

ADULT INTERNSHIPS: BE AWARE OF WAGE AND HOUR PITFALLS

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The current economic downturn and the resulting loss of jobs has many individuals seeking alternative employment. For some, this may mean simply looking for new work in the same industry. But for others, a new job may require changing careers altogether. As a result, some people are seeking unpaid internships to obtain on-the-job training in a new industry as a way of making themselves competitive in the job market. While employers may welcome this new trend, it is important to be aware that there are federal regulations governing whether an intern must be paid in accordance with the wage and hour laws that apply to employees of your company.

The Wage and Hour Division of the United States Department of Labor (DOL) and the federal courts analyze the question of whether an intern is an "employee" for purposes of the Fair Labor Standards Act against the backdrop of a six-factor test which reads as follows:

1. Whether the training is similar to that which would be given in a vocational school
2. Whether the training is primarily for the benefit of the intern
3. Whether the intern does not displace regular employees, but instead works under their close observation
4. Whether the company derives immediate advantages from the activities of the intern, and whether on occasion its operations might actually be impeded

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5. Whether the intern is necessarily entitled to a job at the conclusion of the training period
6. Whether the company and the interns understand that the interns are not entitled to wages for the time spent in training

Although the DOL has taken the position that all six of the above criteria must be met for an individual to be considered a trainee, at least one court has concluded that the determination should be based upon the “totality of the circumstances” even if all six factors are not satisfied.

Given the DOL’s position on the matter, it would be prudent to strive for compliance with all six criteria if at all possible. To maximize compliance with the DOL’s test and avoid potential misunderstandings, it is best to provide the intern with a written description of the program which emphasizes the benefit to the intern, the training afforded by the program, and the fact that the internship is either unpaid or accompanied by a small stipend to cover expenses. The consequences of a finding of non-compliance by the DOL could be considerable, as your company could end up owing back wages, including possible overtime pay, to all of its interns. Because of the technical nature of the DOL test, it is best to seek the advice of knowledgeable employment counsel when structuring and implementing your company’s internship program.

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