

Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act

This fact sheet provides general information to help determine whether interns must be paid the minimum wage and overtime under the Fair Labor Standards Act for the services that they provide to “for-profit” private sector employers.

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 described below 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 forty 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; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all of the factors listed above 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 for “for-profit” private sector internship programs are considered below.

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 forty 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.

Where to Obtain Additional Information

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

* The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sectors.

Hourly Wages for Interns and Co-ops Stable

Spotlight for Career Services Professionals
Spotlight for Recruiting Professionals
 April 2, 2014

The average hourly wage rate for interns at the bachelor's degree level is \$16.35, a slight increase over last year's wage rate of \$16.26, according to results of NACE's *2014 Internship & Co-op Survey*.

Likewise, the wage rate for interns at the master's degree level also climbed slightly to \$22.58, up from \$21.90 reported last year.

For co-op students, the average hourly wage rates show larger gains than they do for interns. The average hourly wage for a bachelor's degree co-op is \$17.44—a jump from \$16.23 last year—while the average hourly wage for a co-op at the master's degree level stands at \$25.04, compared to \$20.58 last year.

Class year makes a difference in hourly wage rates for interns and co-ops. For example, freshmen interns at the bachelor's degree level earn an average of \$15.05 per hour, while senior interns average \$17.94 per hour. (See Figure 1.)

The difference is even more pronounced among co-ops: freshmen at the at the bachelor's degree level earn \$15.17, while their senior counterparts earn an average of \$19.24.

NACE's *2014 Internship & Co-op Survey* was conducted November 18, 2013, through January 24, 2014, among NACE employer-member organizations; 264 organizations participated. The *2014 Internship & Co-op Survey* report will be available this spring.

Now available: The *2014 Guide to Compensation for Interns & Co-ops*, which features in-depth information regarding hourly wages for interns and co-ops gathered through the intern/co-op survey, is available. For details, see naceweb.org/salary-resources/internship-co-op-compensation.aspx. (Note: If you or someone in your membership group participated, you will find the 2014 Compensation Guide in the [Research Reports section of MyNACE](#).)

Figure 1: Average intern and co-op hourly wage rates, by degree and year of study

Degree and year of study	Average intern hourly wage rates	Average co-op hourly wage rates
Bachelor's degree, freshman	\$15.05	\$15.17
Bachelor's degree, sophomore	\$16.10	\$16.74
Bachelor's degree, junior	\$17.19	\$17.93
Bachelor's degree, senior	\$17.94	\$19.24
Master's degree, first year	\$22.21	\$23.46
Master's degree, second year	\$23.06	\$26.82

Source: *2014 Internship & Co-op Survey*, National Association of Colleges and Employers

15 Best Practices for Internship Programs

Excerpted from [Building a Premier Internship Program: A Practical Guide for Employers](#)

Best Practice #1: Provide interns with real work assignments.*

Providing interns with real work is number one to ensuring your program's success. Interns should be doing work related to their major, that is challenging, that is recognized by the organization as valuable, and that fills the entire work term.

You can guarantee that hiring managers provide real work assignments by checking job descriptions, emphasizing the importance of real work assignments during a manager/mentor orientation sessions, and communicating with interns frequently throughout the work term to determine who they perceive what they are doing.

**Note: The best practices presented here assume the organization's goal is to convert interns to full-time hires and is therefore paying its interns. Unpaid internships present a number of problems for organizations focused on intern conversion, not the least of which is legal issues that arise if the unpaid intern is given real work assignments.*

Best Practice #2: Hold orientations for all involved.

It's important that everyone "be on the same page," so to speak. Make this happen by holding an orientation session for managers and mentors as well as a session for students. Orientations ensure that everyone starts with the same expectations and role definitions. This is time well spent—the effort you put into these sessions will pay off throughout the program.

Best Practice #3: Provide interns with a handbook and/or website.

Whether in paper booklet format, or presented as a special section on your website, a handbook serves as a guide for students, answering frequently asked questions and communicating the "rules" in a warm and welcoming way.

