Unpaid Internships: Regulations and Rulings

The Test for Unpaid Interns

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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 Fair Labor Standards Act (FLSA), and the Act's minimum wage and overtime provisions do not apply to the intern.

Challenges to the Six-Factor Test

The FLSA criteria above have not been without controversy. For example, the National Association for Colleges and Employers (NACE) has found that both colleges and employers take issue with the sixth factor as limiting the educational opportunities available to students. As explained in NACE's Position Statement on U.S. Internships:

> *Students pursue internships because they want to gain professional experience that links their academic coursework to the disciplines they want to pursue for their careers. To gain this experience, students want to engage in projects and tasks that contribute to the professional work of the organization. This means that the employer **does** benefit from the work of the intern while, at the same time, it provides a meaningful experience that allows for the application of academic knowledge.*

Following this line of thought, in 2013 the Second Circuit Court of Appeals issued a ruling that deemed the six-factor test "too rigid." In *Glatt v. Fox Searchlight Pictures, Inc*., the Court denied the plaintiff's claim that compensation should be required whenever the employer receives an immediate advantage from an intern's work. Instead, they made *the degree to which an intern benefits from the work* the determining factor, proposing seven non-exhaustive criteria to replace the FLSA's six-factor test. In a 2015 ruling (*Schumann v. Collier Anesthesia, P.A)*, the Eleventh Circuit Court of Appeals **(whose jurisdiction includes Alabama)** joined the Second Circuit in adopting this "primary beneficiary test" for determining the legality of unpaid internships. Due to the influential, precedent-setting nature of such rulings, colleges and employers across the country are adjusting their policies to align with the primary beneficiary test.

The Primary Beneficiary Test

These seven criteria are to be weighed and balanced in evaluating each internship. If the employer is the primary beneficiary of the relationship, the intern is entitled to pay. If the intern is the primary beneficiary, an unpaid internship may be permissible.

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without the entitlement to a paid job at the conclusion of the internship.

One final note: The Courts recognized that an intern may sometimes be an employee entitled to compensation and sometimes not. If required to perform duties wholly unrelated to her education, the intern would be entitled to pay for the hours she is engaged in those activities. Thus, it is important for employers to strictly abide by school-approved job descriptions and to continually evaluate for legality all responsibilities given an intern.