

## ► The Use of Interns In the Workplace — Not Just Free Labor

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### **Interns, Externs & Trainees: To Pay or Not to Pay?**

Hardly a week goes by these days without an email from a friend or a “friend of a friend” attaching a resume and asking me to take on an intern for the summer or semester break. Alternatively, knowing I am an employment lawyer with a direct line to many human resources departments, the emails always implore me to pass along the resume to one of my clients. Without fail most of the resumes are usually outstanding and the students or displaced workplace vets all offer to “work for free” in exchange for the opportunity to “learn” and “demonstrate their stuff.” To employers hardly out of the woods from such a severe recession, these can be magic words: free labor means lower labor costs. However, there’s always a string attached. . .

### **What’s At Risk?**

Unfortunately, it takes more than an individual volunteering to work for free and a designation of this relationship as an “internship” to pass legal scrutiny under federal and state wage and hour laws. Unless the appropriate legal steps are taken prospectively, employers face significant penalties and risk beyond simply back pay. Unpaid internships could lead to legal liability with respect to employee benefits, workers’ compensation, unemployment insurance, anti-discrimination laws and federal and states taxes.

State enforcement has also increased dramatically over the past year with New Jersey and New York’s state budgets particularly hard hit by the recession. Employers have also seen a significant rise in audits for unemployment insurance and state tax contributions. The designation of “interns” are often tested during these audits.

### **What is Required for an Intern to be Non-Paid?**

A common misconception by many is that the federal [Fair Labor Standards Act](#) (“FLSA” or the “Act”) exempts “interns” from coverage under the Act. The FLSA, however, is silent on “interns.” Over the years case law has developed which has addressed the issue of “trainees,” interns, externs and similar employees. Before the protections of the FLSA apply, a determination that an intern is an “employee” must first be established. In the United States Supreme Court decision in *Walling v. Portland Terminal Co.*, [330 U.S. 148](#) (1947), the Court held that the FLSA definition of “employ” does not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another. In reaching its decision the Court utilized an “economic reality” test and took into account the circumstances of their training.

As a result of *Walling*, a six-criteria test has developed to determine whether interns/trainees are employees who therefore, need to be paid. While the U.S. Department of Labor has consistently stated that all six criteria have to be met, a majority of courts addressing this issue look to the Walling Court for direction. These courts typically apply the economic reality test and primarily focus on the individual's expectation of compensation and whether the employer received an immediate advantage from the work performed.

The six criteria are as follows:

1. The training, even though 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 trainees;
3. The trainees do not displace regular employees, but work under their close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and, on occasion, the employer's operations might actually be impeded;
5. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time training.

Distinct from the *Walling* analysis there are a number of state (New Jersey included) and federal laws that also cover student interns who get school credit for specific job training that is typically coordinated with school-based learning. To ensure compliance with your jurisdiction we recommend that your business consult with legal counsel.

### **How Should Companies Proceed With Non-Paid Interns?**

1. Assess current programs in terms of each of the above six factors. Review all written policies and procedures related to interns, including but not limited to individual "offer letters."
2. If a company is using non-paid trainees during pre-employment training, review the program in terms of each of the six criteria. Pay particular attention to ensuring that trainees were not guaranteed employment, and that the employer did not derive a benefit during the training (e.g. the trainee was spending significant amounts of time taking live customer orders while training to be a customer service representative).
3. Interns should sign a release agreement including the following provisions: a general release of the company from liability; confirm that the six factors are met; and, confirm the intern's understanding that there is no guarantee of future employment or of pay.
4. Companies should review their specific state law requirements with respect to workers' compensation coverage for interns. To the extent permitted by law, the release agreement should include a provision confirming that the intern will be covered by workers' compensation insurance.
5. If student interns are being engaged, child labor laws should be reviewed for applicability of age requirements.

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