A separate intern website serves many of the purposes of the handbook, but has the advantage of being easy to change. You can use your website as a communication tool, with announcements from the college relations staff or even articles of interest written by the interns themselves.

Best Practice #4: Provide housing and relocation assistance.

Few employers can afford to provide fully paid housing for interns, but you'll find that you get a lot of appreciation if you offer any kind of assistance toward housing expenses. If that's not possible, provide assistance in locating affordable housing. For those relocating to the job site, the prospect of finding affordable, short-term housing can be daunting. Easy availability of affordable housing will make your opportunity more attractive to students, broadening your pool of candidates.

If you can pay for all or some of your interns' housing, be sure to design (and stick to) a clear policy detailing who is eligible. This will eliminate any perceptions of unequal treatment. In addition, be aware that employer-paid or employer-subsidized housing is considered a taxable benefit. Check with your internal tax department on exceptions to this.

You will also want to consider the issue of relocation, which is separate although related to housing. Many organizations pay some or all of their interns' relocation expenses to and/or from the job site.

Best Practice #5: Offer scholarships.

Pairing a scholarship with your internship is a great way to recruit for your internship program—and this is especially true if you are having difficulty attracting a particular type of student or student with a specific skill set to your program. Attaching a scholarship can increase your pool of candidates with the desired qualifications.

Best Practice #6: Offer flex-time and/or other unusual work arrangements.

Students mention flex-time as one of their most-desired features in a job. (A flexible time schedule during their internship eases their transition to the workplace.)

If you think about how students spend the day on campus (varied schedule each day, with varied activities such as work, class, social time), you can understand that 8 a.m. to 5 p.m. Monday through Friday is a bit of an adjustment for them. A flexible schedule can make them feel less chained in by an unchanging routine.

Other work arrangements that have been found successful with students include keeping them on as part-time, remote employees after they go back to school (depending on the type of work they do for you and whether they have a willing manager), and having them come back and work over school breaks for a couple of weeks. These are excellent ways to keep communications open and build a stronger bond.

Best Practice #7: Have an intern manager.

Having a dedicated manager for your intern program is the best way to ensure that it runs smoothly and stays focused on your criteria for success. Unfortunately, the size and resources available to most internship programs mean that this isn't always possible. If your program isn't big enough to warrant a dedicated full-time staff member, an excellent short-term solution is to hire a graduate student (look for a student working toward an advanced HR degree) to be your intern, and put this college relations intern in charge of the daily operation of the internship program. This gives the interns a "go-to" person, and gives you and your staff a break from the many daily tasks involved in running a program of any size. For this to work, you have to plan the program structure in advance (don't expect your intern to do it), and be very accessible to your college relations intern.

Best Practice #8: Encourage team involvement.

Involve your college recruiting teams—whether they are "volunteers" who participate in college recruiting, staff members dedicated to college recruiting, or some combination of both—in your intern program. They can sponsor social or professional development events, and help to orient the interns to your company culture. In my experience, college team members served as cooks at intern picnics, hosts at speaker events, and drivers for social outings such as ball games.

Best Practice #9: Invite career center staff and faculty to visit interns on site.

Although some programs—especially those that are very structured on the university side—make visits by career center staff and faculty a regular practice, most do not. In general, career center staff and faculty members have relatively few opportunities to visit employer work sites to see firsthand the types of experiences that their students are getting. By inviting them to your site, you will build a better working relationship with these groups, which can lead to more student referrals, enhanced campus visibility, and increased flexibility on their parts when your business needs dictate it.

Best Practice #10: Hold new-hire panels.

New-hire panels are one of the best ways to showcase an organization to interns as a great place to work. These are panels of five or six people who were hired as new grads within the last three years. They act as panelists in a meeting of interns, giving a brief summary of their background and then answering questions from the intern audience. Your interns get insight about your organization from your new hires—people who they perceive are like themselves and who they consequently view as credible sources of information.

