

Summertime Blues: Student Interns and Volunteers

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Summer is the time of year when businesses often use student interns. Many businesses erroneously assume that student interns are not employees, particularly if they “volunteer” or if they are earning college credit for work performed. While it is true that college students under certain circumstances may be classified correctly as non-employees, not all qualify.

This advisory highlights key issues and best practices related to using student interns and the limits on using volunteers. Child labor or other student-learner subjects are beyond the scope of this brief summary.

Be familiar with the six-factor test

The U.S. Department of Labor (USDOL) applies the following six-factor test regarding student interns. All six factors must be met, otherwise an employment relationship exists and the student intern is considered an employee who must be paid under the Fair Labor Standards Act (FLSA).

1. The training, even though it includes actual operations 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 close observation;
4. The employer providing the training derives no immediate advantage from the activities of the trainees, and on occasion the employer’s operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; *and*
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

This “trainee” test also applies to school-to-work learning programs under the School-to-Work Opportunities Act of 1994. Please see USDOL guidance on [trainees](#) and on [school-to-work](#) programs.

Volunteers – private sector vs. public sector

Individuals may volunteer their services for charitable, religious, or other nonprofit community or public services organizations without creating an employment

relationship, so long as certain conditions are satisfied. Thus, private sector for-profit employers generally may not use unpaid volunteers to perform work for them. In contrast, public employers may use volunteers, including individuals who are already employed by the public entity, so long as such individuals are not volunteering to perform work that they are already performing as part of their regular job for the public employer, and other conditions are satisfied. Please see USDOL [guidance on volunteers](#).

But the student “volunteered” to get experience so I am not liable, right?

Wrong. College students looking to get a leg up in the marketplace may try to “volunteer” to work. But, even if the student is getting course credit for work, that alone does not allow the employer to ignore the requirements of the FLSA. Unless the relationship meets the entire six-factor test, the student must be classified as an employee, and the employer must comply with the FLSA and any applicable state wage and hour laws regardless of the student’s motivation.

Pay requirements

If a student should be classified as an employee, the student must be compensated no differently than any other employee. Unless other statutory exceptions and exemptions apply, the student would usually be eligible to be paid at least the minimum wage and overtime. Federal law allows for payment of a sub-minimum wage for certified student-learners. See 29 C.F.R. §§ 519.1, et seq.; 29 C.F.R. §§ 520.500, et seq. However, unless your state law includes a comparable provision, you may not be able to use this federal sub-minimum wage.

Practical tips

An internship must have a significant educational or vocational component.

The employer must prove that the nature of the intern’s activities is directly related to the educational and vocational objectives of the training and that the activities do not unreasonably displace the tasks performed by employees.

An intern should earn college credit or have a learning experience by being able to observe the practical application of classroom instruction in the workplace. The experience must do more than merely enhance the student’s marketability by giving him or her a line on the resume.

The program must benefit the students more than the employer.

The burden of administering the program and supervising the student interns should outweigh any incidental benefit provided to the employer.

The interns or trainees may not displace regular employees or do their work.

The student intern should be shadowing regular employees, not stepping into the place

of a worker, directly performing the main work of the business, or actually working along side regular employees while receiving little or no training.

The interns must be closely supervised.

Supervisors of interns must commit significant amounts of time to mentoring, teaching, and critiquing the activities of the interns.

Where can I get more information?

Check out the USDOL's [Fact Sheet #71](#).

In 2006, the USDOL published [a useful opinion letter](#) addressing the six-factor test in the context of university externs.

Still thinking of utilizing an intern?

- Begin with the assumption that any person performing any job or task for you should be classified as an employee.
- Never assume that anyone may lawfully “volunteer” or perform any work for you without being covered by wage and hour laws, particularly if you are a for-profit business.
- Do not assume that every college student earning credit can be classified as an intern or trainee.
- Confer with employment counsel before classifying a student as an unpaid “intern” or “volunteer.”
- Be clear with interns, both in written and verbal communications, that the internship will not be paid and will not necessarily lead to employment.
- Forms don't control, but they are helpful in a close case. Have counsel assist with drafting an internship agreement in which the student-intern acknowledges that the six factors are present, particularly the absence of a wage.
- When in doubt, classify a worker as an employee entitled to minimum wage and overtime.

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