



In the News

Refresher On Employee Qualifications For Summer Interns

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Nearly half of all college students complete an internship before they graduate, according to a 2023 [Gallup Inc.](#) report.[1] But internships can create special legal risks for employers.

Permitting students to join your workforce as interns for a limited period offers them a valuable opportunity to gain real-world experience. Businesses can benefit, too, from having extra help and investing long-term in a more qualified workforce.

But before companies welcome interns to their ranks this summer, they should consider the extent to which the interns may be entitled to the same legal protections as employees, including the right to be paid for their hours worked and to receive at least minimum wage — and overtime, as applicable.

Why Intern Classification Is Important

Individuals who qualify as employees are protected by various federal and state laws. In some circumstances, an intern is deemed to be an employee.

That may be true even if the individual offered to work without compensation, and the individual and the company jointly described the person as an unpaid intern or a volunteer.

For purposes of employment law, California understands “volunteer” to refer only to a person who provides services for a religious or charitable organization, or similar nonprofit, without expecting to be paid.

When an intern is an employee, the business must pay the intern for all hours worked, in compliance with minimum wage and overtime laws. But there are other consequences, too.

For example, businesses that rely on employee-interns must provide the intern with legally required disclosures at the time of hiring, track the days and hours that interns work, ensure that interns have the opportunity to take legally required rest and meal breaks, and reimburse interns for business expenses they reasonably incur.

Businesses must also comply with payroll requirements such as tax withholding, provide interns with complete and accurate wage statements, retain payroll and employment records for interns as for other employees, permit interns to accrue and take paid sick leave as required by state and local law, and pay the interns’ final wages as and when required.

Companies that improperly classify an individual as a nonemployee intern may have exposure under federal or state law. Damages potentially recoverable by an intern who should have been classified as an employee may include amounts that should have been paid as wages, unreimbursed expenses, liquidated damages, interest and the right to recover attorney fees.

Businesses also may be liable for taxes that should have been withheld, benefits that should have been provided, workers’ compensation contributions, and unemployment insurance and benefits.

Determining Whether Interns Are Employees

Before they take on student interns, for-profit businesses should evaluate their obligation to treat the workers as employees under both federal and state law.

The U.S. Department of Labor utilizes a so-called primary beneficiary test to determine whether an intern qualifies for protection as an employee under the Fair Labor Standards Act.

A fact sheet released by the DOL in 2018 describes seven relevant factors — no one of which is determinative — as articulated by the U.S. Court of Appeals for the Ninth Circuit in *Benjamin v. B&H Education Inc.* in 2017.

The plaintiffs in the Benjamin case were students at a for-profit cosmetology school that operated salons in California and Nevada. The salons were staffed by the students, who were not compensated for services they performed for the salon's customers.

California and Nevada law required, as a condition for obtaining cosmetology licenses, that applicants complete hundreds of hours of instruction, including performance of services.

The student-plaintiffs earned academic credit toward their licensure by performing services at the salons. They asserted FLSA and state law claims based on the school's alleged failure to pay them minimum and overtime wages, provide meal and rest breaks, and reimburse them for supplies.

The U.S. District Court for the Northern District of California granted the school's motion for summary judgment on the grounds that the students were not its employees.

On appeal, the Ninth Circuit agreed with the district court that the primary beneficiary test is the "most appropriate test for deciding whether students should be regarded as employees under the FLSA." The court reasoned, and the DOL later agreed, that these seven factors are instructive:

1. Whether the student and the business "clearly understand" the work will not be compensated;
2. The extent to which the internship provides the student training similar to that which would occur in an educational environment;
3. The extent to which the internship is linked to the student's formal education by integrated coursework, or earning academic credit;
4. Whether the internship accommodates the student's academic calendar, i.e., follows the student's educational schedule;
5. Whether the internship is limited to the time within which the student benefits by learning;
6. Whether the work performed by the student otherwise would be performed by an employee, i.e., does the intern's work displace a paid employee?; and
7. Whether the student and the business agree that the student will not be entitled to a paid job following the conclusion of the internship.

