

DOL's advice: Think twice before using interns as free labor

Businesses are still skittish about adding to the payroll, and as we head into fall, it's tempting to consider filling empty cubicles with young interns eager for work experience.

On paper, internships are good for everyone. Interns learn a business and make connections in organizations where they hope to one day get jobs. In turn, businesses pay nearly nothing for work that needs to be done.

However, the U.S. Department of Labor recently issued a fact sheet that casts that equation into doubt. *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act* provides information to help businesses determine whether interns:

- Are truly gaining an education and are appropriately unpaid
- Or whether they are "employees" who must be paid minimum wage and overtime under the Fair Labor Standards Act (FLSA) for the services they provide.

(You can download a copy of the fact sheet at www.dol.gov/whd/regs/compliance/whdfs71.htm.)

6 internship criteria

The FLSA defines the term "employ" so broadly that interns in the for-profit sector are almost always considered employees under the FLSA. As a result, you must typically pay interns at least the minimum wage and overtime compensation for hours worked in excess of 40 in a week.

However, businesses that structure their internship programs like educational training programs rather than employment, may do so without paying minimum wage and overtime.

The DOL says six criteria must be applied to determine if the educational exemption applies:

1. The internship is similar to training that would be provided in an educational environment, even though it includes actual work at the employer's facilities.

What about nonprofit interns?

According to the DOL, unpaid internships in government agencies and nonprofit organizations are generally permissible if the intern volunteers without expectation of compensation.

2. The internship experience benefits the intern.

3. The intern does not displace regular employees, but works under close supervision of existing staff.

4. The employer providing the training derives no immediate advantage from the intern's activities. Occasionally, 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.

As long as all of the above factors are met, no employment situation is created under the FLSA, and the intern is exempt from the minimum wage and overtime requirements.

Most internships break law

Most often, businesses with internship programs violate the FLSA without even realizing that their practices run afoul of the law.

For example, if an intern is engaged in the operations of the employer or is performing productive work that results in the employer benefiting from the intern's work, then the intern is really an employee.

Other factors that make your intern an employee are:

- Using interns as substitutes for regular employees or augmenting a workforce during specific time periods
- Using interns to perform work that would otherwise have been done by regular employees working extra hours or would have required the

hiring of additional employees

- Supervising interns in the same manner (and with the same supervisors) as the employer's regular workforce
- Using the intern for a "trial period" with the expectation that he or she will be hired on a permanent basis.

Minimize your internship risk

There are, however, methods to minimize the risk, and make your company's unpaid internship structure more defensible, if challenged.

- Structure your internships so they resemble and revolve around an academic experience.
- Make sure the intern's work doesn't take job opportunities away from current or potential employees.
- Build an internship experience that provides the individual with skills that can be applied to multiple jobs. That makes it more likely that the program will be viewed as training rather than employment.
- Provide job shadowing opportunities that allow the intern to learn certain functions under the close and constant supervision of regular employees, but require the intern to perform minimal actual work.
- Schedule the internship to run for a fixed period determined before the internship begins.
- Don't do or say anything that implies the internship is a "trial period" for people who may one day become employees of your organization.

Clearly, education is the key. Under the above guidelines, for-profit employers that wish to offer unpaid internships must be sure their interns are being educated, and that the business is not gaining a benefit from free, productive intern-generated work.

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