

Federal Guidelines for Unpaid Internships

Background

The Fair Labor Standards Act (FLSA) defines the term *employ* very broadly as including to “suffer or permit to work.” Covered and non-exempt individuals who are “suffered or permitted” to work must be compensated under the law for the services they perform for an employer. Internships in the for-profit private sector will most often be viewed as employment, unless the test for unpaid interns, relating to trainees, is met. Interns in the for-profit private sector who qualify as employees rather than trainees typically must be paid at least the minimum wage and overtime compensation for hours worked over 40 in a workweek.

The Test for Unpaid Interns

There are some circumstances under which individuals who participate in for-profit private sector internships or training programs may do so without compensation. The Supreme Court has held that the term *suffer or permit to work* cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. This may apply to interns who receive training for their own educational benefit if the training meets certain criteria. The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.

The following six criteria must be applied when making this determination.

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.
2. The internship experience is for the benefit of the intern.
3. The intern does not displace regular employees, but works under close supervision of existing staff.
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.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all six factors listed are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern. This exclusion from the definition of employment is necessarily quite narrow because the FLSA’s definition of *employ* is very broad. Some of the most commonly discussed factors of for-profit private sector internship programs are considered as follows:

Similar To an Education Environment and the Primary Beneficiary of the Activity

In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience. (This often occurs where a college or university exercises oversight over the internship program and provides educational credit). The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training. Under these circumstances the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern. On the other hand, if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.

Displacement and Supervision Issues

If an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns should be paid at least the minimum wage and overtime compensation for hours worked over 40 in a workweek. If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees and entitled compensation under the FLSA. Conversely, if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience. On the other hand, if the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training.

Job Entitlement

The internship should be of a fixed duration, established prior to the outset of the internship. Further, unpaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.

The California Division of Labor Standards Enforcement's 11 Different Criteria for Valid Trainee Arrangements:

The work that trainees perform, even if it includes operation of the employer's equipment or facilities, must be similar to that which they would otherwise perform in a vocational school or program.

1. The work must be primarily for the benefit of the trainees, rather than the employer.
2. Trainees must not displace regular employees in performing the work.
3. The employer cannot derive any immediate advantage from the work of the trainees (in fact, employers' operations should to some extent be impeded by the trainees' presence).
4. Trainees cannot be guaranteed a paying job at the conclusion of their training period.
5. The trainees clearly understand that they are not entitled to wages for their worktime.
6. **The work the trainees perform must be an essential part of a valid educational curriculum that the trainees are actively enrolled in.**
7. Trainees cannot receive employee benefits.
8. The training work must be general enough so that it prepares the trainees for work in any similar business, rather than being so specialized that it only qualifies the trainee for a job with the particular employer.
9. The screening process for the training job cannot be the same as that used for regular employees (that is, applicants should not think they are applying for paying jobs).
10. Advertisements for the training jobs must clearly indicate that jobs are not for paying work.