

Legal Issues for Start-Ups:

What You Need to Know About Unpaid Internships

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Objectives

- Understand risks of intern misclassification
- Navigate the legal requirements (federal & state)
- Learn how to structure a compliant unpaid internship program





Fair Labor Standards Act (FLSA)

- Federal law governs who is an employee and therefore must be compensated for services performed
- Sets minimum wage and overtime requirements for employees
- An individual performing services for a company will be deemed an employee unless an employer can satisfy the FLSA's 6 factor "trainee test"

Massachusetts Minimum Fair Wage Law

- Employer must satisfy 6 factor FLSA test
- No additional state requirements
 - *But additional risks/penalties! (3x damages)*

New York State Minimum Wage Act (MWA)

- New York employers must also comply with the MWA
- To properly classify an individual as an intern in NY, an employer must satisfy the 6 factor FLSA test and demonstrate the existence of 5 additional factors
- Only if all 11 criteria are satisfied will an individual be deemed an intern



California Wage Orders

- Employer must satisfy 6 factor FLSA test
- *Currently*, no additional state requirements
 - Due to recent changes in California’s approach, California employers should consider noting (and satisfying) additional NY factors



Unpaid Internship Criteria - FLSA

1. ***Internship must be similar to training provided in an educational environment***
 - Need not be directly administered by vocational/educational institution (but helpful)

Path to Compliance:

- Intern should ideally receive educational credit
- Internship should be structured around classroom or similar instruction



Unpaid Internship Criteria - FLSA

2. Internship must be for the benefit of the intern

- Intern must be primary beneficiary
- Benefit for employer should be “merely incidental”

Path to Compliance:

- Again, intern should ideally receive educational credit
- Focus should be on skills/knowledge to be gained by intern



Unpaid Internship Criteria - FLSA

3. *Intern does not displace regular employees and works under close supervision*
4. *Employer derives no immediate advantage from the internship; operations may actually be impeded*

Path to Compliance:

- Internship should be instructional
- Provide job shadowing opportunities
- Minimize “productive work”



Unpaid Internship Criteria - FLSA

5. Intern is not necessarily entitled to a job at the end of the internship

- Internship ≠ “trial period”

Path to Compliance:

- Internship should be of fixed and limited duration
- Establish in writing that no job offer or guarantee of offer exists



Unpaid Internship Criteria - FLSA

6. *Intern must understand that he/she is not entitled to wages*

Path to Compliance: Provide a clear written notice that intern is not an employee and will not be paid





Unpaid Internship Criteria - NY

7. All work performed by intern must be supervised by an employee experienced in such work

- Focus of internship must be on training and learning

Path to Compliance: Intern should be supervised by an employee in the department to which the intern is assigned (no general HR/administrative supervision)



Unpaid Internship Criteria - NY

8. Intern may not receive employee benefits

- Employee benefits “conclusively” indicate an employment relationship
- Program stipends are not necessarily benefits
- **Path to Compliance:**
 - Inform interns in writing that they will not receive any benefits (e.g., health/dental insurance, pension or retirement credit, employee discount on goods/services)



Unpaid Internship Criteria - NY

9. Intern training should not be employer-specific

- Skills learned must be transferable to other companies in the same industry
- Training specific to an employer is “conclusive evidence” of employment relationship

Path to Compliance:

- Teach general skills
- Avoid focus on Company-specific technology, databases, or practices



Unpaid Internship Criteria - NY

10. Intern recruitment must be separate from employee recruitment

Path to Compliance:

- Ensure different applications and application processes
 - If possible, have different employees in charge of each process



Unpaid Internship Criteria - NY

11. Internship advertisements, postings, and solicitations must focus on the education or training associated with the internship

Path to Compliance: Focus any solicitations on the learning experience, not on duties or qualifications of intern candidate



Stipends

- Does not change legal analysis
- A properly classified intern may receive a stipend without jeopardizing his/her status as an intern
- A stipend will not insulate a company from a wage claim if intern is misclassified



Best Practices and Next Steps

1. When in doubt, pay applicable minimum wage
2. Ensure solicitations reflect educational nature of internship
3. Structure internship so that intern may obtain educational credit
4. Make training and learning the purpose and focus of the internship (offer structured learning opportunity at least weekly)
5. Document terms and conditions of internship with a good offer letter (different than employee offer letter)
6. Ensure reality aligns with documentation



Questions?

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