

Unpaid Internships and the Fair Labor Standards Act

While internships come in many shapes and sizes, one of the common questions when developing an internship program is whether an employer must pay an intern for his/her work. The answer to this question lies in an analysis of the on-the-job experience that the individual will have in relation to the standard set forth under the Fair Labor Standards Act (FLSA), a federal law which establishes the minimum wages for work performed.

Pursuant to this law, the U.S. Department of Labor (DOL) has developed six criteria for differentiating between an employee entitled to minimum wage or above and a learner/trainee who may be unpaid. The criteria for learner/trainee are:

1. The training, even though it includes actual operations of the facilities of the employers, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the student.
3. The student does not displace a regular employee, but works under the close observation of a regular employee or supervisor.
4. The employer provides the training and derives no immediate advantage from the activities of the student; and on occasion, the operations may actually be impeded by the training.
5. The student is not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the student understand that the student is not entitled to wages for the time spent training.

Not all six factors have to be present in order for the individual to be considered a trainee. The experience, however, should look more like a training/learning experience than a job.

Employers often question the fourth criterion -- that the employer derives no immediate benefit from the student's activities. This seems to contradict the contemporary practice of the use of internships by employers and colleges. To make the experience educationally valid, the same way that a student working in a college laboratory is expected to become actively involved in the work at hand, an intern is expected to participate actively in the work of the company. Several DOL rulings, while not directly addressing the criterion, seem to suggest that as long as the internship is a prescribed part of the curriculum, is part of the school's educational process, and is predominately for the benefit of the student, the fact that the employer receives some benefit for the student's services does not make the student an employee for purposes of wage and hour law.

An internship site should be able to answer "yes" to at least half the following questions if an unpaid internship is being contemplated:

1. Is the work that you are offering an integral part of the student's course of study?
2. Will the student receive credit for the work or is the internship required for graduation?
3. Does the student have to prepare a report of his/her experience and submit it to a faculty supervisor?
4. Have you received a letter or some other form of written documentation from the school stating that the internship is approved/sponsored by the school as educationally relevant?
5. Will the student perform work that other employees also perform, with the student doing the work for the purpose of learning and not necessarily performing a task for the employer?
6. Is the student working and providing benefit to you less than 50 percent of the time and/or is the student in a shadowing/learning mode?
7. Will you provide an opportunity for the individual to learn a skill, process, or other business function, or operate equipment?
8. Is there educational value to the work performed, that is, is it related to the courses the person is taking in school?
9. Is the individual supervised by one of your staff members?
10. Is it clear that a job is not guaranteed upon completion of the training or completion of the person's schooling?