

Unpaid Internships: No, You Can't Work For Free

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Another class of college graduates is about to enter the workforce finding increasingly fewer job opportunities available in their chosen professions. The applicants for these limited opportunities are more likely to be successful in their job searches if they have some relevant work experience. Thus, the need for experience is making internships, whether paid or unpaid, attractive both to individuals new to the workforce and their potential employers.

The downturn in the economy in recent years has made employers increasingly willing to consider bringing on unpaid interns to fill positions previously held by paid employees. The arrangement benefits the employer by lowering its labor costs. It also provides the employer the opportunity to assess whether an intern might be a good fit for a permanent job with the organization in the future. An internship provides a reciprocal benefit to the intern by giving the intern practical experience which can help build his or her resume. More importantly, the internship allows the intern to get his or her foot in the door, allowing the intern to develop the relationships that will help secure future employment. Nevertheless, even though unpaid internships stand to benefit both parties to the relationship, in most cases, the internships will violate the law.

While both the employer and the individual seeking the internship may be amenable to treating the internship as unpaid, doing so is not without risk. The Fair Labor Standards Act ("FLSA") requires that all employees be paid at least minimum wage as well as overtime compensation for any hours worked in excess of 40 in a work week. The term "employee" is defined very broadly by the FLSA and, generally speaking, to the extent the employer is benefited by the services provided by the intern, it is more likely than not that the intern will be treated as an employee who must be compensated for any hours worked. The U.S. Department of Labor has made it clear that it intends to step up the regulation of unpaid interns and investigate potential FLSA violations. Even if an individual is willing to work for free in order to gain much needed experience, an employer's compliance with the FLSA will not be excused.

Under certain circumstances, an intern may fall within an exception to this general rule that is applied when the intern's work serves only his or her own interest rather than the interest of the employer. The following six criteria must be satisfied in order to make this determination:

1. The internship is similar to training which would be given in an educational environment even though it may include the actual operation of the facilities of the employer;
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 by the presence of the intern;
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 these criteria are satisfied, an employment relationship does not exist and the intern need not be compensated.

As a practical matter, if the intern is intended to take the place of a regular worker, the intern will be viewed as an employee entitled to compensation under the FLSA. In contrast, if the arrangement is more closely akin to a job shadowing opportunity where the intern is allowed to learn certain job functions under the close and constant supervision of a regular employee, but the intern performs minimal work, if any, the arrangement is more likely to be viewed as an educational experience for which the intern need not be paid.

In the private for-profit sector, where the work performed by the intern is for the benefit of the employer, rather than the intern, the intern must be paid for the work performed. A possible compromise might be to hire the intern at minimum wage. The intern will benefit from the work experience and the employer will benefit from having an employee eager to learn who is willing to work for less pay.

Unpaid internships in the public sector and for non-profit charitable organizations are generally permissible provided the intern is volunteering with no expectation of being paid. The FLSA provides a special exception for individuals volunteering their time freely and without anticipation of compensation to non-profit organizations for religious, charitable, civic or humanitarian purposes. Under certain circumstances, individuals may also volunteer their services to state or local government agencies.