

Department of Labor Cracking Down on Unpaid Internships

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As summer approaches, many students and recent graduates are planning to participate in unpaid summer internships in order to gain valuable work experience. However, employers that view interns as a source of free labor do so at their own peril; failure to pay interns who provide services that benefit the employer may violate wage and hour laws.

The U.S. Department of Labor (DOL) has been and will continue to be more aggressive in policing violations of the Fair Labor Standards Act (FLSA), which requires the payment of minimum wage and overtime to covered, non-exempt employees. One exception to the FLSA's minimum wage and overtime requirements is that a for-profit, private sector employer may hire individuals for internships or training programs without compensation if the internship is primarily for the interns' educational benefit. Because the FLSA's definition of "employ" (which includes "to suffer or permit to work") is extremely broad, most workers are considered employees and the internship exception is narrowly construed.

The DOL is likely to focus some of its enforcement resources on internship programs. As New York's Labor Commissioner, the DOL's Solicitor of Labor, M. Patricia Smith, ordered the investigation of several unpaid internship programs. Consequently, employers that have or would like to implement unpaid internship programs should make sure that the programs qualify for the exception to the FLSA's minimum wage and overtime requirements.

The DOL recently issued a fact sheet to help employers determine whether an internship is properly excluded from minimum wage and overtime requirements. The fact sheet lists these six criteria that must be met for the internship exception to apply:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment.

The DOL explains that if the internship is structured around a classroom or academic experience, as opposed to the employer's operations, it is more likely that the internship would be considered an educational experience for the intern.

2. The internship experience is for the benefit of the intern.

If the internship provides the intern with skills that can be used in other employment settings, as opposed to skills particular to the employer, then it is more likely that the internship will be viewed as being for the primary benefit of the intern. If, on the other hand, an intern is performing work (such as clerical work) that benefits the employer, the fact that the intern also receives some benefit from the work (such as learning a skill) will probably not be sufficient to meet the exception.

3. The intern does not displace regular employees, but works under close supervision of existing staff.

If, without the intern's assistance, the employer would have hired additional employees or required current employees to work longer hours, then the intern will likely be viewed as an employee. Additionally, if the intern receives the same level of supervision as the existing workforce, then the intern is more likely to be considered an employee. On the other hand, if the intern works under close supervision to learn certain skills but performs minimal or no work, the internship would probably be viewed as an educational experience rather than employment.

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4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the internship.

The parties should have an understanding that the internship will have a fixed duration. The internship should not be a trial period to “test” the intern for future employment.

6. The employer and intern understand that the intern is not entitled to wages for the time spent in the internship program.

If *all* of these factors are met, then the employer and intern do not have an “employment relationship” and therefore, the FLSA’s minimum wage and overtime pay requirements are not applicable.

Employers that wish to create an unpaid internship program should formalize the internship relationship in writing, to show that each of the DOL’s six requirements is met. The writing should be signed by the intern and should contain an acknowledgement that the internship is unpaid, is for the intern’s educational benefit and will not necessarily result in a job offer.

Given the high stakes in wage and hour litigation and the challenge of establishing that individual interns are not employees, employers should tread cautiously before deciding not to pay interns. Employers should consult with counsel to ensure that an internship program is structured carefully to meet the exception to the DOL’s minimum wage and overtime requirements.

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