage Act. This letter follows [REDACTED] submission of additional information and a request for reconsideration of an earlier determination by the Department that the program was subject to minimum wage and other requirements of New York law and regulations. A site visit was conducted on November 29, 2010, by representatives of this Department, including the Division of Employment and Workforce Solutions and Counsel's Office, during which additional information was provided by the program.

Program Background

The program operated by [REDACTED] a non-profit 501(c)(3) organization, serves 18 to 24 year-olds in primarily underserved communities who have not progressed in their education beyond receiving a GED or high school diploma. The program includes an 11-month intensive educational and training curriculum designed to: provide young adults with technical skills in information technology; develop professional skills for working in an office environment; provide a support network of social workers, instructors, and mentors; instill the importance of lifelong learning through career development tools; and assist participants with applying to college.

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In the first 5 months of the program, participants engage in a learning and development phase in which they receive thirty-two hours of college level classroom instruction per week. Participants receive 13 college credits at Pace University and/or Empire State College¹, along with a stipend of \$144 per week. [REDACTED] pays the college the cost of each participant's tuition, which is valued at approximately \$15,000 at Pace University. The second phase of the program is the Internship Phase, a six month placement made pursuant to agreements with non-profit or for-profit businesses. During the internship phase, the participants receive a stipend of \$260 per week. The classes being conducted during this phase include business communications, business math, professional skills (including information technology, financial operations, and quality assurance), and professional readiness. These classes resemble classes provided in an educational setting and require that the participants take tests, do homework, and participate in classroom lectures and assignments.

During the internship stage, which is the focus of this letter, participants spend up to thirty-six hours per week at their internship site and two hours per week in [REDACTED]'s classrooms for development and support. [REDACTED] has "partner agreements" with businesses with the purpose of providing on-the-job training to participants as a part of their educational experience. The agreements provide for a (sponsorship) fee payable by the business and invoiced by the program that average \$875 per week for each intern placed with the business. There are currently 27 partner businesses in the New York City area. While at their internship sites, the participants are assigned a supervisor to train and monitor their development. Supervisors' time commitment generally ranges from thirty minutes to three hours per day, with the average weekly time spent training, supervising, and providing feedback to the interns averaging five hours per week. Participants either pursue an information technology (IT) or an Investment Operations (IO) track during the program, where they learn the skills necessary for entry level positions in those fields.

During the internship stage of the program, the IT participants engage in job shadowing, working with mentors to develop troubleshooting skills, assisting in building computers, rotating through functional troubleshooting teams, imaging and configuring workstations, troubleshooting various computer related issues, performing system upgrades and patches, conducting web application tests, and providing technical support. A sample of the IO participants activities include learning how to reconcile dividend reimbursements vs. internal controls, assisting with data analysis and integrity testing, gaining exposure to the confirmation of large trading volumes, assisting on trade reconciliations and investigations, learning how to identify trade discrepancies, assisting in financial reporting, expense budgeting, and expense processing, maintaining cash logs, and organizing and maintaining SAS 70 compliance packages. A visit to a partnership site revealed that the focus of the internship was in providing the skills necessary to perform work not only at that specific company, but at other companies in the financial sector.

¹ At the site visit, it was communicated that discussions are being held with the Bureau of Manhattan Community College for recognition of [REDACTED] classes for direct credits.

A participant's behavior can negatively impact the amount they receive as a stipend in both phases of the program. For example, dress code violations, late arrival or early departure without notification, inappropriate use of electronic devices, failure to complete assignments on time, and failure to attend all planned meetings each result in a participant losing \$15 from his or her weekly stipend. Other participant violations result in more serious consequences including, for example, a forfeiture of a day's stipend as well as a loss of \$50 for a day of missed work at the internship or for missing a meeting of the internship class. Additionally, [REDACTED] operates a behavioral points system whereby participants start the program with 200 points (with more points being earned through successful participation earns points throughout the year), and points are deducted in equal amount to the monetary penalties described above. A participant that drops below one-hundred and fifty points is required to write a paper describing the reason(s) for dropping below that threshold; at one-hundred points the participant is required to read that paper to his or her peers; and at zero points, the participant has "fired him or herself" from the program. Participants described these penalties being effective since they work to help each other through the program and minimize the penalties each of them are awarded.

Employment Status of Program Participants

The provisions of the New York State Minimum Wage Act apply to all individuals who meet the statutory definition of "employee." Section 651(5) of the Labor Law defines "employee" as "any individual employed or permitted to work by an employer in any occupation," but excludes fifteen categories which the Commissioner is directed, pursuant to Section 651(5), to further define through regulation. Those definitions are contained in the Minimum Wage Orders and generally operate simply to clarify and flush out the statutory requirements for those exclusions. (See *e.g.*, 12 NYCRR §142-2.14.) A number of exceptions relevant to the present discussion are contained in Section 651(5), and are explained by the Minimum Wage Orders.

