

**Are Your Interns Also
Employees?:
How Learning Opportunities
May Lead to Liability**

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Non-profit Internships and the FLSA

- FLSA = Fair Labor Standards Act
 - ✓ Federal wage and hour law
- Non-profits are not exempt from the FLSA
- An “internship” is more than just a label.

Employees v. Interns

- FLSA governs “employees”
- “Employ” – “to suffer or permit to work”
- If an intern is a nonexempt employee, he/she must be compensated with minimum wage and overtime compensation

Employees vs. Interns

- Unpaid internship programs are permissible in some circumstances
- To qualify as a non-employer/employee relationship, an internship or training program should meet all the criteria of a six-factor test
- Will discuss Department of Labor statement regarding nonprofit internships

Six Factor Test

- 1. Similar training to that which would be given in a vocational school**
- 2. Work is for the benefit of the intern**
- 3. No displacement of regular employees, but work under close observation**
- 4. Employer derives no immediate advantage from trainees' activities, and on occasion operations may actually be impeded**
- 5. No job entitlement when training period concludes**
- 6. Mutual understanding of no compensation**

Factor 1: Internship is similar to training in actual educational environment

➤ Acceptable:

- ✓ A university externship program that sent students out to various corporate sponsors to “shadow” employees for a week.
- ✓ An internship program where training resembled a college marketing course. Interns were given an outline, syllabus and assignments, and a company supervisor consulted with a faculty coordinator.

Factor 1: Internship is similar to training in actual educational environment

➤ Unacceptable:

- × Interns drove, loaded and unloaded trucks, restocked retail store shelves and vending machines, learned basic food vending machine maintenance, and filled out paperwork.
- × Interns provided janitorial duties, kitchen duties, cleaned the shop and yard, replaced a septic tank, converted a warehouse into the dormitory, and did yard work.

Factor 2: Internship is for the Benefit of the Intern

- One can almost always identify some benefit to the intern
- Some types of work may signal that the employer is in fact the primary beneficiary

Factor 2: Internship is for the Benefit of the Intern

➤ Acceptable:

- ✓ Intern performs work that uses skills applicable to the job type as a whole

➤ Unacceptable:

- x Filing, general clerical work, and assisting customers
- x Work that is applicable to only the employer's business, or is otherwise narrowly focused

Factor 3: Intern Does Not Displace Regular Employees

- Test: Without the internship, would the employer have to hire an employee?
- Acceptable:
 - ✓ Employer does not displace employees by hiring an intern, nor does it need to hire a new employee if the internship does not exist
- Unacceptable:
 - x Employer would need to increase employee workloads or hire new employees without the intern, even if only during peak or seasonal times

Factor 3: Intern Works under Close Supervision of Staff

- The more supervision, the better
- Acceptable:
 - ✓ Intern learns under the active supervision of employees, receives ongoing feedback, and performs only minimal productive work
- Unacceptable:
 - x Intern is supervised in the same way as a regular employee

Factor 4: No Immediate Advantage/ Organization May Actually Be Impeded

- One of the more difficult factors
- Acceptable:
 - ✓ An internship of under 13 weeks where the intern rotates through several career areas and receives heavy training and supervision

Factor 4: No Immediate Advantage/May Actually Be Impeded

➤ Unacceptable:

- x Internship of a long duration where the intern requires no further training to perform tasks
- x Internship with no training or supervision given beyond what regular employees receive
- x Employer is reliant on the intern to make quotas or to otherwise carry out its work

Factor 5: Intern is not entitled to a job at conclusion

➤ Acceptable:

- ✓ Employer sets a duration of the internship at the outset and requires interns to sign an agreement expressly stating they are not entitled to a job.

➤ Unacceptable:

- x Employer uses internships as a trial period for hiring employees

Factor 6: Mutual Understanding of No Compensation

- Acceptable:
 - ✓ Having the intern sign an agreement
 - ✓ Providing a stipend that does not exceed a reasonable approximation of the expenses incurred
- Unacceptable:
 - x Referring to stipends as wages, or giving out compensation in a similar manner to how employees are paid

Factor 6: Mutual Understanding of No Compensation

- Safest way to avoid an issue is to not offer any compensation at all
- Otherwise you may create an expectation of compensation

Signed Agreement

- Intern agrees he is not an employee
- States internship is unpaid
- Sets duration of the internship
- States intern is not entitled to a job at the conclusion of the internship
- States internship is provided in connection with an academic program, if applicable

Tips to Avoid an Employee-Employer Relationship

- Provide an educational experience
- Avoid “grunt” work
- Develop training programs and supervise interns
- Keep training broad
- Never suggest there is an employment relationship
- Limit duration

Example #1

- High school internship program where students rotate in different career areas, without settling on one occupation or working an excessive length of time and require close supervision.

Example #2

- Formerly homeless participants are given \$40 a week to intern after signing a Letter of Agreement that they are not employees. Interns receive some training, counseling, and progress reports, but do not receive significant supervision on low-level tasks. Their work allows the non-profit to offer services at a below-market rate.

Potential Liability

- The DOL has said that unpaid internships for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are “generally permissible”
- However, the DOL has provided no further guidance for non-profits
- Non-profits are also subject to suits from former internship participants

For More Information:

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

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