



Be Careful Using Unpaid Interns

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The federal Department of Labor's Wage and Hour Division has become much more aggressive in identifying and seeking damages against employers who fail to pay interns for the work they perform. Under the Fair Labor Standards Act (FLSA), covered, non-exempt individuals who "suffer" or are "permitted" to work must be compensated for the services they perform for an employer. Unless an internship in the "for-profit" private sector meets all of the below-listed criteria, the internship will most often be viewed under the FLSA as employment and interns who qualify as employees must be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek.

Criteria For Meeting The Exclusion

The criteria for meeting the exclusion from employment are:

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.

The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each internship program. This exclusion is narrow because the FLSA's definition of "employ" is so broad. Only if all six of these factors are met will an employment relationship be deemed not to exist under the FLSA and the Act's minimum wage and overtime provisions not apply to the intern.

If these criteria are not met, the intern must be paid at least the applicable minimum wage for hours

worked and receive overtime at the rate of one and one-half of his or her regular rate of pay. “Hours worked” and “regular rate of pay” are both terms of art that have special meaning under the FLSA. Additionally, employers are also required to maintain records of the hours worked by covered, non-exempt employees.

Penalties For Non-Compliance

Employers who fail to comply with the FLSA can be liable for unpaid wages (minimum wage and/or overtime), plus liquidated damages in an equal amount, and attorneys’ fees for the prevailing employee. The statute of limitations can extend back three years if the employer’s non-compliance is deemed to be willful.

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