However, a worker or individual who is not in an employment relationship is excluded from the coverage in the Minimum Wage Act and Orders since that individual is not considered an "employee," as well as the coverage of Article 6 of the Labor Law, which governs the payment of wages.² To determine the existence of an employment relationship for interns and trainees, like the [REDACTED] participants, the Department looks at the totality of the circumstances, primarily using the six criteria used by the U.S. Department of Labor³ in addressing the same inquiry, along with five additional criteria that the Department considers useful in evaluating the existence of an employment relationship. Under this test, an employment relationship will *not* be deemed to exist for the purposes of the New York State Minimum Wage Act and Orders only if all of the following exclusionary criteria are met:

² Section 193 of the Labor Law, which applies to all "employees," prohibits deductions from wages including the penalties described above.

³ The test used by the U.S. Department of Labor is based on the Supreme Court's decision in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947), and is succinctly described on FLSA Fact Sheet No. 71, which is available online at the following address: <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>

1. The training, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.
2. The training is for the benefit of the intern.
3. The interns do not displace regular employees and any work they may do is under close supervision.
4. The employer who provides the training derives no immediate advantage from the activities of the trainees or students and, on occasion, 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 are free to take employment elsewhere in the same field.
6. The trainees or students have been notified, in writing, that they will not receive any wages for such training and are not considered to be employees for minimum wage purposes.
7. Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed.
8. The trainees or students do not receive employee benefits.
9. The training is general, so as to qualify the trainees or students to work in any similar business, rather than designed specifically for a job with the employer offering the program.
10. The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program.
11. Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

The following analysis applies each of the eleven criteria listed above to the elements of the [REDACTED] program in order to determine the applicability of the Minimum Wage Act and Orders to the internship phase of the [REDACTED] program.

1. *Training Similar to an Educational Environment.*

The first criterion requires that the training provided, even though it includes the actual operation of the facilities of the employer, be similar to training given in an educational environment. While this criterion does not require that the internship be directly administered by a vocational or educational institution, it is more likely to be satisfied in situations which are structured around classroom or similar types of instruction and which provide skills which can be used in multiple employment settings. Educational credit serves as further evidence of the similarity to an educational environment, but the performance of actual, productive, and/or routine work for the employer operates to distinguish it from such an environment.

As relevant to this criterion, [REDACTED] participants are required to attend weekly classroom sessions during the internship phase of the program to supplement the training provided by the program partners. The direct training provided to the participants by the supervising employees of the program partners consist of approximately thirty minutes to three hours per day, with an average of five hours per week spent training, supervising, and providing feedback to the program participants. The remaining time is spent engaging in vocational tasks which, your letter states, provide the interns with a closely supervised, directed vocational experience. The training provided to participants involves extensive job shadowing and hands-on training under direct supervision. Based upon the information provided, it appears that the program satisfies the first criterion as it is sufficiently similar to an educational environment. While the limited time spent directly supervising and training the participants by supervisors detracted from the program's similarity to a training program, the participants' other activities and indirect supervision are also sufficiently similar to the training provided in an educational environment.

2. Benefit of the Trainee

The second criterion requires that the training be for the benefit of the trainee. The Department looks at this criterion to require that the trainee be the primary beneficiary of the training, that there is a predominant benefit to the trainee, and that any benefit conferred upon the employer is merely incidental to the benefit provided by the training. Additionally, while not determinative for this criterion, a trainee's receipt of college credit for the training program is considered evidence of the beneficial nature of the program.

[REDACTED]'s program can properly be described as being for the benefit of the participants based on the focus placed on the individual participant's development and education by both the program partner and [REDACTED]. The participants are provided not only with classroom and on-the-job training that enhances their ability to obtain employment upon the completion of the program, they obtain college-level credits documenting that training. While the classroom training is not being performed by the program partner, it operates as a supplement for the training that the partner provides. Furthermore, the activities observed at both [REDACTED]'s facility and a partnership site were strongly indicative of the beneficial nature of the program and the training provided to the participants. Accordingly, this criterion appears to be satisfied.

3. Displacement of Regular Employees and Close Supervision.

The third criterion requires that the trainees do not displace regular employees and that any work performed is done under close supervision. If an employer uses trainees as substitutes for regular workers or to augment its existing workforce during specific time periods or in general, these interns would be treated as employees. A typical example of a training program which satisfies this criterion is one in which the employer provides job shadowing opportunities that allow trainees to learn certain functions under the close and constant supervision of regular employees where the intern performs no or minimal productive work. Such a situation correctly and further demonstrates the educational nature of the program. As an indicator of the sufficiency of the level of supervision provided to trainees, this Department compares the supervision provided to the trainees to that provided to the employer's other employees, as well as to other employees in the same or similar industries.

