Worker Classification Issues 101 for Breweries

Jeffrey C. O'Brien

Many breweries take advantage of the abundance of people interested in helping their business grow by allowing them to volunteer at the brewery. Depending upon the nature of the duties they are performing, classifying an individual who ought to be treated – and compensated – as an employee as a "volunteer" can lead to significant penalties under Minnesota and federal law. In the past few years as both state and federal government have tried to get more revenue, they have focused on going after employers for misclassification of workers, whether they be independent contractors, interns or the use of volunteers.

Minnesota Law:

There is a presumption anyone performing work for a "for-profit" enterprise is an employee. In Minnesota, the nature of the employment relationship is determined by using worker classification tests, similar to the manner in which employee status is determined under both workers' compensation and unemployment insurance laws. Compensation of Minnesota employees is determined under Minn. Stat. § 181.722, Subd. 3, and the federal Fair Labor Standard Act. Correctly assessing a worker as an employee, student/intern, independent contractor, or volunteer is critical.

Minnesota Statute Section 177.23 governs the use of volunteers. Minn. Stat. §177.23, Subd. 5 states that "Employ" means "to permit to work", and Subd. 6 states that an "Employee" means any individual employed by an employer, subject to certain enumerated exceptions. There is an exception for "any individual who renders service gratuitously for a nonprofit organization", but there is no exception for an individual who renders service gratuitously for a for-profit organization.

Federal Law:

The Fair Labor Standards Act (FLSA) defines employment very broadly, i.e., "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another." In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar non-profit organizations that receive their service. Members of civic organizations may help out in a sheltered workshop; men's or women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly; parents may assist in a school library or cafeteria as a public duty to maintain

effective services for their children or they may volunteer to drive a school bus to carry a football team or school band on a trip. Similarly, an individual may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with disabled children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs.

Under the FLSA, employees may not volunteer services to for-profit private sector employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employers. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception - public sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed. There is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector.

Student/Interns:

Until recently, student/interns have not received the same close scrutiny as other groups of workers. Student/interns are <u>not</u> considered employees under both state and federal law, if their use in the workplace generally passes six tests offered by the Department of Labor. The tests are:

1. The training experience is similar to what is provided at school;
2. The training experience is for the benefit of the student/interns;
3. The student/interns do not displace regular employees;
4. The employer providing the training receives no immediate advantage from the activities of the trainees;
5. Student/interns are not necessarily entitled to a job at the conclusion of the training; and
6. The employer and the student/interns understand the work is unpaid training.

Whether an employment relationship exists is not always clear. Instead, whether an intern or trainee is entitled to such things minimum wage and overtime compensation will often depend upon whether the individual is receiving training without displacing other employees or providing any real benefit to the employer. (Note: a reasonable stipend may be permitted)

Independent Contractor:

Independent contractors are hired to perform special services of a limited scope and duration, and they typically perform the same services for a variety of businesses. The standards in Minnesota to be considered in determining whether or not an individual is an employee or an independent contractor depend upon the purpose for which such classification is to be considered but typically include factors such as:

1. The right to control the means and the manner of performance;
2. The mode of payment;
3. The furnishing of materials or tools;
4. The control of the premises where the work is done; and
5. The right of the employer to discharge the individual.

Generally, the more control, or right of control, an employer has over the individual performing the work, the work site, and the nature, quality, and manner in which work is performed, the more likely the relationship is an employer-employee relationship vs. an independent contractor arrangement.

Conclusion

While it may be advantageous from a cost standpoint, classifying workers as "volunteers" when such individuals are performing duties of employees can have significant adverse consequences for your brewery. Using the above guidelines, it is essential to carefully examine the role of each worker and determine what the appropriate classification. Given the complexities of the law in this area, it is recommended that employers consult qualified legal counsel to assist them in navigating the various risks that may be encountered. Consideration needs to be given to all stages of the relationship from the offer letter to the distribution of work rules and policies as well as the expectations contained in job descriptions and other work documents. The financial consequences can be significant if the various laws are not complied with in this area.