

To Pay or Not to Pay, That Is a Complicated Question

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With the end of school comes the onslaught of resumes from students seeking a position-paid or unpaid-for the summer months. Unpaid “internships” may seem like a great idea as a resume booster for the students and extra help for businesses, but are they legal? The answer is, it depends.

It is important to remember, there are different rules under the wage and hour law for non-profit and for-profit entities; and businesses and organizations must comply with both state and federal law. Further complicating matters, there are exceptions for certain categories of individuals (such as students). This article will not attempt to cover every possible scenario. Instead, the goal is to provide an overview for businesses considering such an arrangement.

For Profit Businesses

Unpaid internships at for-profit businesses are rarely legal. Under federal law, in order to have an unpaid internship, the situation must meet six criteria:

1. The internship provides training similar to what would be given in an educational environment;
2. The internship 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 derives no immediate advantage from the activities of the intern and may occasionally 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 at the internship.

In addition to these six criteria, New York State has five more of its own. These are:

7. Any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity.
8. The trainees do not receive employee benefits.
9. The training is general and qualifies the intern to work not only for the specific employer, but in the field in general.
10. The screening process for interns must be different than the process for employees.
11. Advertisements, postings, or solicitations for the program discuss education or training, rather than employment.

To meet these criteria, businesses should have in place a written agreement with the intern that specifies the duration of time for the intern; the activities of the intern; and that the internship is unpaid. An employer may reimburse the expenses of the intern, but should not provide compensation or benefits. The written agreement must be given to the intern before the internship starts. Generally, for such internships, it is helpful (but not required) for an institution of learning to be involved. The school can set the educational criteria for the internships and awards credit to the student.

Non-Profit Organizations

There is no blanket exception for non-profit organizations under the state or federal wage and hour laws. Both federal and state laws do permit individuals to volunteer for non-profit organizations without receiving compensation. If an internship meets the criteria above, an unpaid internship is permissible. Alternatively, if the individual is volunteering, without expectation of compensation, the person is not an employee and is not subject to federal or state wage and hour law. Generally, someone is a volunteer if the person:

1. Does not replace paid staff to do the work of paid staff.
2. Does not do anything but tasks generally reserved for volunteers.
3. Is not required to work certain hours.
4. Is not required to perform duties involuntarily.
5. Is not under any contract to be hired.
6. Is not paid for services except reimbursement for expenses.
7. Generally performs the work on a part-time or short-term basis.

Employees of non-profit organizations may volunteer for their employer so long as the work done is different from their normal job duties. Non-profit organizations are wise to consider a "Volunteer Agreement" that not only covers the fact that the volunteer's activities are unpaid, but also includes a release of liability for injury occurring while volunteering.

As noted, there are also exceptions specific to students who are enrolled in school and have not yet completed their education. Depending on the circumstances, students may be permitted to be paid at a reduced rate (or no rate) for work done for a non-profit organization.