

The Unpaid Internship: A Trap For The Unwary Employer

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School is out, summer has arrived, and intern season has begun.

Some of your student and graduate interns may have offered to work for free. Perhaps you have taken them up on that offer, viewing the unpaid internship as a “rite of passage” – a way for the intern to gain valuable experience that, down the road, may help the intern land a paying job in a tough job market.

If students and graduates are *seeking out* unpaid internships, and if businesses are willing to *take-on* unpaid interns, then this would appear to be a voluntary, mutually beneficial relationship, right?

Perhaps, but that does not necessarily mean that it’s legal.

Over the last few years, there has been a spike in legal challenges to unpaid internship programs. Some of those challenges have taken the form of class (or collective) action litigation. At their core, the challenges have focused on whether an intern is an “employee” entitled to minimum wage and overtime pay under wage payment laws, including the federal Fair Labor Standards Act (FLSA).

Is a company required to pay an intern? It depends. The U.S. Department of Labor generally looks at six factors to determine whether an intern in the private, for-profit sector is an “employee” entitled to minimum wage and overtime pay:

- The internship must be similar to training that would be provided in an educational environment. This is most easily demonstrated when an educational institution oversees the internship and grants educational credit.
- The program must be for the intern’s benefit. This means that the intern should not be relegated to performing clerical and administrative tasks, such as filing papers, organizing files, answering the phone, and performing routine data entry tasks.
- The internship must not displace regular employees. If the company would have hired additional employees or required existing staff to work additional hours

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had the intern not been brought-in, then the intern may be viewed as an employee entitled to minimum wage and overtime pay.

- The company must not derive an immediate advantage from the internship. An internship program occasionally may impede a company's operations because the intern should be closely supervised and taught skills that are not tied solely to the company's operations (but are transferable to various employment settings). In fact, the greater the benefit the intern provides to corporate operations, the greater the chance the intern is an "employee" entitled to pay.
- At the outset of the internship, the intern should not be promised a job at the end of the summer. Rather, the internship should be for a fixed duration. The internship should not be used by the company as a "trial period," at the conclusion of which the company decides whether to offer a "real" job to the intern.
- The intern must understand that the internship is unpaid. This agreement can be stated in a letter sent to the intern prior to commencement of the internship.

The Department of Labor has stated that the circumstances under which a private, for-profit company may take-on an unpaid intern are "quite narrow." The potential exposure, however, may be quite large for a company that improperly maintains an unpaid internship program, particularly for a larger company that historically has relied upon interns throughout the year, and not only during the summer months. Therefore, a company should take great care in crafting an internship program, especially with respect to its substantive components and the issue of compensation.

Of course, companies can decrease the risk of exposure to pay-related claims by paying interns at least the minimum wage (currently \$7.93 per hour for employees working in Florida) and overtime compensation at time and one-half the intern's regular, hourly rate for all hours worked in excess of 40 in a workweek.

The rules are different for certain non-profit organizations. In that arena, unpaid interns generally may volunteer their time, usually on a part-time basis, to further public service, religious, philanthropic, and humanitarian objectives.

The legal risks associated with unpaid internship programs may result in a decline in availability of internship opportunities, especially among smaller companies whose programs may not comply with the Department of Labor criteria and that cannot afford to comply with minimum wage and overtime legal requirements.

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