

# Legal Issues Surrounding Internships

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What are the legal issues surrounding internships?

**A.** Career services and college relations professionals often raise questions about an intern's 'employment' status, eligibility for workers' compensation, and unemployment benefits, and the liability of a school or employer if a student is injured in the workplace. The answers to their questions depend upon an interpretation of applicable state or federal statutes. To determine if an employer/school/student has obligations or rights under the law requires a look at the facts and circumstances of the particular internship and whether the law extends to that situation.

Following is information that may be helpful to college and employment professionals in administering their internship programs.

## What is an internship?

In academic circles, internships are viewed as a form of experiential education that allows students to apply what they have learned to real work situations and build on their skills. Among employers, internships serve as an opportunity to train students in their operations and to identify prospective hires. Some internship programs are part of a school's curriculum—either students receive credit for the internship and/or the experience is required for graduation. In other situations, faculty may be involved in recommending and providing oversight to students, but no credit is given by the school for participation in the internship. In still other situations, the employer advertises the internship position in the career services office, and the school has no involvement other than the posting. The one common thread in all internships is that the work is related to the student's course of study.

## What is an intern's 'employment' status?

Generally speaking, the various employment laws do not use the term "intern," nor do they provide a detailed definition of the term "employee." For example, workers' compensation laws typically define "employee" as an individual who "performs services for another for valuable consideration." Similarly, Title VII of the Civil Rights Act, the federal employment discrimination law, defines an employee as "an individual who is employed by an employer."

In cases involving the issue of a worker's status, the courts consider several factors to determine if the worker is, in fact, an employee or an independent contractor. These factors include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the equipment and tools needed to accomplish the work; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the worker's discretion over when and how long to work; the method of payment; the worker's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the worker provides services to any other organization; the provision of employee benefits; and the tax treatment of the worker by the hiring party.

Although no single factor is definitive, the courts place the greatest emphasis on the first factor—that is, on the extent to which the hiring party controls the manner and means by which workers complete their assigned tasks. Based on a review of these factors, it is unlikely that any court would consider an intern an independent contractor.

If interns are considered employees under the law, the employer must not only pay payroll taxes on the interns' salaries, but also afford the interns the same legal protections as other employees, such as nondiscriminatory treatment, right to sue for harassment, and eligibility for workers' compensation.

## Must an employer pay wages to an intern?

The answer to this question depends upon whether the intern is considered a “learner/trainee” under the federal Fair Labor Standards Act (FLSA) or the state equivalent. The U.S. Department of Labor (DOL) has developed six criteria for differentiating between an employee entitled to minimum wage and a learner/trainee who, while an employee, may be unpaid. The criteria are:

1. The training, although it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the students.
3. The students do not displace regular employees, but work under the close observation of a regular employee or supervisor.
4. The employer provides the training and derives no immediate advantage from the activities of students, and, on occasion, the operations may actually be impeded by the training.
5. The students are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the student understand that the student is not entitled to wages for the time spent in training.

Of those criteria, three are very straightforward. Interns cannot displace regular employees. They are not guaranteed a job at the end of the internship. And they are aware that they are not entitled to wages during the internship. In many cases, employers pay a stipend to students for meals and lodging or provide tuition assistance. Stipends and tuition assistance are not considered payment of wages for the purpose of determining whether a student is an employee. Likewise, the fact that an employer may ultimately hire the student does not make the intern an employee as long as the employer did not promise the student a job prior to or during the internship.

A bit trickier are the criteria regarding training. For one, interns must receive training from the company even if it impedes operations, for example, by taking time away from work to provide the training. Two, the training must be similar to that provided by a vocational school. That is, the intern must get hands-on experience with equipment and processes used in the company. And three, the training must primarily benefit the student, not the company. Since the intern would be learning work skills and procedures that are relevant to his or her field, wouldn't that be benefiting the employer? Several court rulings, while not addressing the criteria head on, seem to suggest that as long as the internship is a prescribed part of the curriculum, is part of the school's educational process, and is predominately for the benefit of the student, the fact that the employer receives some benefit from the student's services does not make the student an employee for purposes of wage and hour law.

Not all six factors have to be present for a student to be considered a trainee; rather the experience should ultimately look more like a training and learning experience than a job. In the case, *Archie v. Grand Central Partnership*,<sup>1</sup> which involved participants in a welfare-to-work program, a federal district court held that the participants were to be considered employees for purposes of payment of wages. The participants enjoyed certain advantages, such as the opportunity to acquire basic job skills and create an employment history. However, the organization did not structure a training program, but one that required participants to perform work that had direct economic benefit to the employer. Among other things, the training was not similar to what would be provided in a vocational school, and the participants displaced regular employees, worked without meaningful supervision, and expected to be paid.

