



Assessing The Risk:

Wage and Hour Tip Of The Week

All Work and No Pay Makes Jack a Litigious Intern

TIP: When hiring interns who will be unpaid or paid less than minimum wage, keep in mind the guidance provided by the Department of Labor.

Plaintiffs' counsel are aggressively pursuing claims against employers on behalf of unpaid interns or those earning less than minimum wage. These lawsuits often allege that the interns act as *de facto* employees, but without receiving pay (or receiving pay that amounts to less than minimum wage and no overtime), in violation of the requirements of the FLSA and state wage laws. The Department of Labor has articulated guidelines to help employers evaluate whether interns meet the definition of "employees" or can properly be unpaid. See *Department of Labor Fact Sheet #71 (Wage and Hour Division)*. While courts often follow the DOL's criteria, they are not regulatory and won't necessarily have the force of law in every case.

However, to help reduce your potential liability (not to mention avoid the watchful eye of the local DOL investigator), you should be mindful of the following factors in the DOL guidance as you administer your unpaid internship programs:

1. The internship should be similar to training that would be given in an educational environment, and should benefit the intern. The purpose of an internship should be to simulate an educational or training environment. This justifies non-payment (or low payment) of wages, as the benefit comes in the form of educational growth, not pay. The more that you can foster this educational aspect – by mentoring, classes, seminars, field-trips, or some other manner of imparting information to the intern – the better off you'll be. You should not simply give an intern menial work and assume that the intern is "learning" just by being there. For example, an intern for an investment bank could be shown the ropes about investment banking as a whole and the process of underwriting an IPO. Similarly, an intern for a marketing agency could be allowed to sit in on meetings about strategy, techniques, and concepts.
2. The intern should not displace regular employees, and should work under close supervision of existing staff. Employers are often accused of saving labor costs by hiring an unpaid intern to replace a paid employee. While the intern can certainly be asked to perform some tasks that an employee performs, that should not be the focus or the most important part of the program.
3. You should derive no immediate advantage from the activities of the intern, and on occasion your operations may actually be impeded. Interns are usually novices in their field, and you should not expect to use them to perform critical tasks. You should not be generating significant work assignments for the intern as you would for a regular employee. In fact, the employee overseeing the intern may actually have to take time out of his or her day to mentor the intern, often resulting in diminished productivity from that employee.

The overarching concept behind these guidelines is that an unpaid internship should be as much as possible about the education of the intern. You should not simply replace an employee (or decline to hire one) with an unpaid or underpaid intern, no matter how willing or desperate the intern may be for the experience. In order to proactively audit such programs, you should carefully review your intern programs, evaluate what interns are doing on a day-to-day basis, and analyze the benefits they receive.

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