

Don't Get Burned by Summer Interns

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For many of us, summers past were spent working as unpaid interns. When set up properly, these arrangements epitomized the notion of a win-win relationship. The intern beefed up her resume by gaining experience no one would pay her to obtain. The employer built good will by providing a worker with an opportunity to develop skills and talent. The intern had two months to impress the higher-ups and use the contacts he developed to move his career forward. The employer got some work done for free. The paradigm I've just described, however, is a relic to the past, at least in the for profit world. Granted, this it may seem nonsensical, particularly in this rough economy where thousands of unemployed workers would relish the opportunity to obtain on the job experience and avoid resume gaps. Nonetheless, both state and federal law prohibit unpaid internships except in the following limited circumstances:

- where the intern is working to fulfill an educational or training program requirement;
- for a charity, or;
- for a public-sector employer.

Let's take a look at these narrow exceptions to the rule that one who performs work for an employer is an employee who must be paid.

Educational or Training

There are narrow circumstances under which individuals who participate in "for-profit" private sector internships or training programs may do so without pay. The key is that the internship experience must provide an educational or training experience that benefits the intern

more than the for-profit employer, and must not displace an employee who could be doing such work for pay. More specifically, employers should consider the following six factors to determine whether they can legally hire an unpaid intern:

1. Is the training primarily for the benefit of the intern, not the employer? [intern]
2. Does the intern perform work that is not performed by paid employees? Is she regularly supervised by at least one staff member? [intern]
3. Do both employer and intern understand that the internship is unpaid? [intern]
4. Does the employer immediately benefit from the intern's work? [employee]
5. Is the intern guaranteed a job at the end of the internship? [employee] and;
6. Does the internship take place in an educational environment? [intern].

Here's an application: suppose Acme has employees that perform routine data-entry. Acme could not offer an unpaid data-entry internship because, according to the Department of Labor,

- the intern would be performing the routine work of the business on a regular and recurring basis;
- the business would be dependent upon the intern to perform data entry, i.e. the employer would have to hire more paid workers but for the intern;

Here's another hypothetical. Suppose an established electrician offers an electrician-in-training the opportunity to shadow him so the student can fulfill a certain number of "on the job" training hours. This is a legitimate unpaid internship with a for-profit employer because:

- The student could not replace a paid worker because the student could not perform much of the work without supervision.
- The student is receiving educational credit (in the form of a job training requirement) towards his degree.

Volunteers of Non-Profit, Charitable or Religious Entities

Interns working for a non-profit, charitable or religious organization need not be paid if the internship

further the purpose of the organization. For example, an intern at a religious organization may do missionary work on an unpaid basis, but she cannot assist the priest in cleaning and organizing his office. Why? Presumably, missionary work furthers the purpose of the church. Having a neat and organized office does not fulfill any church mission (unless there's a religious organization out there to help the hopelessly unorganized!) The Department of Labor provides useful examples demonstrating this exception to the FLSA:

- members of civic organizations may help out in a sheltered workshop;
- men's or women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly;
- parents may assist in a school library or cafeteria as a public duty to maintain effective services for their children or they may volunteer to drive a school bus to carry a football team or school band on a trip;
- an individual may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross;
- an individual may volunteer to work with disabled children or disadvantaged youth;
- an individual may volunteer in youth programs as camp counselors, scoutmasters, den mothers, and;
- an individual may provide child care assistance for needy working mothers.

Public Sector Volunteers

Perhaps unsurprisingly, the state and federal government have exempted themselves from the unpaid internship requirements that apply to private employers. That is, any governmental body may hire an intern to work on a volunteer basis without

compensation, even if the 6 criteria applied in the Educational Exemption are not met. The only requirements are that the volunteer (1) understand that s/he will not be paid; (2) the volunteer's employer cannot force the volunteer to perform the work; and (3) the volunteer cannot already be employed by the public agency to render the same type of services. In plain English, this means that there has to be a "meeting of the minds" between the intern and the employer that the intern is working for free. Furthermore, an employer cannot force an employee to give up his or free time to volunteer for a state agency. Finally, if an employee works for a state or local agency, he or she cannot also volunteer for that same agency, in the same capacity. For example, a police officer could not volunteer for the department for which he works, but he could volunteer at an unaffiliated police department.

With regards to internships and the duty to pay, it is important to remember that minimum wage in Massachusetts is \$8.00 an hour, and non-exempt workers are entitled to overtime during any week they work more than 40 hours. Further, an employee's right to minimum wage and overtime is not waivable. An employer cannot contract around the wage and law provisions even if the intern would be willing to do so. Thus, if an employer violates an employee's right to compensation, no matter the lack of understanding or good intentions, by law, the employee is entitled to triple damages (what the employer should have paid the employee multiplied by 3, plus attorney's fees and costs).