

Student Interns Do Not Equal Free Labor

Labor & Employment Law Update

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Fall is around the corner, and with it comes student interns bolstering their resumes. Interns can benefit companies by cutting down some of the workload; however, employers need to be aware that wage and hour laws can apply to interns.

The federal Fair Labor Standards Act (FLSA) mandates that nearly all employees be paid minimum wage and overtime for hours worked over 40 in a week. One FLSA exemption is for *bona fide* interns.

The U.S. DOL applies a fact-specific inquiry to determine whether an internship may be unpaid because “no employment relationship exists.”

- The internship, which may include “real work,” is similar to training which would be given in an educational environment;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The intern is not necessarily entitled to a job at the conclusion of the internship;
- The employer and the intern understand that the intern is not entitled to wages;
- The internship experience is for the benefit of the intern; and
- The employer derives no immediate advantage from the intern’s activities, and may even be impeded by the internship.

While the Supreme Court has not spoken on the issue, trial and appellate courts have split between applying the DOL’s test (above), and a flexible “Predominant Benefit Test” (“PBT”). The PBT uses non-exhaustive factors, including the first four factors of the DOL test, to evaluate internships in the modern era. Some additional factors may include:

- The extent to which the internship is tied to the intern’s formal education by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.

- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

While a topic for another day, it bears mention that (1) a for-profit business may never have "volunteers," and (2) public agency/nonprofit employees may not volunteer for the same agency for the same type of work.

Internships Done Right

Employers should continue to embrace internship programs as a means of developing the future labor force, and identifying potential workers without all of the risks associated with employment, including wages and taxes.

Steps to Implement a Successful Intern Program:

1. Develop the program, considering educational goals, work tasks, and supervision.
2. Ensure any company benefit from the intern's work is outweighed by the intern's benefit. Particular advance analysis may save future headaches.
3. Use a written engagement agreement clearly stating (i) compensation, if any, (ii) the length of the program, and (iii) that there are no expectations of any future employment at the end.
4. Employment counsel should audit the program to ensure it will survive administrative agency, plaintiff's counsel, and judicial scrutiny.

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