If the intern does not meet the criteria of a “trainer/learner,” can the intern be considered an unpaid volunteer for the employer? The DOL regulations define “volunteer” as an individual who provides services to a public agency for civic, charitable, or humanitarian reasons without promise or expectation of compensation for services rendered. Thus, an intern at any for-profit company would not fit the definition of volunteer.

If circumstances are such that the intern must be paid, the next question is whether the intern is entitled to overtime pay if he or she works more than 40 hours a week. The overtime pay requirements of the FLSA apply only to those workers classified as “nonexempt,” or hourly, employees. Those considered “exempt,” or salaried, are not entitled to overtime pay if they work more than 40 hours. To be exempt, employees must be paid on a salary basis and fall within certain specific occupational classifications. If either of those criteria is not met, an employee is considered nonexempt.

The “salary basis” test means that an employee receives a predetermined salary regardless of the number of hours worked per week. The salary cannot be reduced because of quality or quantity of work performed. According to DOL regulations, if a salaried employee is subject to an hourly reduction in pay because of an attendance or discipline problem (except for discipline for severe safety violations), the employee would no longer be considered exempt.

The occupational classifications that are considered exempt from overtime requirements are “white-collar” classifications: executive, administrative, professional, computer-related, and outside sales. (Since an intern is rarely assigned to jobs in the executive and outside sales classifications, this column does not address them.)

The DOL has repeatedly stated that neither job title nor payment of a salary controls the outcome of a wage-hour dispute. The controlling factors are the actual job duties of the individual. The specific job duties for each classification are as follows:

- **Administrative:** The employee exercises discretion and independent judgment in performing non-clerical office work directly related to management policies or business operations; administrative work in the academic field; or work relating to academic instruction.
- **Professional:** The employee exercises discretion and independent judgment in a position requiring knowledge of an advanced type in a field of science or learning; works in a position requiring invention, imagination, or talent in a recognized field of artistic endeavor; or is a certified or recognized teacher. Possessing a college degree is not enough to classify an individual as an exempt professional. Rather, the individual must be involved in work requiring some degree of autonomy and self-direction.
- **Computer-related:** The employee is a computer systems analyst, programmer, or software engineer who primarily performs computer programming or systems-related tasks and is paid more than 6.5 times the minimum wage. Primary job duties include applying systems-analysis techniques to determine hardware and software specifications, designing computer systems based on user specifications, creating or modifying computer programs based on system-design specifications, creating or modifying computer programs related to machine-operating systems, or a combination of the above.

The key characteristic of exempt classifications is the exercise of independent judgment and discretion. This means the individual makes original decisions and is not closely supervised. The DOL does not accept as exempt employees who merely apply knowledge based on a particular procedure or policy, regardless of academic degree, level of education, or job title. A journalism intern, for example, may possess a journalism degree and be very knowledgeable about writing, editing, and even publishing, but may not qualify as exempt if the work performed is essentially editing articles for a periodical following the organization’s editorial guidelines. On the other hand, if the journalism intern decides which articles to include in the periodical, sets the editorial policy, and determines the amount of money to be spent on printing the periodical, he or she would be considered exempt. In most internship programs, students perform work that would be considered “nonexempt” and, thus, they would be entitled to overtime wages.

### Is an intern entitled to workers’ compensation if injured on the job?

Workers’ compensation laws have been enacted in all states to provide specific amounts of recovery (lost wages and medical benefits) by employees for injuries arising out of, or in the course of, employment. This is a “no-fault law,” meaning that there does not need to be proof of fault by the employer only proof that an injury has occurred either at the workplace or while pursuing the employer’s business purposes. The underlying principle of workers’ compensation is common to all states, but the amounts and methods of payment, types of injury covered, and options open to employees vary considerably under the laws of the states. If the intern receives workers’ compensation benefits, he or she is barred from suing the employer for negligence with unlimited damages. It, then, behooves the employer to provide such coverage for interns.

Some of the state workers' compensation statutes specifically exclude interns from coverage, while others do not specify whether an intern is entitled to coverage. In those states, the courts and workers' compensation boards often find that an intern's contribution to an organization is sufficient to establish employee status with the participating employer organization for workers' compensation purposes, regardless of whether the worker is unpaid or paid wages or a stipend. In *Olsson v. Nyack Hospital*,<sup>2</sup> the court found that an unpaid intern was an "employee" for purposes of workers' compensation because the training and experience that she gained as an intern was equivalent in value to wages. In another case, *Kinder v. Industrial Claim Appeals Office*,<sup>3</sup> the court awarded lost wages to an unpaid intern under the workers' compensation statute.

### **Can a school be liable if an intern is injured in the workplace?**

If workers' compensation does not apply, an injured student could sue the employer and possibly the school under a negligence theory. In a personal injury case, the student must prove that his or her injury is due to the negligence of the employer or the school. The court will determine if there is a duty of care to protect the student, and if that duty was breached by an unsafe work environment, the injury was a result of the breach, or the student was actually to blame. Accordingly, the court will consider such factors as who controls the work site, who has supervisory responsibility over the student, whether supervision of the student was adequate, the safety rules and regulations of the workplace, and what promises or guarantees were made to the student regarding safety.

Because an employer has more control than an intern over the workplace, there is a good chance of being found liable for an intern's injuries. But what about the school? In *Nova Southeastern University, Inc. v. Gross*,<sup>4</sup> the court found that the school was liable under certain circumstances for an intern's injuries. In this case, the plaintiff, upon leaving the internship site, had been raped in the employer's parking lot. The specific circumstances that created the duty of care on the part of the university were the mandatory practicum, the school's assignment of students to particular locations, the school's direct knowledge of a dangerous practicum location, and the school's failure to warn the student about the danger.

It would stand to reason that in those instances where the school simply posts notices of internship opportunities, it has no role in the creation of the student-employer relationship and no control over the workplace. Therefore, the school would not be responsible if a student was injured on the job. In situations in which an internship falls somewhere between mandatory and elective, the school's liability depends upon the level of involvement and control it has over the internship site, selection of the intern, supervision of the intern, knowledge of the unsafe condition, and the harm that was caused to the intern.

### **Is it advisable to have the employer, student, or school sign "hold-harmless" or indemnity agreements or releases of liability?**

Because of the concern over liability, some employers and colleges are asking their counterpart organizations and/or the student to sign a hold-harmless or indemnity agreement. In some cases, employers are asking students to sign a release of liability as a condition to accepting the internship. While no study supports or refutes the growing concern that hiring interns is risky, the increased demand for indemnity agreements and waivers of liability indicates that employers perceive a real liability in hiring interns.

In an indemnity agreement, one party essentially says, "Although I may not be responsible for the injury, I will pay for any expenses, damage, or claims that are made." There are a number of things to consider when signing—or asking another organization/student to sign—an agreement.

- The agreement is only as good as the organization/person that makes it. If the organization has the financial resources to pay a claimant, then the agreement can provide some protection. However, if the institution has limited financial resources, then there is no protection. This is one reason students are rarely asked to sign indemnity agreements: A student typically does not have the resources to indemnify another's losses.
- The agreement should be executed by someone who has the authority to bind the employer or the college. Having the signature of a faculty member may not be enough to bind a school to the

agreement. By the same token, an internship site supervisor may not have the authority to sign an agreement on behalf of an employer.

- An institution must have the legal authority to agree to pay for another institution's losses. In certain states, the law may bar a public entity, e.g., a state university or a governmental employer, from entering into such an agreement. Thus, even if a high-level officer signed such an agreement, state law would nullify it. In most states, individuals over the age of 18 have the capacity to enter into contracts, so most interns would have the legal authority to enter into a contract.
- What was the respective bargaining power between the two parties entering into such an agreement? If the bargaining power is relatively equal, chances are that the agreement will be an enforceable agreement. If there is unequal bargaining power and one party is, in essence, told "take it or leave it," then the agreement might not be worth the paper it is printed on. It is highly doubtful that a court would enforce an indemnity agreement against an intern.

Any agreement should be carefully reviewed with your organization's attorney and risk manager. Many times, a hold-harmless or indemnity agreement can be written or modified to describe the specific relationship between the employer, school, and student and to carefully delineate the various rights and obligations of all parties.

Releases of liability are nothing more than agreements not to sue even if there is an injury. Once again, an employer that requires a student to sign such a release as a condition of accepting the internship should realize that it is probably unenforceable. For a waiver of legal rights to be enforceable, an individual must receive some form of "legal consideration" for doing so. In the case of an unpaid internship, it is unlikely that the court would find that the internship itself is sufficient legal consideration for a person to give up his/her right to sue for an injury or some other legal wrong occurring in the workplace. Even if the intern is paid, it is unlikely that the court will uphold the release as it would probably consider such a release a violation of public policy. A better risk-management approach for the employer is advising the intern of the inherent risks in working in that workplace, training him or her in safety procedures, and providing adequate supervision.

## Endnotes

1 DC SNY No. 95 Civ 0694 (1998)

2 598 NYS 2nd 348 (1993)

3 976 P.2d 295 (1998)

4 [www.law.fsu.edu/library/flsupct/sc94079/OP-SC94079.pdf](http://www.law.fsu.edu/library/flsupct/sc94079/OP-SC94079.pdf) (2000)