In these meetings, I've found that the interns consistently bring up the same topics: *Why did you choose this employer over others? What was your first year like? How is being a full-time employee here different from being an intern? Do you recommend getting a graduate degree? In the same field, or an M.B.A.? Is it better to go straight to graduate school after the bachelor's or better to work a while?*

It's also fairly consistent that the new hires will offer other types of advice to your interns, such as how to handle finances those first couple of years out of school. (Their typical advice: *Don't run right out and buy a new car, and, Start contributing the maximum to your savings plan as soon as you are allowed.*)

College relations staff should attend these sessions, but should remain unobtrusive, staying in the back of the room so as not to stifle the conversation. By being there, you stay aware of what is on the minds of your target group, and you can answer any detailed questions that may come up, such as those related to benefits.

Best Practice #11: Bring in speakers from your company's executive ranks.

One of the greatest advantages to students in having internships is the access they get to accomplished professionals in their field. Consequently, speakers from the executive ranks are very popular with students—it's a great career development and role modeling experience for interns. Having a CEO speak is especially impressive. Best scenario: Your CEO speaker is personable, willing to answer questions, and willing and able to spend a little informal time with the students after speaking—your interns will be *quite* impressed.

For you, having your executives speak to interns is another way to "sell" your organization to the interns, and get your executives invested in (and supporting) your program.

Best Practice #12: Offer training/encourage outside classes.

Providing students with access to in-house training—both in work-skills-related areas, such as a computer language, and in general skills areas, such as time management—is a tangible way to show students you are interested in their development.

You may also want to consider providing interns with information about nearby community colleges: Many students will be interested in attending during their work term to take care of some electives and/or get a little ahead with the hours they need to graduate. If you have the budget, you may also want to consider paying the tuition for courses they take while working for you, but, as is the case with housing, any assistance you can provide—even if it's just providing them with information about local schools—will earn you points with students.

Best Practice #13: Conduct focus groups/surveys.

Conducting focus groups and feedback surveys with these representatives of your target group is a great way to see your organization as the students see it. Focus groups in particular can yield information about what your competitors are doing that students find appealing.

Best Practice #14: Showcase intern work through presentations/expo.

Share

Students work very hard at completing their work and are generally proud of their accomplishments. Setting up a venue for them to do presentations (formal presentations or in a fair-type setting such as an expo) not only allows them to demonstrate their achievements, but also showcases the internship program to all employees.

Best Practice #15: Conduct exit interviews.

Whether face-to-face or over the telephone, a real-time exit interview done by a member of the college relations team is an excellent way to gather feedback on the student's experience and to assess their interest in coming back. Having the students fill out an exit survey and bring it to the interview gives some structure to the conversation.

Courtesy of the [National Association of Colleges and Employers](#).

Legal Issues: Considerations Surrounding Internships

by George C. Hlavac, Esq., and Edward J. Easterly, Esq.
NACE Journal, November 2013

A recent ruling in a lawsuit filed by unpaid interns may have employers thinking twice about using them to reduce costs.

"They worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. The benefits they may have received-such as knowledge of how a production or accounting office functions or references for future jobs-are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer. They received nothing approximating the education they would receive in an academic setting or vocational school." - Honorable William H. Pauley III

This quote is from the recent ruling in a lawsuit filed by unpaid interns who worked on the production of the movie Black Swan. The interns alleged that Fox Searchlight illegally classified them as "unpaid interns" and, as such, failed to pay them wages that they were due. The court, in a landmark decision, agreed with the unpaid interns and indicated that unpaid internships should be allowed "only in limited circumstances." The court further indicated that in order for an internship to be classified as unpaid, it must meet the test set forth by the U. S. Department of Labor (DOL). This is only the first in a number of recent lawsuits filed by interns who contend that they have illegally been classified as unpaid. A second lawsuit has also recently come to an abrupt resolution, where Charlie Rose agreed to pay \$250,000 in back pay to interns who claimed they were misclassified under the law.

