

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.



SEP 12 2013

Laurel G. Bellows
Immediate Past President
American Bar Association
321 North Clark Street
Chicago, IL 60654-7598

Dear Immediate Past President Bellows:

I am writing in response to the concerns you raised regarding the limitations imposed by the Fair Labor Standards Act (FLSA) on the ability of law students to secure work experience through unpaid internships with private law firms where the work they perform is limited to pro bono activities.

Generally, the FLSA does not permit individuals to volunteer their services to for-profit businesses such as law firms. In most instances, individuals who are suffered or permitted to perform work by a covered for-profit entity are considered employees under the FLSA and entitled to minimum wage and overtime unless they are covered by a specific exemption or exclusion. The FLSA does, however, permit individuals to participate in unpaid internships or training programs conducted by for-profit entities if certain criteria are met.

Under certain circumstances, law school students who perform unpaid internships with for-profit law firms for the student's own educational benefit may not be considered employees entitled to wages under the FLSA. The determination of whether such an internship meets this exclusion depends upon all of the facts and circumstances of each student's case. Where all of the following criteria are met, an employment relationship does not exist under the FLSA¹:

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.

¹ See WHD Fact Sheet 71, enclosed, for further guidance.

While the intern (or trainee) exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of "employ" is very broad, it may be met in some circumstances when law students perform unpaid internships for for-profit law firms. We understand your specific concern with respect to law students involves unpaid internships (whether or not any academic credit is provided) in which the law school places students with for-profit law firms and acts as an intermediary empowered to monitor the progress of the internship, and in which the law firms provide written assurance that the students will receive an educational experience related to the practice of law and that the student will be assigned exclusively to non-fee-generating pro bono matters.

Where the program is designed to provide a law student with professional practice in the furtherance of his or her education and the experience is academically oriented for the benefit of the student, the student may be considered a trainee and not an employee. Accordingly, where a law student works only on pro bono matters that do not involve potential fee-generating activities, and does not participate in a law firm's billable work or free up staff resources for billable work that would otherwise be utilized for pro bono work, the firm will not derive any immediate advantage from the student's activities, although it may derive intangible, long-term benefits such as general reputational benefits associated with pro bono activities. Where law firm internships involve law students participating in or observing substantive legal work, such as drafting or reviewing documents or attending client meetings or hearings, the experience should be consistent with the educational experience the intern would receive in a law school clinical program. Such internships also offer significant benefit to law students because legal representation and licensing requirements necessitate that unlicensed law students receive close and constant supervision from the firm's licensed attorneys. Such supervision both provides an educational benefit to the law student, and reduces the time that firm attorneys may spend on other work, potentially impeding the firm's operations. Thus, where the hiring of unpaid law student interns does not displace regular employees, the law student is not necessarily entitled to a job at the conclusion of the internship, and the law firm and the law student agree that the intern is not entitled to wages, an unpaid internship with a for-profit law firm structured in such a manner as to provide the student with professional experience in furtherance of their education, involving exclusively non-fee generating pro bono matters would not be considered employment subject to the FLSA.² In contrast, a law student would be considered an employee subject to the FLSA where he or she works on fee generating matters, performs routine non-substantive work that could be performed by a paralegal, receives minimal supervision and guidance from the firm's licensed attorneys, or displaces regular employees (including support staff).


You also raised concerns that recent law school graduates who have not yet passed any state bar should be able to participate in unpaid internships with law firms working on pro bono matters to the same extent as current law students. But we understand from your communications that the Labor and Employment Law Section leadership has

² The Department considers all of the facts in assessing whether all of the criteria are met. A different set of circumstances may, thus, lead to a different conclusion.

reviewed this matter and determined that law graduates may not volunteer for private law firms without pay in the same manner. Likewise, we believe that the analysis would be different for law school graduates than for law students as the former have completed their legal education. Additionally, law schools would not have the same ability to act as intermediaries between graduates and the law firms that they do with current students and would not be able to monitor the internship's compliance with these principles.

I hope that this summary is helpful in clarifying the limitations the FLSA places on unpaid work in various situations.

Sincerely,

A handwritten signature in cursive script that reads "M Patricia Smith".

M. Patricia Smith
Solicitor of Labor