AT THE BAR WITH BOWDITCH

A Legal Blog for the Craft Brewing Community

Free and Easy? Not Quite.

BY ROBERT G. YOUNG • DECEMBER 31, 2015

Imagine the following scenario: someone approaches a brewer and offers their services for free, either because they genuinely enjoy the work and culture of craft brewing (and thus will volunteer their time) or because they are trying to learn the ropes in the industry (and thus will work as an unpaid "intern"). That sounds great, doesn't it? The brewer receives free labor, keeping costs down and driving profits up. And because the individual agreed to do it–indeed, it was the individual's idea in the first place–it must be ok, right? The U.S. Department of Labor would beg to differ.

The Fair Labor Standards Act ("FLSA"), enacted as part of Franklin D. Roosevelt's New Deal, guarantees certain minimum wages to anyone who is "employed." In one of the great legislative turns of phrase, the statute defines "employ" to mean "to suffer or permit work." The Department of Labor and the courts have interpreted this phrase broadly, creating a strong presumption that anyone performing services for a for-profit business should be classified as an "employee" and therefore must be paid for their time (note that this post focuses on paid vs. unpaid workers and does not address the employee/independent contractor issue, which is a subject for another day).

That said, courts and the Department of Labor understand that there may be certain circumstances where a person can work as an unpaid intern. The legality of an unpaid internship program will be analyzed under (of course) a facts-and-circumstances, multi-factor test. In 2010, the DOL issued guidelines setting out six factors that it considers necessary for a business to accept services from an unpaid intern, including that the business derive "no immediate advantage" from the intern's work (under this factor, an "intern" wouldn't be permitted to, for example, pour samples or work the cash register in a tasting room because that would produce an immediate advantage for the brewer). While some courts have relaxed the stringent Department of Labor test, they still focus on who the "primary beneficiary" of the relationship is: if the brewer is receiving the primary benefit of the relationship, the person will be considered an employee and must be paid.

But what if someone simply wants to volunteer their time at the brewery? Unfortunately, that would be impermissible. In short, a for-profit business cannot accept volunteer labor; volunteer work is appropriate only in the non-profit realm, where a person is offering their services not for monetary gain, but for religious, civic or charitable purposes tied to the

mission of the non-profit organization.

That someone may offer up their services and agree to work for free is irrelevant. Businesses and individuals cannot agree privately to waive requirements of the FLSA and analogous state law.

The penalties for non-compliance with the wage and hour laws can be severe. The FLSA provides for, at a minimum, double damages for unpaid wages. In Massachusetts, the Wage Act goes even further and requires treble damages—three times the amount owed—on any successful claim for unpaid wages, regardless of the employer's intent. Accordingly, before accepting any unpaid help, brewers should consider whether they can meet the legal requirements for an unpaid internship.