

**ESTABLISHING A WINNING
INTERNSHIP PROGRAM
FOR THE COMPANY AND STUDENT:
LEGAL ISSUES**

by

**Janet E. Wise, Esquire
Board Certified in Labor & Employment Law
by The Florida Bar**

Tampa Bay Technology Forum: Grow Tampa Bay Tech
Internship Roundtable Workshop
August 13, 2013

Available Courtesy of:
Law Offices of Cynthia N. Sass, P.A.
601 West Dr. Martin Luther King Jr. Boulevard
Tampa, Florida 33603
(813) 251-5599
www.EmploymentLawTampa.com
©2013

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.

ISSUES TO CONSIDER WHEN PROVIDING INTERNSHIP PROGRAMS

1. Paid or Unpaid: If your company would like to provide an unpaid internship program, comply with U.S. Department of Labor, Wage and Hour Division, Fact Sheet #71 (see preceding 2 pages).
2. Unpaid Interns Have Legal Rights: If interns are properly unpaid, they may have some rights similar to legal rights employees have. For example, when selecting and using interns, be aware of the Americans with Disabilities Act (including when medical examinations are appropriate), Title IX, Education Amendments of 1972 (regarding gender discrimination in education), and 42 U.S.C. §1981 (race and national origin discrimination in making and enforcement of contracts).
3. Defamation of Character: When communicating information about the intern to the educational institution and/or prospective employers of the intern, be aware of the law against defamation in Florida. Section 626.9541(1)(c), Florida Statutes, defines defamation as: “Knowingly making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of, any oral or written statement, or any pamphlet, circular, article, or literature, which is false or maliciously critical of, or derogatory to, any person and which is calculated to injure such person.”
4. Defense to Defamation: An employer may be immune from a defamation claim under Florida Statute. Section 768.095, Florida Statutes, states that: “An employer who discloses information about a former or current employee to a prospective employer of the former or current employee upon request of the prospective employer or of the former or current employee is immune from civil liability for such disclosure.” The employee can overcome this immunity by showing by clear and convincing evidence that:
 - (a) The information disclosed by the employer was knowingly false; or
 - (b) The information disclosed violated any civil right of the employee under the Florida Civil Rights Act.
5. Workers’ Compensation: Workers’ compensation boards have found that interns contribute enough to a company to make them employees. It may be wise to cover interns under your workers’ compensation policy even if you are not technically required to do so.
6. Employment Policies: Take time to advise your interns of appropriate workplace behavior, the organization’s harassment policy and complaint procedures. If an intern is harassed at your organization, it will be important for your organization to be able to establish that:
 - (a) It took reasonable steps to prevent and promptly correct harassment in the workplace; and
 - (b) The intern (or employee) unreasonably failed to take advantage of the employer’s preventive or corrective measures.