Based upon these recent decisions, employers who attempt to use "free" labor as a means to reduce costs are going to have to see the light and change their ways, or face dire consequences. Therefore, the initial question an employer seeking to use an unpaid intern should answer is "can we meet the DOL" test referenced by Judge Pauley

Compensation

To clarify the issue of "employment" in the area of internships, the DOL set forth a Six-Part Test for interns in May 2010. The lawsuit filed against Fox Searchlight was the first major lawsuit that implicated the Six-Part Test. Under this test, an employer is not required to pay an intern if these criteria are met:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in the educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees;
- The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages.

The test, however, is fact-specific, meaning that not all of the six factors have to be met. However, if an employer hires an intern merely to make coffee, answer phones, or run errands, it is unlikely that will meet the test for an unpaid intern. An employer must focus on the productive work performed by the intern. If the productive work outweighs the training and supervision burden imposed on the employer, an employee/employer relationship may be present and an employer may be subject to liability under the Fair Labor Standards Act (FLSA).

Employers have also attempted to rely upon the fact that an unpaid intern receives college credit to support its position that regardless of the duties performed, the intern is technically "compensated." The Black Swan ruling has, essentially, blown that argument out of the water. The court in the Black Swan case stated that receiving college credit, in and of itself, does not establish an unpaid internship and is of "little importance" in determining if interns must be paid. The true test is whether the internship is structured to benefit the intern and not the employer.

As such, an employer must focus on the work performed by the intern, the training provided by the employer, and who, ultimately, receives the benefit of the internship. Gone are the days where unpaid interns could be used as "replacement employees," unless employers want to end up like Charlie Rose or Fox Searchlight.

Unemployment

A second question that is tied to compensation is unemployment benefits. As an initial matter, each state has its own specific unemployment compensation regulations. Generally, to collect unemployment, one must be "able and available" for work. As a practical matter, interns, as college students, are usually not available for work at the conclusion of an internship because they must return to college. It is unlikely that interns, whether paid or not, will be able to collect unemployment benefits at the conclusion of an internship.

Workers' Compensation Issues

What happens if an intern is injured while performing services for a company? Will the intern be entitled to workers' compensation benefits? Workers' compensation provides benefits to individuals who suffer injuries during the course of and arising out of the scope of their employment. Workers' compensation laws vary from state to state, but there are some consistent matters that can be addressed.

Questions about whether an individual is an employee and whether the intern is paid or unpaid are essential to determining coverage under the applicable workers' compensation statutes. In some recent cases, courts have found that where the internship is paid, the responsibility to provide workers' compensation coverage falls to the employer. If the internship is unpaid and it is affiliated or sponsored by the educational institution, the burden falls on the school to provide workers' compensation coverage.

It is imperative to make a determination prior to implementing an internship program. In most instances, workers' compensation claims bar recovery by the intern for any work-related injuries. So if an intern is injured while on an employer's premises, his or her sole recovery would be under the applicable workers' compensation statutes.

Discrimination Claims

Both federal and state statutes provide protections for individuals to be free from discrimination at the workplace. The key inquiry, however, to determine whether interns are protected is again whether they fall within the definition of an employee under the relevant statute.

Once again, this question reverts to whether or not the intern was provided with compensation. In a recent case in Illinois, this issue was discussed at length. In *Doe v. Lee*, a former police intern filed a sexual harassment claim under Title VII (which prohibits discrimination based upon race, gender, national origin, and religion). Under the terms of her internship, the intern was not paid, came and went as she pleased, and planned to leave the internship when she returned to college. In reviewing the intern's claims, the court first had to determine whether she was an employee as defined by Title VII. To make the determination, the court looked at these factors:

- The extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work;
- The kind of occupation and nature of skill required, including whether skills are obtained in the workplace;
- Responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations;
- The method and form of payment and benefits; and
- The length of job commitment and/or expectations.

