

Do you have to pay interns?

Unpaid internships can seem like a great deal – the employer gets free labor, and the intern gets experience and contacts to build a resume. However, federal labor laws, as well as state labor laws in California and many other states, require that workers, including student interns working for academic credit, must be paid at least minimum wage except in very limited circumstances. A summer of "free" labor may ultimately prove very expensive if the intern later raises a wage claim. This article provides an overview of some of the issues for companies who may be considering hiring an intern.

When do interns have to be paid?

Interns must be paid unless the internship satisfies the federal Department of Labor's (DOL) six-factor test, which has been adopted in California. The six factors are:

1. The internship is similar to training that would be given in an educational environment
2. The internship experience 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 that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually 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 or the time spent in the internship.

Factors 3 and 4, highlighted above, mean that if the intern is going beyond job shadowing and is taking on work that would otherwise be handled by paid employees, the intern should be paid.

What are the risks of not paying interns?

If a company fails to pay an intern when the law requires it, the company can later be required to pay back wages equal to no less than minimum wage, overtime, potential penalties and more. A free intern could instead turn out to be a very costly problem for the company.

A company may also expose itself to other risks outside of wage claims. For example, a company may not complete a US Citizenship and Immigration Services Form I-9 for an unpaid intern; if the intern is later deemed an employee, then his or her legal right to work will become relevant.

Practical tips to satisfy the six-factor test for unpaid interns

- **Require that interns receive academic credit.** Having an internship program that is structured around a classroom or academic experience as opposed to the employer's actual operations can reduce risk. This often occurs where a college or university exercises oversight over the internship program and provides educational credit.
- **Arrange for job shadowing.** Provide "job shadowing" opportunities that allow interns to learn certain functions under close and constant supervision of regular employees. If an intern receives the same level of supervision as a regular employee (*ie*, not very much supervision), the employment relationship becomes suspect.
- **Set expectations with the intern.** Prior to engaging an intern, enter into a written agreement stating that a job is



not guaranteed at the conclusion of the internship period, that the startup and the intern understand no wages are due for the internship, that training received during the internship is for the benefit of the intern, and that the intern will be closely supervised by a specific employee of the startup.

- **Don't use interns to replace the work of employees.** Do not require that an intern do work that an employee would do in the intern's absence.

If a company is not able to reduce the risk of having unpaid interns, the alternative is to go ahead and pay minimum wage and overtime, where applicable.

What if I'm not in California?

A 2015 court case in New York used a different test to conclude that interns may not need to be paid, particularly if the intern is the primary beneficiary of the internship. These holdings do not control in states outside of New York and you should consult counsel for legal advice on wage-and-hour issues, whether in California or elsewhere.

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