Applying those factors, the Ninth Circuit agreed that the school was not required to treat the cosmetology students as employees. The students did not dispute that they had no expectation of being paid.

They received academic credit for the services they performed at the salon, and they received hands-on training. They did not displace the salon's paid employees who performed other types of work, and they had no expectation of being hired after they completed their training. For those reasons, the students were the primary beneficiaries of the internships, and

they were not employees under the FLSA.

The Ninth Circuit further concluded that the California Supreme Court likely would apply the same or a similar test to determine whether the students were employees for purposes of their state law claims, and on that basis decided that the students' state law claims failed also.

It's an open question whether the Ninth Circuit was right; the California Division of Labor Standards Enforcement notes that "there is no state statute or regulation which expressly exempts persons participating in an internship from wage and hour laws," and its enforcement manual does not comment on the "primary beneficiaries" test or the Benjamin decision.

Instead, the DLSE Enforcement Manual refers to a previous DOL test — now replaced by the 2018 guidance, following Benjamin — and these six criteria:

1. Whether training is similar "to that which would be given in a vocational school";
2. Whether training is for the benefit of the students;
3. Whether students do not displace regular employees, but work under their close supervision;
4. Whether the business derives an "immediate advantage," and its business "operations may actually be impeded";
5. Whether the students are entitled to a job at the conclusion of training; and
6. The extent to which the students and business understand that students will not be compensated during training.

These criteria are similar, but not identical, to the seven-factor primary beneficiary test under the FLSA. In a 2010 opinion letter responding to a request about an internship program, the DLSE said that it "has historically followed federal interpretations which recognize the special status of trainees and interns who perform some work as part of an educational or vocational program."

At that time, the DOL had relied on the six criteria above. Now that the DOL has embraced the primary beneficiary test and the seven factors described by the Ninth Circuit, it remains to be seen whether California would still adhere to the now-withdrawn, six-criteria DOL standard, or the DOL's more recent 2018 guidance, embracing the seven-factor primary beneficiary test.

Takeaways for Employers

The safest course is to compensate student workers in the same manner as other employees, even if the students will only work for a short time, for a defined term or during summer break.

Businesses considering treating student workers as nonemployees or unpaid interns may wish to assess the potential for legal exposure based on a claim that the students should have been treated as employees.

It seems reasonable to assume that under either set of factors described above, unpaid internships are more likely to survive a challenge if a student's work is performed pursuant to a formal internship program sponsored by a college.

To the extent a business determines that the student's work will be so closely connected with the student's educational program that an internship may satisfy the tests described above, it may be advisable to memorialize the student and the company's mutual understanding in writing.

An unpaid internship agreement could confirm the parties' expectations regarding the lack of compensation, and the nonexistence of any agreement to hire the employee after the internship is concluded.

The document could also refer to the student's enrollment at the school, the school's sponsorship of the internship

program and placement of the student with the company, the learning objectives for the student, and the academic credit the student will earn by completing the internship.

Whether or not they qualify as employees, interns in California are entitled to the same protections against discrimination and harassment as other types of workers.

The state's Fair Employment and Housing Act prohibits employers from refusing to select an individual "for a training program leading to employment," or discharging a person from a training program, because of a protected trait.

Employers also are barred from discriminating against a person in the terms or conditions of an "apprenticeship training program, [] other training program leading to employment, [or] an unpaid internship." Likewise, the FEHA explicitly prohibits any person from harassing an unpaid intern or volunteer based on a protected characteristic.

For these reasons, companies should ensure that their policies prohibiting discrimination and harassment apply equally to interns, that interns receive copies of the policies, and that both frontline workers and supervisors understand the scope of the protections afforded to interns.

Kate LaQuay is a partner at Munck Wilson Mandala.

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- Kate LaQuay