

Questions—And Answers

Are Your Unpaid Interns Actually Employees?

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Unpaid internships are prevalent in corporate America. They are a way for students and recent graduates to acquire experience and make contacts that will help them obtain gainful employment in the future. However, not all unpaid internships are lawful.

Contrary to common practice, most unpaid interns are actually employees who should be paid at least the federal and state minimum wage. The Fair Labor Standards Act (FLSA), a federal statute that requires employers to pay covered, nonexempt employees the federally mandated minimum wage for all hours worked and overtime for all hours worked over 40 in a work-week, has a very broad definition of the term *employ*.¹ Under the FLSA, *employ* means "to suffer or permit to work."² This definition is intentionally broad because the FLSA is meant to be a remedial statute that extends to all employees. As such, the general rule is that any individual who suffers or is permitted to work is an employee under the FLSA. In 1947, however, the United States Supreme Court, in *Walling v. Portland Terminal Co.*, created an exception for trainees, holding that the definition of *employ* could not be interpreted so as to make a person who serves only his or her own interest an employee of another who provides aid or instruction.³ This exception allows for-profit corporations to retain unpaid interns if they qualify as "trainees." This is an extremely narrow exception, however, that will apply only if all of the trainee criteria are met, which, as described in detail later, is not an easy task.

In recent years, several claims have been brought against for-profit corporations challenging the applicability of the trainee exception. In fact, in June of this year, the Southern District of New York held that unpaid interns at Fox Searchlight were

actually employees covered by the FLSA.⁴ Given the rise in legal claims against for-profit corporations for misclassifying unpaid interns, HR professionals should be familiar with the requirements of the trainee exception and how they are applied in determining whether an individual is a trainee or an employee.

This Questions—And Answers column reviews the factors that should be considered when classifying an individual as an unpaid intern, the consequences of misclassification, and practical tips for creating a lawful unpaid internship program.

WHAT ARE THE CRITERIA FOR DETERMINING WHETHER AN INTERNSHIP MEETS THE TRAINEE EXCEPTION?

The United States Department of Labor (DOL), which is tasked with enforcing the FLSA, has issued guidance outlining six criteria derived from *Walling* for determining whether an internship meets the trainee exception. To qualify, each of the following factors must be met:⁵

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that 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 any of the above factors is missing, the internship creates an employment relationship under the FLSA, and the intern must be paid the applicable minimum wage for all hours worked.

WHEN IS AN INTERNSHIP SIMILAR TO TRAINING THAT WOULD BE GIVEN IN AN EDUCATIONAL ENVIRONMENT?

The internship should be built around a classroom or academic experience. For example, if the internship is done in conjunction with a college or

university and interns receive educational training that is tied to the hands-on experience acquired at the internship, this criteria is met. Where that is not feasible, the internship should include overall general training that develops individual skills that can be applied to multiple employment settings, as opposed to skills particular to the corporation providing the internship. The more the internship develops skills that can be applied in the industry as a whole, the more likely it will be viewed as similar to the educational environment. In contrast, the more the intern performs routine work of the business, the more likely it is that the intern will be viewed as an employee who should be paid for purposes of the FLSA.

WHEN IS AN INTERNSHIP FOR THE BENEFIT OF THE INTERN?

The internship must be primarily for the benefit of the intern; any benefit to the corporation should be merely incidental. As mentioned previously with respect to providing an educational environment for the internship, if the intern is provided with training and skills that can be used in the future, regardless of where the intern ends up working, this will demonstrate that the intern is the primary beneficiary of the internship. Note, however, that the performance of routine and clerical work, although transferable to any work environment, is viewed as a benefit to the corporation, not the intern.

WHEN IS AN INTERN DEEMED TO HAVE DISPLACED A REGULAR EMPLOYEE?

If an intern is regularly assigned to perform work that the corporation would otherwise have to pay an employee to do, the intern is deemed to have displaced a regular employee.

Corporations may not use unpaid interns as substitutes for regular employees or to augment their existing workforce during specific time periods. If the corporation would have had to hire an employee or require an employee to work additional hours to perform the work completed by the intern, then the intern is an employee under the FLSA and should be paid at least the minimum wage for each hour worked. Likewise, if an intern performs work similar to an entry-level employee and receives the same amount of supervision as an entry-level employee, the intern will likely be deemed an employee. In contrast, if the intern is merely shadowing an employee to learn the functions of a position and is performing little to no work under significant supervision, the intern will likely not be deemed to have displaced a regular employee.

WHEN DOES A CORPORATION DERIVE AN IMMEDIATE ADVANTAGE FROM AN INTERN?

If an intern performs productive work for the corporation, the corporation derives an immediate advantage from the intern. For example, interns who perform routine and clerical tasks such as filing, copying, stapling, and organizing files are providing an immediate advantage to the corporation. Similarly, interns who run errands, deliver and pick up packages, organize and schedule meetings, and perform other administrative tasks provide an immediate advantage to the corporation.

