

## **Community Arts Agency Policy for Hiring Interns**

### **Summary of Rules on whether an internship requires compensation:**

Interns whose work benefits your organization must be paid at least the minimum wage for the time they put in. That is spelled out in the Fair Labor Standards Act, which is enforced by the United States Department of Labor.

In order to be unpaid, an intern must receive training from your organization that benefits the student intern and is similar to the training he or she would find in a vocational school. However, that training cannot advance your organization's interests. For instance, you might help an intern develop the skills to sort and route a nonprofit bulk mailing for your arts agency, but if the individual is performing the tasks that a regular employee would normally perform, the intern must be paid. While an unpaid intern could work with another employee to learn a process, the intern may not actually perform the employee's job.

The standard to be unpaid is really quite high. In addition to not benefiting from an unpaid intern's work, the organization might actually have normal business operations hampered by the intern's presence.

In the case that you might actually have an unpaid intern whose work does not benefit the organization at all, the intern must understand that he or she is not entitled to wages. He or she must also not be guaranteed a job at the end of the internship. If the employee was entitled to a job, the training he or she received would be considered a benefit to the organization, and the internship could not be unpaid.

While it is possible for an organization to have an unpaid intern, it's not likely, but that doesn't mean interns can't be beneficial. Savvy businesses can still use interns as extra help at a low cost, and internships give an organization a chance to get to know an individual for a particular period of time. While the hourly cost of interns can be small, remember that their contributions to your organization don't have to be. Instead of assigning menial tasks to interns and keeping them separate from your "real" employees, give the intern actual work, complete with challenges and opportunities for problem solving.

### **Ten Rules for Hiring Unpaid Interns:**

Here are his tips on how businesses can avoid legal problems when engaging a student for such internship positions:

- Training received by the intern must be for his or her benefit.
- Training must be general, not for the immediate advantage of the business, and it may even slow normal operations.
- Interns can't be used to replace paid employees.
- Interns must be closely supervised or mentored.
- Interns can do real work as long as they are closely supervised, are learning and aren't necessarily creating a final product.
- Both the intern and the business must agree that the internship will be unpaid.
- Both parties must agree that no job is promised at the end of the internship.

- High schools, technical schools and colleges can partner with businesses to set up compliant unpaid internships in which the student receives course **credit**. This lends credibility to the internship's benefit for the student.
- Decide beforehand if the business has the time and personnel to closely supervise and mentor an unpaid intern.
- When in doubt, businesses can avoid legal problems by paying interns at least minimum wage.

According to the DOL, a person may be considered an intern or student "trainee" and not an employee entitled to minimum wage and overtime under the FLSA if all of the following six criteria are met:

1. The training the person receives is similar to that given in a vocational school.
2. The training is for the benefit of the trainee or student.
3. The intern doesn't displace regular employees, but works under their close supervision.
4. The employer that provides the training does not derive any immediate advantage from the activities of the trainee or student, and on occasion its operations may be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainee or student intern understand that the trainee or student is not entitled to wages for the time spent in training.

So, if the students are receiving training that benefits them, rather than the employer, and the training furthers their educational goals, the DOL typically will not consider them to be employees, therefore the interns do not need to be paid. Similarly, if the students receive academic credit for their work, they likely will not be considered employees. In addition, these students may be paid a stipend and still not be considered employees as long as the stipend does not exceed a reasonable estimate of the students' expenses.

On the other hand, if you're hiring an intern to do work normally performed by other employees and receive little supervision or training, and the employer gains an immediate benefit from the students' work, they probably should be treated as employees under the FLSA.

Even if the students should be considered employees, you may be able to obtain a special **certificate** to hire them at wages that are lower than the minimum wage. Under the FLSA, "full-time students" employed in retail and service establishments and in agriculture may be hired for a wage that is at least 85% of the current minimum wage. In addition, students over the age of 16 who are enrolled in an accredited school, college, or university and who are employed in an approved vocational training program may work in an occupation requiring a substantial learning period at a wage that is at least 75% of the minimum wage.

Because these intern pay requirements are complex, you should err on the side of treating these interns as employees and paying interns accordingly. If you want to treat them as nonemployees or pay interns using the subminimum wage exceptions, you should consult with legal counsel to ensure you comply with all of the requirements around hiring interns.

## **Rules are applicable to nonprofits:**

**The question:** Whether federal Fair Labor Standards Act principles are different for unpaid internships at non-profit organizations or for those sponsored by educational institutions for which the intern receives academic credit.

**The short answer is:** No, they are not.

Deputy Wage and Hour Administrator Nancy Leppink’s ominous quote referred to “for-profit” entities, and this is the sector upon which Fact Sheet # 71 focuses. Furthermore, a Fact Sheet footnote says that unpaid internships are “generally permissible” for a non-profit charitable organization in the right circumstances. Non-profit organizations permitting internships, and entities considering participating in student internships, should not simply assume clear-sailing where the risk of FLSA claims is concerned.

For one thing, it is unlikely that the Labor Department sees such unpaid internships as being “generally permissible” in each situation, or for non-profits of every kind, or for all school-sponsored arrangements. Even USDOL does not consider the Fact Sheet to be an authoritative or binding official position. The Fact Sheet itself says that the Labor Department “is reviewing the need for additional guidance” on internships in the non-profit sector. So notwithstanding the Fact Sheet’s statement about what is “generally” the case, do not doubt that USDOL will assert FLSA liability for a particular unpaid internship, even one undertaken with a non-profit or in conjunction with a school, when it deems this to be warranted.

And even were it otherwise, the Labor Department is not the only potential source of a challenge. Interns are perfectly free to assert their own FLSA claims in court should they decide to do so, without regard to what USDOL thinks or does.

## **The Bottom Line**

Whether an unpaid internship occurs under the auspices of an educational institution, in a non-profit organization, or at a for-profit business, in the end the FLSA question still gets down to some version of this: Do the circumstances clearly show that the relationship is for the purpose of generalized learning, education, and training that imparts to the participant significant knowledge of a broadly-applicable kind, or do they instead indicate that the idea is to have the person perform work? In other words, if the motivation is something like, “We could sure use help from an intern this summer,” that is a danger sign – whether the setting is for-profit, not-for-profit, school-related, or any other.

Fact Sheet #71 **Internship Programs Under The Fair Labor Standards Act**  
<http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>

[Wage and Hour Division Website: <http://www.wagehour.dol.gov> Tel: 1-866-487-9243]