

To Pay or Not to Pay Interns

According to the Department of Labor, there are limited circumstances in which private-sector employers can offer unpaid internships under the Fair Labor Standards Act (FLSA). Employers should ensure their internship programs comply with the law. Generally, interns must be paid for their work. However, under certain specific circumstances, interns are not considered employees and do not need to be paid. To assist employers with determining whether interns qualify as employees, the Department of Labor (DOL) uses a “primary beneficiary test.” The test considers seven factors when assessing whether an intern should be paid. These seven factors help clarify the “economic reality” of the intern/employer relationship and who gets the primary benefit from that relationship.

The seven factors are:

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, suggests 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.

The scopes of all seven factors are taken into consideration and not one single factor is determinative. Rather, in each situation, the unique circumstances are looked at individually. Before moving ahead with an internship program, analyze the program against these seven factors to determine whether the intern or the employer is the “primary beneficiary” of the relationship. If the intern is the primary beneficiary, then he or she is not an employee. However, if the employer is the primary beneficiary, then the intern is entitled to at least the minimum wage and overtime requirements set forth by the FLSA (or local law, if more generous). The more an internship program is structured around a classroom or training, such as performing simulated work, as opposed to the employer’s actual operations, the more likely the internship will be viewed as contributing to the intern’s educational experience. If an intern shadows an employee by following and observing but not performing the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern, then it is more likely to be viewed as educational and could be unpaid. On the other hand, if an intern is engaged in the operations of the employer or is performing work that benefits the employer such as filing, assisting customers, and/or inputting data, then it is more likely that the intern will be determined an employee. There is 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 their time freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to nonprofit organizations. Unpaid internships in the public sector and for nonprofit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.

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