Your letter states that [REDACTED] participants displace no employees and do not act as substitutes in handling the regular activities of employees. Assuming this to be true, we must now consider whether the participants perform their work under close supervision. Rather than displacing regular workers, the interns at all placements appear to require and rely upon their supervisors directly and other regular workers indirectly to acquire and learn the skills necessary for the described activities. Additionally, the extensive level of supervision of the participants by the program partner's employees at the various sites demonstrates that the participants are performing in accordance with the educational objectives and shows that an assigned supervisor (employee) is required to and actually performs sufficient supervision of the interns' work. Each participant is assigned one to three supervisors who supervise the participant for an average of thirty minutes to three hours each day. The time commitment of supervisors only amounts to an average of five hours per week spent training, supervising, and providing feedback to participants, but additional time commitments of other employees adds to the level of supervision provided to the participants. Such a time commitment appears to exceed that provided by the employers for their own employees and is focused on ensuring that the participants obtain sufficient and marketable job skills. As such, it appears that this criterion has been met.

4. Employer Advantage

This criterion requires that the employer who provides the training derives no immediate advantage from the activities of the trainees or students and that operation of the employer's business may actually be impeded by the trainee. This criterion helps to ensure that the employer is providing a benefit to the trainee in the form of developing the trainee's work skills or substantive knowledge, not that the trainee is providing a benefit to the employer. Consequently, in any true traineeship situation, the employer will not derive an immediate advantage from the intern's presence. In fact, in most circumstances, interns will require a dedication of resources from the employer (in the form of training, supervision, etc.) that may actually detract from the productivity of the worksite for some period or on occasion.

Your letter states that the program partner's "primary motivations" are not for their own benefit; rather that they desire to be "a good corporate citizen, doing good for the

community, investing in youth workforce development, and inspiring employees and managers.” This statement consistently describes the motives enunciated by a business partner when representatives of the Department inquired as to the partner’s motivations for participating in the program. Supervisors’ commitment to the participant’s training averages over 180 hours per participant and the sponsorship of the intern averages over \$22,000 per intern for the costs of the training the individual receives and the college credits at Pace or Empire State College. While the financial contribution of the employer does not weigh in on determining whether any immediate advantage is being provided to the employer, any advantage employers derive is purely incidental to the supervision and training provided. As such, it appears that this criterion has been met.

5. Job Entitlement

As stated above, the trainee cannot be necessarily entitled to a job at the conclusion of the training period and they must be free to take employment elsewhere in the same field. The program should be of a fixed duration, established prior to the outset of the internship and not connected with any offer of employment or promise to stay with the employer following the internship. This criterion helps to ensure that unpaid internships are not used by employers as a trial period for individuals seeking employment at the conclusion of the internship period. If a trainee is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee and the longer the duration, the more likely it will be held to be that of an employment relationship since the expectation of compensation in exchange for work performed and the forbearance of earnings elsewhere will likely have occurred.

While your letter states that [REDACTED] does not discourage employers from hiring program participants, the participants sign a contract which states and acknowledges that the participant is not entitled to a position and that the program is merely a training experience. The sponsor agreement between [REDACTED] and the employer further states that “interns are not necessarily entitled to a job.” While written agreements are often given little weight by this Department based on their self-serving nature, taken together with the fact that less than half of all program participants have been hired by the employer at the conclusion of the training, with the last three groups of participants experiencing hiring rates of 13%, 44%, and 29%, respectively, this criterion appears to be satisfied. It is worth noting, however, that although hiring statistics with the program partners are positive signs of [REDACTED]’s success, such numbers should not be shared or distributed amongst prospective or current [REDACTED] participants since it could foster the belief that they are likely to be hired by the partner in which they are placed.

6. Wage Entitlement

The sixth criterion requires that the trainees be notified, in writing, that they will not receive any wages for such training and are not considered to be employees for minimum wage purposes. Such notice must be both clear and provided to the trainees or students prior to the commencement of the internship or traineeship.

Your letter states that the contract between [REDACTED] and the participants provides as follows: "I understand that I will be placed at a corporation for an unpaid internship as part of my educational experience at [REDACTED]." While this notice would be more complete should it also state that the participants are not considered employees for minimum wage purposes, it is sufficient for the purposes of this exception so long as it is further supported by communications with the participant.