The essence of an unpaid internship is that the intern does not benefit the corporation. In fact, in a true unpaid internship, the corporation cannot derive an immediate advantage from the intern because the intern requires the corporation to dedicate resources in the form of training and supervision, which actually detract from the productivity of the corporation.

HOW DOES A CORPORATION AVOID THE APPEARANCE THAT AN INTERN IS ENTITLED TO A JOB?

Any documentation regarding the internship, including the advertisement and internship application, should clearly state that the internship does not create an entitlement to employment with the corporation.

The internship should be for a specific period of time, with a set start date and end date determined before the internship begins. The longer the internship, the more likely it will be deemed employment.

The internship should have no connection with an offer or promise of employment, and the corporation should not use the internship as a training or trial period. If there is an expectation that the intern will be hired at the conclusion of the internship, the intern will likely be deemed an employee.

HOW DO YOU ENSURE THAT THE INTERN UNDERSTANDS THAT THE INTERNSHIP IS UNPAID?

As with the fifth criteria, any documentation regarding the internship should explicitly state that the internship is unpaid. This statement should be clear and conspicuous to avoid any doubt regarding the unpaid status of the internship.

Note, however, that even where it is clear that the internship is unpaid, if the other five criteria are not met, the intern will be deemed an employee covered by the FLSA. Employees cannot waive their entitlement to wages under the FLSA. As such, an agreement to accept an unpaid internship that does not qualify as an unpaid internship is not enforceable and does not

excuse the corporation of its obligation to pay the intern the applicable minimum wage for each hour worked. Accordingly, it is incumbent on the corporation to ensure that unpaid interns are properly classified.

WHAT OTHER FACTORS NEED TO BE CONSIDERED WHEN DETERMINING WHETHER AN INTERN IS ACTUALLY AN EMPLOYEE?

As with most federal laws, many states have their own criteria for determining whether an individual qualifies as an unpaid intern, and employers must be aware of these. For example, the New York State Department of Labor uses the six criteria provided by the DOL in addition to the following five criteria:⁶

1. Any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity.
2. The interns do not receive employee benefits.
3. The training is general and qualifies interns to work in any similar business and is not designed specifically for a job with the corporation that offers the program.
4. The screening process for the internship program is not the same as for employment and does not appear to be for that purpose.
5. Advertisements, postings, or solicitations for the program clearly discuss education or training, rather than employment.

Similarly, the California Division of Labor Standards Enforcement also applies five additional criteria,⁷ the first being that any internship should be part of an educational curriculum, and the other four being the same as the last four criteria applied in New York.

Accordingly, after determining whether an individual qualifies as an unpaid intern under federal law, HR professionals should confirm whether the individual also qualifies as an unpaid intern under any applicable state law.

WHAT IS THE HARM IN MISCLASSIFYING AN EMPLOYEE AS AN UNPAID INTERN?

The penalties for misclassification can be very costly. In addition to payment of the unpaid wages, including any unpaid overtime, misclassified interns may recover liquidated damages, interest, and attorney's fees. The corporation will also bear the cost of defending against individual claims and potential class actions. The corporation may also be fined or incur penalties for violations of applicable federal and state labor laws and for failure to pay applicable federal, state, and local taxes.

WHAT ARE SOME PRACTICAL TIPS FOR AVOIDING MISCLASSIFICATION?

For corporations that want to eliminate their risk, the sagest advice is to pay all of your interns at least the minimum wage. Although this will increase the corporation's payroll, it eliminates the risk of future claims from former interns. It also costs less than hiring a full-time employee to perform some of the tasks that are being completed by interns as part of the internship program. By acknowledging that interns provide some benefit to the corporation, and paying them the minimum wage, the corporation can avoid all of the liability that may come from misclassification.

Corporations that want to continue utilizing unpaid interns but minimize the risk of misclassification should:

- ❑ Familiarize themselves with the trainee criteria applied by the DOL and related state agencies;
- ❑ Maximize classroom and training experiences, rather than merely assigning regular work projects to interns;
- ❑ Provide interns with tasks that will develop more general skills that can be applied to any employer in the industry;
- ❑ Provide shadowing opportunities for interns to observe and learn the functions of a position;
- ❑ Assign minimal independent work (to the extent interns perform any productive work, it should be under direct supervision and should not displace a regular worker); and
- ❑ Refrain from assigning interns routine and clerical tasks that provide little benefit to the intern, while providing an immediate advantage to the corporation.

Note that this is a developing area of the law and may be the basis for the next wave of wage-and-hour claims. Accordingly, HR professionals should stay apprised of the changing legal climate surrounding unpaid internships.

NOTES

1. 29 U.S.C. § 203 (g).
2. *Ibid.*
3. 330 U.S. 148 (1947).
4. See *Glatt v. Fox Searchlight Pictures*, No. 11-6784 (S.D.N.Y. June 11, 2013).
5. US DOL Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act.
6. New York State Department of Labor Fact Sheet: Wage Requirements for Interns in For-Profit Businesses.
7. Division of Labor Standards Enforcement April 7, 2010, opinion letter.

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