

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

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Nonprofit Internships and the FLSA

- FLSA = Fair Labor Standards Act
 - Federal wage and hour law

- Nonprofits 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 v. Interns

- Unpaid internship programs are permissible in some circumstances

- Recent rejection of rigid, six-factor test in favor of seven-factor “economic reality”/“primary beneficiary” test
 - No single factor determinative
 - Focus on educational experience

Seven Factors to Consider

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggest that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Factor 1: The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggest that the intern is an employee—and vice versa.

- Clear expectations up front
- “Economic reality” of arrangement

Factor 2: The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

- Classroom setting not required
- Opportunities for tasks that apply specific skills to the professional environment
- Vocational training and mentorship

Factor 3: The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

- Consider relation to major, coursework
- Regular feedback during program

Factor 4: The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

- Summers, school semesters
- Consider time commitment of intern

Factor 5: The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

- Learning a “practical skill may entail practice” - some repetition is allowed
- Finite time period

Factor 6: The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

- Ensure oversight or involvement by an employee
- Who bears primary responsibility for work?

Factor 7: The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

- Entitlement to job indicates worker is simply a trial employee

Signed Agreement

- Intern agrees he/she 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
- Don’t compensate interns
- Never suggest there is an employment relationship
- Limit duration

Example #1

- Internship for magazine published by nonprofit, where journalism students take notes at staff meetings and publishes articles on the magazine's website. Their work requires heavy editing and they receive class credit as well as samples for their portfolios.

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 nonprofit to offer services at a below-market rate.

Potential Liability

- The DOL has said that unpaid internships for nonprofit charitable organizations, where the intern volunteers without expectation of compensation, are “generally permissible”
- However, the DOL has provided no further guidance for nonprofits
- Nonprofits could be subject to suits from former internship participants

Questions?

For More Information:

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