

Internships: What Qualifies, What Doesn't and How Do You Protect Yourself?

With Peter S. Leyton

With corporate budgets shrinking and unpaid internships on the rise, there is also increased attention being paid to such internships and penalties being assessed for ones that fail to meet the required criteria. As a result, there has been recent public discussion and several articles written about whether employers are actually meeting the criteria. In April, the U.S. Department of Labor issued a statement (Fact Sheet #71) outlining again—as it did in a 2004 opinion letter from the Department of Labor's Wage and Hour Division—its six criteria for determining internships under the *Fair Labor Standards Act*. Those six points are:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that 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, according to the USDL statement.

One of the complaints from many students is that instead of actually receiving on-the-job training related to their education, they were doing general labor—things like filing, answering phones, etc. The fact sheet is very clear about things like this and says, "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.... The more the internship provides the individual with skills that can be used in multiple employment settings, as

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opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training.... 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."

So with the potential for increased scrutiny being given to unpaid internships, how are career colleges affected, if at all? And what can they do to protect themselves?

"The six factors outlined by the WHD in Fact Sheet #71 constitute the entire test for determining whether an intern

is an employee under the *FLSA*. No other criteria exists or can be used for proving an intern is not an employee," says Peter Leyton, a partner with Ritzert & Leyton, P.C. "However, while the factors must be considered, courts have been split on whether all factors must be met in order to consider an intern as a non-employee or whether the factors are to be used in making a totality of the circumstances' analysis. However, the WHD has consistently taken the position in all cases challenging intern employment status that all factors of the test must be met. Therefore, schools should be seeking to comply with all the factors if the employer is a for-profit entity."

When putting together internships or externships, Leyton recommends schools clearly lay out what it is that the student—in whatever program it is—is going to be doing for this employer.

"Clearly, internships are intended from the school's point of view as something to benefit the intern, not the employer. Schools also want to make sure they're not displacing any regular employees and that the work that is being done is done so under the supervision of existing employees;



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it needs to be clear that the intern doesn't have the expectation of any job at the conclusion of the internship," he says.

What might be a way to deal with the issue that affects the for-profit employer is in the context of the agreement signed between the institution and the employer offering the internship: actually make the six elements part of the agreement, Leyton suggests. And there usually is a written agreement between the school and that employer because a school needs to be able to show accrediting agencies some proof of whom the arrangements are with, and that you're meeting their criteria for internships or externships.

"But that would really serve to protect the employer, more than the school. The schools really aren't the ones at risk here, unless the employer says they don't want to take on any more interns because they'd have to pay them money. So this is really something schools need to focus on from the standpoint of protecting their base of possible employers for intern- or externships. And by protecting the employer you're protecting the students' access," Leyton says.

Because certain criteria has to be met, it's important that schools have systems in place to ensure there is some oversight from the school of the externship or internship program itself, making sure, for example, that in fact, there are people at the employer who are supervising your student.

"Internships or externships are supposed to provide that person with some educational benefit, so if all they're doing is filing or being an extra hand, that's not going to meet the requirements and that really would tend to trigger the requirement to pay them, at least minimum wage," Leyton says. "That I think really is one of the most important elements of the school's

obligation in following through on these programs: having documentation of each student's intern- or externship and the efforts made to maintain oversight and ensure that the students are getting what the school expects them to get, based on the curriculum. Those are really important elements in terms of meeting accrediting agency standards and being able to demonstrate to that accrediting agency the validity of the intern- or externship as part of the program.

Finally, some of the intern- or externships, especially in the allied health area, might be with not-for-profits. The *FLSA* does make a special exception under certain circumstances for individuals who volunteer to per-

form services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. There are also some excep-

tions allowed for those who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. The fact sheet says, "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."

If you are in doubt about any aspect of an intern- or externship, you should check with your school's legal department or its outside legal counsel.

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