The court, in reviewing the facts, determined that the internship did not qualify as employment. The court found that the internship was more closely associated to that of a "volunteer" than that of an "employee." Accordingly, the intern was not protected by Title VII.

Other courts have made similar determinations. Regardless of the issues presented, the key inquiry is generally whether there was remuneration provided to the intern in exchange for services. The question is what happens where the individual is not provided with pay but with other types of compensation. Courts have stated that nonfinancial benefits that create or relate to career opportunities may suffice. By way of example, free training and educational opportunities (such as a corporate leadership course) may establish an employer/employee relationship where the individual can demonstrate an economic dependence upon the training and not a mere pleasure from the "compensation." Also, at least one court has found that where a volunteer was provided with a "clear pathway to employment" deriving from her position as a volunteer, she could establish the plausibility of an employment relationship under federal anti-discrimination laws. If an intern can establish that he or she was provided with some form of remuneration for services provided, a court may find that the intern is afforded protections under federal and state anti-discrimination laws.

Additionally, both employers and universities can be subject to common law tort theories of liability. If the unpaid interns are unable to use the statutory protections, they may still file suit for intentional infliction of emotional distress for harassment or discrimination. As a result, employers are recommended to treat interns the same as regular employees and investigate all claims of discrimination promptly and effectively.

Whether an intern is paid or unpaid, it is recommended that employers take all claims of harassment or discrimination seriously and conduct a thorough investigation. Merely because an employer believes an intern is not an employee does not mean a court will make the same determination.

Employment Agreements

Some employers have started requiring interns to sign employment agreements at the commencement of the internship. Such agreements provide the scope of the intern's duties, along with the inclusion of restrictive covenants. Such agreements may include noncompete, nonsolicitation, or nondisclosure provisions. Both the intern and the employer should have an attorney review the agreement to ensure they understand the legal requirements that come along with entering into such terms and conditions. Whether such agreements are valid, however, is an entirely different issue.

In general, employment agreements are necessary if an employer wants to define the manner in which an employee can be terminated, terms of severance, and to provide certain restrictions on employment. Regarding interns, most of the foregoing terms are unnecessary as the scope and duration of the internship is definite and certain. The only true need to have an intern sign an employment agreement is to protect the employer's business interests.

Nondisclosure Agreements

A nondisclosure agreement prohibits an employee or intern from disclosing an organization's confidential and/or proprietary information to third parties during both the tenure of employment and after termination. The individual agrees that he or she will not reveal anything the company considers confidential (i.e., customer lists or research and development plans). Unlike other forms of restrictive covenants, a nondisclosure agreement does not restrict an individual's ability to obtain work upon the termination of employment, but merely protects an employer's proprietary information.

As interns are generally provided with unlimited access to an employer's business, it is not unusual for a company to require interns to sign a nondisclosure agreement upon the commencement of the program. Employers are generally recommended to have interns sign such agreements to protect the company's interests, and such agreements should be provided during an intern orientation period and thoroughly explained prior to execution.

Provided the nondisclosure agreement is not overbroad and is explained to an intern prior to execution, a court will likely find such an agreement valid.

Noncompete and Nonsolicitation Agreements

Unlike a nondisclosure agreement, noncompete and nonsolicitation agreements limit an individual's ability to perform work in his or her chosen profession for a certain period of time. As of today, no court has determined whether a noncompete or nonsolicitation would be deemed valid and enforceable against an intern. But it is unlikely that a court would find such an agreement valid. The reason is that an employer would be hard-pressed to point to the "legitimate interest" it is trying to protect with the use of such an agreement. Further, a court is unlikely to restrict the ability of a college student to engage in his chosen profession when he or she is just entering the work force. While an employer may have interns sign such agreements; the likelihood is that they are not going to be worth the paper on which they are drafted.

Internships provide a benefit to both employers and interns. However, employers and interns alike must be mindful of the legal land mines of such relationships. If an employer does not recognize and prepare for such issues it could result in significant liability for the employer, as evidenced by the cases involving Charlie Rose and Black Swan.

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