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May 28, 2013

The Honorable M. Patricia Smith
Solicitor
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Ms. Smith:

I am writing on behalf of the American Bar Association (ABA) to follow up on the discussions you and your staff had with representatives of our Governmental Affairs Office regarding participation by law students in handling pro bono matters as unpaid interns in law firms. I appreciate your taking the time to meet with our staff and your willingness to consider clarifying your Office's perspective on this subject.

As you may know, law schools are required by ABA Accreditation Standard 301(b) to offer substantial opportunities for student participation in pro bono activities. In addition to pairing their students with nonprofit organizations and government agencies, law schools would also like to place their students with for-profit law firms (including corporate legal offices) to work on pro bono matters. The primary purpose of these programs is to advance and expand the education of the students; where law firms, legal aid offices, and certain nonprofits are involved, the placement also provides desperately needed legal assistance to the underserved.

The ABA supports your efforts to obtain fair wages for those clearly falling under the Fair Labor Standards Act (FLSA). At the same time, we believe that the language of the FLSA does not clearly, on its face, permit or prohibit pro bono internships with private law firms or business law departments related to purely pro bono matters in which the firm or business has no anticipation of revenue. The ABA agrees that exploitation of law students and other interns is unacceptable; however, the FLSA uncertainty inhibits law firms from offering students the opportunity to work on pro bono matters in a real-life practice setting. It also reduces the potential supply of legally trained women and men willing to spend their time working on behalf of persons without the resources to pay for legal counsel. Furthermore, in the current economic climate with shrunken employment opportunities for law school graduates, hindering the ability of law students and recent graduates to work side-by-side with experienced lawyers who could provide both strong mentoring and favorable substantive references unnecessarily reduces access for future employment prospects.

Therefore, the ABA requests that the Department of Labor, through an informal letter, provide both law firms and law schools assurance that the Department will not take legal enforcement action against intern hosts who utilize unpaid interns under certain circumstances that are consistent with the purposes of FLSA and do not violate the law. (We understand that a private right of action is accorded under FLSA; we do not see that to be a practical obstacle if your Department's interpretation does not oppose the activity.)

As we understand it, FLSA is intended to prevent displacement of existing covered workers and to prevent exploitation of volunteer workers by employers. These objectives can be fully attained if the Department agrees that it will refrain from taking legal action against intern hosts that utilize unpaid law students or recent law graduates under the following conditions:

- The intern must be (a) a law student, (b) a law school graduate who intends to take the bar within one year of graduation, or (c) a law school graduate who has taken the bar exam, is awaiting results, and is not yet licensed to practice law in any U.S. jurisdiction;
- The intern's law school must be involved in the process as an intermediary between the intern's host and the intern (including a post-graduation intern);
- The intern must only work on pro bono matters from which the intern host neither derives nor expects direct financial benefit from the intern's work. This excludes participation in potential fee-generating litigation;
- The intern host must offer the intern or graduate an educational experience related to the practice of law. However, the law school is not required to grant course credit for pro bono work, although it may do so if it chooses; and
- The intern hosts must provide written assurance to the law school and the prospective intern that the internship is in compliance with the above conditions.

We appreciate your willingness to clarify these issues to ensure that law students and recent graduates are not exploited through internships while still allowing them to complete pro bono efforts without pay at both law firms and not-for-profit entities.

I have sought input from the ABA's Labor and Employment Section, which represents both management and unions/employees, on this subject. The Section's leadership does not support unpaid pro bono internships for nonstudents – that is, for law school graduates who have yet to pass the bar.

As you know, New York has been at the forefront of encouraging pro bono activities by law students and graduates, requiring potential bar applicants to complete 50 hours of pro bono services for admission to the bar. I have spoken with Chief Judge Jonathan

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Lippman and Associate Judge Victoria Graffeo of the New York Court of Appeals on this issue, and I was pleased to learn of their support for our efforts seeking to ensure multiple avenues, including working with law firms, for students and graduates to fulfill their pro bono requirement. We would welcome the opportunity to meet with you to discuss these issues further and to explain some of the innovative and effective ways that are being developed to expand delivery of pro bono services by students and graduates in New York and elsewhere.

Thank you for your response. Please do not hesitate to contact me or Tom Susman (thomas.susman@americanbar.org, 202-662-1765) if you need additional information or if the ABA may be of assistance as you consider this request.

Sincerely,

A handwritten signature in blue ink that reads "Laurel G. Bellows". The signature is written in a cursive, flowing style.

Laurel G. Bellows