

FLSA-169

January 28, 1988

This is in further responses to your letter on behalf of your client, the *** Foundation. Your client is concerned about the application of the Fair Labor Standards Act (FLSA) to its proposed law clerk extern program, and wishes to know if this proposed program would exempt the law clerk externs from the minimum wage requirements under FLSA.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

According to information contained in your letter, the law clerk extern program is clinical in nature and the training is similar to the training received by medical students who participate in hospital extern programs. Program clerks would not displace regular employees. The corporate law office has substantial supervisory responsibilities which offsets any advantage it might otherwise be perceived to receive. We also understand that participation in the program is voluntary, and a program clerk would not be eligible for a position as a paid law clerk in a particular office for at least three months after the end of the training program. The program clerk would gain practical experience in a corporate setting addressing real business problems and interacting with "clients." You state that this should contribute to the program clerks' marketability as paid clerks or in-house counsel.

The Supreme Court has held that persons who, without any express or implied compensation agreement, may work for their own advantage on the premises of another are not necessarily employees under FLSA. Whether students are employees under FLSA will depend upon all of the circumstances surrounding their activities on the premises of the employer. If all of the criteria listed below are met, the students would not be considered employees within the meaning of FLSA, and thus would not be subject to its monetary provisions.

The students or program clerks are not employees within the meaning of FLSA, if all of the following criteria apply:

1. The training 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 that provides the training derives no immediate advantage from the

activities of the trainees or students, and on occasion the employer's 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 or students are not entitled to wages for the time spent in training.

It is our position that where education or training programs are designed to provide students with professional experience in the furtherance of their education and training and are academically oriented for their benefit, the students will not be considered employees of the institutions to which they are assigned, provided the criteria noted above are met. However, where an individual is serving in an after-graduation internship, an employment relationship would exist between the graduated intern and the employing institution.

It is our position that the proposed law clerk extern program you describe appears to meet the above criteria and the participating law clerks therefore would not be subject to the monetary requirements of FLSA.

We trust that the above information and discussion is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator