



## Labor & Employment Alert June 2010

### The Price of Experience: Is It Okay to Use Unpaid Interns?

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Many employers regularly maintain summer internship programs for students. This gives the students much needed experience and filler for their resumes, and serves the additional purpose of giving the cash-squeezed employer some cheap labor. But, concerned that the practice may be becoming abusive to the interns, the United States Department of Labor has issued recent guidance on the legality of the practice.

The DOL's Fact Sheet #71, recently issued, opines on the practice of using unpaid interns in the private, for profit<sup>1</sup> sector. The DOL indicates that unpaid interns, unless they meet the DOL test, are incorrectly classified and *are actually entitled to minimum wage and overtime*.

According to the DOL, interns who are actually receiving "educational benefit" from the internship may not have to be paid. Factors in determining whether the intern is receiving an educational benefit include:

- Does the internship provide training similar to that provided in an educational environment?
  - Specifically, is the training under the supervision of a college? Is the training general in nature, and applicable potentially to many employers? Is the business dependent on the work of the intern?
- Is the experience for the intern's benefit?

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<sup>1</sup> Although the DOL recognizes that, generally, unpaid internships are permissible in the public or non-profit sectors, they indicate that they are reviewing the need for "further guidance" in the area.



- Does the intern displace existing employees or work under the close supervision of existing staff? (If displacement exists, could be employment)
  - If not for the interns, would the employer have hired more employees, or would it have not laid off existing employees? Is the intern more closely supervised than “regular” employees?
- Does the employer benefit from the intern, or does the intern’s presence actually impede the employer’s operations? (If a benefit, could be employment)
- Is the intern entitled to a job at the end of the internship? (If yes, could be employment)
- Do the intern and the employer have an understanding before the internship that no money will be paid as compensation?

Depending on the answer to these questions and any other important circumstances, the DOL could determine that a company’s “interns” are actually employees. This determination could mean not only that minimum wage and overtime requirements apply but could trigger, in certain circumstances, attorney fees, and double or triple compensatory damages. Remember that state law on the issue of interns could be even more stringent than federal law. Further, while this Fact Sheet may reference the DOL’s enforcement position in the area, case law, statutes and regulations may command a different result. Thus, any unpaid internship program should be fully vetted by your human resources professionals and legal counsel before implementation.

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*If you have any questions or concerns about the use of unpaid interns, please contact Katherine A. Hesse or the attorney assigned to your account at (617) 479-5000.*

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