

Have the Intern Do It? The Risk of Using Unpaid Workers.

Often, well-intentioned employers will look to help a student or trainee develop work experience by taking them on as an unpaid intern. However, the law has a very narrow definition of when someone qualifies as an “intern.” Employers who don’t comply with this definition face a significant risk of violating wage and hour laws. Indeed, you may have noticed in the news recently that many large corporations – Warner Music Group and Condé Nast, to name a few – have been the target of class actions over their unpaid internship programs. To avoid this same fate, make sure you understand the requirements of a valid internship.

● ***1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.***

This means the employer must have a planned program of job training and work experience for the student, appropriate to the student’s abilities. This includes training related to pre-employment and employment skills to be mastered at progressively higher levels, which are coordinated with learning in the school-based learning component and lead to the awarding of a skill certificate. The program must encompass a sequence of activities that build upon one another, increasing in complexity and promoting mastery of basic skills. It must be structured to expose the student to all aspects of an industry and promote the development of broad,

transferable skills. Finally, the program must provide for real or simulated tasks or assignments that push the intern to develop higher-order critical thinking and problem-solving skills.

● ***2. The training must be for the benefit of the intern.***

This means the intern receives ongoing instruction at the employer’s work site and receives close on-site supervision throughout the learning experience, with the result that any productive work that the student performs is offset by the burden to the employer from the training and supervision provided.

● ***3. The intern does not displace regular employees, but works under their close supervision.***

In other words, the presence of the intern at the work site does not result in an employee being laid off, does not result in the employer not hiring an employee it would otherwise hire, and does not result in an employee working fewer hours than he or she would otherwise work. If the intern is working in a position where the employer pays other people to perform the same or similar work, or has a history of doing so, then the intern is an employee and must be paid in accordance with wage and hour laws.



- **4. The employer that provides the training must derive no immediate advantage from the activities of the intern; and on occasion the operations may actually be impeded.**

This means that the cost to the employer, in time and resources, of providing the internship must outweigh any immediate profit or benefit the employer may obtain from having the intern.

- **5. The intern is not entitled to a job at the conclusion of the training period.**

This doesn't mean you can't hire an intern at the completion of the internship. It just means you can't promise them a job if they complete the internship. The intern should be required to go through the employer's regular hiring process and compete with other applicants for the job.

- **6. The employer and the intern understand the intern is not entitled to wages for the time spent in training.**

There can be no promise or expectation of compensation in exchange for the intern's time. However, the intern can be given a stipend for expenses such as books and tools.

Labeling a work site experience as an "unpaid internship," "mentorship," "apprenticeship" or similar label has absolutely no impact on whether or not there is an employment relationship. If the above

criteria are met, then the intern is not an employee and the experience qualifies as training rather than employment. The intern does not need to be paid wages or overtime. If, on the other hand, one of the above criteria is not met, then the intern is an employee and must be paid in accordance with wage and hour laws.

Additionally, there cannot be an employment relationship at any time while an intern participates in the program. For example, the intern cannot be an eligible participant in the program during school hours, assume an employment relationship after school hours, and resume the participation in the program the next day. Likewise, a student may not be an "intern" during the school year, become a paid employee during the summer or other break, and revert back to "intern" status when school begins.

On a related subject, the law also narrowly defines when employers can use unpaid volunteers to perform work for them. For-profit private sector businesses can *never* use unpaid volunteers to perform work. If a person performs work for a private sector business, and they are not an intern, then they need to be compensated for that work in accordance with wage and hour laws.

On the other hand, individuals who volunteer or donate their services to non-profit organizations for public service, religious or humanitarian objectives, without expectation of pay, are not considered employees of the religious, charitable or similar non-profit organizations that receive their service. However, employees of the organization cannot be allowed or expected to volunteer to perform the same work for which they are already employed.



EMPLOYMENT LAW UPDATES

● *Minimum Wage:*

On January 1, 2014, minimum wage in Oregon raises to \$9.10 per hour. In Washington it raises to \$9.32 per hour. Make sure to adjust your payroll accordingly.

● *Enforcement of Portland's Sick Leave Ordinance Delayed:*

The Bureau of Labor and Industries – the agency charged with enforcing Portland's new Sick Leave Ordinance – has announced it will focus on training and assistance until July 31, 2014. This does not mean employers will not have to comply with the law starting January 1, 2014; it just means they have some breathing room to work out the kinks of implementing the law without fear of liability.

● *New Laws For 2014:*

The following changes in Oregon employment laws take effect January 1, 2014. Make sure to update your policies accordingly. For details on these new laws, see our newsletter published last quarter, or contact Shane Swilley.

- Restrictions on employers' ability to access and use information contained in employee and applicant social media accounts (e.g., FaceBook, LinkedIn, etc).
- Oregon Family Leave Act expanded to cover bereavement leave.
- Elimination of eligibility requirements for employees to take leave to address domestic violence, stalking and harrasment.

Employment Law Q & A:

Question: Can I prorate an employee's salary for missing work?

Answer: To maintain an employee's salary-exempt status, the employee's salary can never be reduced for missing a partial day of work, or for absences caused by jury duty, attendance as a witness, or temporary military leave. The employee's salary can be reduced (prorated) in full-day increments for each full day of work missed for personal reasons, other than sickness or accident. If the employer has a paid leave plan that provides compensation in cases of illness or disability, then the employee's salary can be prorated for each full day missed due to illness or disability if the employee has no accrued paid leave to use or has not been with the company long enough to qualify for leave under the plan.

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If you have any questions about the content of this newsletter, please contact Shane P. Swilley at (503) 276-6074 or swilley@cosgravelaw.com.

Take advantage of our free consultation to review the current state of their employment policies and procedures. This service is invaluable to ensure compliance with current employment laws. For more information or to schedule an appointment, contact Shane Swilley.

If you or your company has been threatened with litigation, or a lawsuit or complaint has been filed, then contact the head of Cosgrave's Employment Law Group, Tim Coleman, at (503) 219-3810 or tcoleman@cosgravelaw.com for a consultation.