7. Knowledge and Expertise of Trainers

This criterion requires that any clinical, hands-on work performed by the trainees is done under the supervision and direction of an individual with sufficient experience and knowledge in the industry in which the trainee is working. In applying this criterion, the Department will deem an individual to have "sufficient" experience and knowledge in the industry if he or she is proficient in the area and in all activities to be performed by the trainee, and has adequate background, education, and experience to fulfill the educational goals and requirements of the training program. Furthermore, the individual must be sufficiently competent in providing training in such areas as demonstrated by previous experience training employees or students.

Representatives of [REDACTED] communicated that they actively screen both the individuals providing the training and professional mentors for the requisite experience and knowledge so as to ensure the participants are provided with the educational experience that the program envisions. The supervisors and employers described in the materials provided by [REDACTED] and identified during the site visit, some of whom were met by the Department's team and interviewed, appear to possess sufficient knowledge and expertise in the areas in which the participants work to satisfy this criterion. As such, it appears that this criterion has been met.

8. Employee Benefits

This criterion provides that individuals who receive employee benefits cannot be considered trainees since such benefits conclusively indicate the existence of an employment relationship. Examples of such benefits include, but are not limited to, health and dental insurance, pension or retirement credit, employer sponsored trips or parties, and discounted or free employer provided goods and services. In the present case, while the participants are provided with a weekly stipend from [REDACTED], nothing in your letter indicates that they are provided with any of the benefits enunciated above from the program partners. Accordingly, it appears that this criterion is satisfied.

9. Generalized Training

This criterion requires that the training be general in nature, so as to qualify the trainees or students to work in any similar business, rather than designed specifically for a job with the employer offering the program. Skills offered through the training must be useful and transferable to any employer in the field and not specific to the for-profit employer offering the

training. Any training that is specific to the employer and its operations will be considered conclusive evidence of the existence of an employment relationship.

The description of the activities and training provided in your letter indicate that the nature of the training provided to the participant, along with the classes provided by [REDACTED], is generalized in nature and is not specific to the individualized needs of the program partner. You describe the training as being consistent with the requirements to earn college credit, and frequent check-ins help to ensure that the participants receive a generalized and meaningful experience that will assist them in obtaining work in the future. The specific activities appear, from the materials provided and as indicated by the site visit, to be general in nature and such as would provide the participants with the experience to obtain employment in a particular industry, rather than simply at a particular place of employment. Accordingly, it appears that this criterion has been satisfied.

10. Screening Process

The tenth criterion requires that the screening process for the training program not be the same as that which is used for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program. This criterion helps to ensure, in connection with the fifth criterion above, that employers do not commingle their recruitment of employees and trainees, and that such are run independently from each other.

In the present case, the recruitment and screening process for the program is to be conducted entirely by [REDACTED] and not by the program partners. Furthermore, the admissions applications paperwork is similar to that of an application to an educational program, not an application for employment. The application process has been described as typically taking one month during which one in three applicants are accepted. Participants are placed at internship sites on an individualized basis so as to find a "good fit" between the participant and the corporate partner. For example, a participant with a propensity for structure will be placed in with an employer that has a strong emphasis on structure. Nothing indicates that the process used resembles a typical employment recruitment process, nor does it appear that the process is performed in conjunction with the program participant's recruitment of employees. As such, it appears that this criterion has been satisfied.

11. Advertisements, Postings, and Solicitations

This criterion requires that advertisements, postings, or solicitations for the program be couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment. This criterion is related to and furthers the same objective as the sixth criterion which requires the trainee to be informed, in writing, that he or she is not entitled to wages for the training. In this way, these two criteria seek to avoid a trainee's misunderstanding of the nature of the program, and/or an

employer's misrepresentation of its nature, purposes, and entitlements.

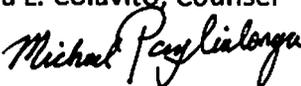
Your letter enclosed a print advertisement for the program which contains the headline, "earn while you learn" on the top of the form. It describes ██████ as "a free training program for young adults ages 18-24 who have their high school diploma or GED and can work in the US," and that participants "can earn a stipend up to \$260 per week, 10-16 free college credits, and a corporate internship while [participants] can learn professional skills in technology and finance." While these advertisements would be more complete should it also state that the participants would not be the employees of the corporate partners, they are not so skewed towards employment as to fail to satisfy this criterion. However, it is worth noting that efforts in future advertisements must be careful not to describe the program as involving employment or the stipend as wages.

Conclusion

Based upon the above analysis and in view of the totality of the circumstances described in your letter and the site visit conducted by representatives of the Department, it is the opinion of this Department that ██████'s activities as they have been described herein, are outside of the coverage of the provisions of Articles 6 and 19 of the Labor Law, and, as such, are permissible in New York State.

This opinion is based exclusively on the facts and circumstances described in the letter received by this office on May 12, 2010, the materials enclosed therein, and on the site visit by representatives of this Department on November 29, 2010, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel

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