

PROPERLY STRUCTURING AN UNPAID INTERNSHIP PROGRAM

When is it okay not to pay an intern?

To avoid liability, businesses must comply with both federal and state laws. Separate tests exist for non-profits and for-profits. Here, we focus on the requirements of for-profit businesses.

Federal Law Requirements for Unpaid Internships in the Second Circuit:

In the Second Circuit (Connecticut, New York, and Vermont) employers must comply with the “primary beneficiary test” when determining whether an intern can be paid or unpaid under the federal FLSA.

Under this test, there are seven non-exhaustive factors to consider when assessing whether an intern is an employee entitled to compensation under the FLSA. The extent to which the:

- intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
- internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
- internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
- intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Applying these considerations requires weighing and balancing all of the circumstances. Every factor need not point in the same direction in order to conclude that the intern is not an employee entitled to the minimum wage.

New York State Law Requirements for Unpaid Internships:

Businesses must also comply with applicable state laws. New York’s Department of Labor considers the following 11 criteria at for-profits (all 11 of these criteria must be present for an intern to be unpaid):

- The training: (1) is similar to training provided in an educational program; (2) is for the benefit of the intern; (3) provided to the intern is general and qualifies the intern to work in a similar business, rather than specifically for a job with the business offering the program.
- The intern: (1) does not displace regular employees and works under close supervision; (2) is not necessarily entitled to a job at the conclusion of the training period and is free to take a job elsewhere in the same field; (3) is notified, in writing, that the intern will not receive any wages and is not considered an employee for minimum wage purposes; (4) does not receive employee benefits, such as insurance or discounted or free goods or services from the business.
- The activities of the intern do not provide an immediate advantage to the business and, on occasion, business operations may actually be impeded.
- Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed.
- The screening process for the internship is not the same as for employment, and involves only criteria relevant to admission to an independent educational program.
- Program advertisements are couched clearly in terms of education or training, rather than employment (although employers may indicate that qualified graduates of the program may be considered for employment).