

# Unpaid Internships: Tips for Avoiding Legal Liability

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Unpaid internships present companies with potential legal exposure, as shown by several recent, well-publicized legal victories for interns, including one against NBC, which ultimately paid out millions of dollars. To help avoid liability, companies must comply with the Fair Labor Standards Act (FLSA), which permits unpaid internships under certain limited circumstances. While the FLSA applies to both for-profit and non-profit entities, it only becomes relevant if an employment relationship (between an employer and an employee) exists.

To determine whether an employment relationship exists for FLSA purposes, courts look at the 'economic realities' of the individual case (i.e., worker's economic dependence on the alleged employer). The U.S. Supreme Court has not addressed whether student interns are 'employees' for purposes of the FLSA. However, the Supreme Court has considered a related question—in the context of trainees in a company's own training program—and determined that the FLSA does not define the employment relationship so broadly as to render all who provide any kind of service employees. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947). Since then, courts have applied the *Portland Terminal* holding in the student intern context.

## Portland Terminal

In *Portland Terminal*, a railroad gave prospective brakemen a seven- or eight-day preliminary training course. There were no classrooms. Under a yard crew's supervision, the trainees first observed the work and then performed it. Those who successfully completed the course formed a pool of workers available to the railroad as openings occurred. The trainees were not paid for the training period.

The Supreme Court found that, because the trainees were not employees under the FLSA, they were not entitled to compensation for their training. Although the trainees performed "work in the kind of activities covered by the [FLSA]," they still had to prove they were "employees." In that regard, the court looked at the relative benefits of the training program to the trainees and the railroad. *Id.* at 150.

The court found that the trainees' "work does not expedite the company business, but may, and sometimes does, actually impede it." *Id.* at 150. Clearly, there is no employment relationship if the business "receive[s] no 'immediate advantage' from any work done by the trainees," or if the trainees are "work[ing] for their own advantage." *Id.* at 152-53. That is because the FLSA "was not intended to penalize [businesses] for providing, free of charge, the same kind of instruction [as a school] at a place and in a manner which would most greatly benefit the trainees." *Id.* at 153. Otherwise, "all students would be employees of the school or college they attended," and everyone who performed work for others (but for their own personal purposes) would be entitled to wages. *Id.* at 152. So, although the trainees performed hands-on work during the training period, and the railroad created a pool of trained brakemen from which it could hire as openings arose, the Supreme Court

held the trainees were not “employees.”

Applying *Portland Terminal*, courts have found that no employment relationship exists for students where: the work is an extension of studies and the intern received course credit and a grade for the work; the intern’s performance of actual work at the facility is the central purpose of the internship; no compensation was contemplated or paid; the facility received very little benefit from the intern’s work in that the intern did not displace a paid worker and did not lighten the workload for other workers; and the business had to supervise the intern’s work, provide feedback and training as needed; and answer the intern’s questions. Some courts, including appellate courts in the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) and Second Circuit (Connecticut, New York, and Vermont), have said this analysis, and *Portland Terminal*, create a “primary benefit” test: Whether the primary benefit of the internship was to the student or the business. See e.g., *Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 525, 526, 528-29 (6th Cir. 2011); *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 383 (2d Cir. 2015).

### **The DOL’s Position on Unpaid Student Internships**

The DOL, the agency tasked with implementing regulations for the FLSA, has stated in the context of student interns, that no employment relationship should be found where the student receives credit toward graduation for the internship and the internship provides real life experiences unobtainable in the classroom setting. To analyze the student intern relationship, it also developed a six-factor test, which is intended to evaluate the relationship’s economic realities consistent with *Portland Terminal*.

Some courts use the DOL factors as a guide in evaluating whether an employment relationship has been formed. Others do not use them at all, finding them overly rigid and inconsistent with *Portland Terminal*.

The factors are:

- . 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;
- . the training is for the benefit of the trainees or students;
- . the trainees or students do not displace regular employees, but work under their close observation;
- . the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion its operations may actually be impeded;
- . the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- . the employer and the trainees or students understand that the trainees are not entitled to wages for the time spent in training.

### **Student Intern Programs: Best Practices**

While there is no sure way to prove that an employment relationship does not exist, the court will weigh the following factors in the event of a lawsuit:

- **College credit.** If student interns receive college credit, that will be enormously helpful to a company’s position that no employment relationship exists. In fact, the DOL has stated that if the intern receives college credit, the primary benefit inures to the student thereby satisfying factor No. 2 of its test.
- **Educational experience.** Ensuring that the internship is an educational experience will also help a company’s case. For example, obtain course materials and a syllabus from the student’s school; speak to school instructors about the intern’s assigned tasks to ensure that the school believes the tasks have educational value; and maintain contact with the school, providing updates on the interns’ work and evaluations of their projects. Consider inviting school representatives to visit your premises to observe the students at work and get the representatives’ feedback on the interns’ assignments. Also, to the extent the school has internship requirements, be sure the program meets them. If the dates of work correspond to the academic calendar, that is helpful. The internship should not last so long that the work becomes overly repetitive and lacking in further educational advancement.
- **Indicia of employment.** To the extent the school can select your company’s interns, this “take what you get” approach is beneficial because your interviews of students would be classic indicia of employment. Also, allowing students to choose their own work hours and days militates against a finding of employment because most employers establish an employee’s dates and hours of work.
- **Hands-on Training.** Keep the focus on skills that are transferable within the applicable industry, not just on those solely related to your company’s operation. The key is to emphasize teaching and observing the students. Make an employee responsible for the students’ tasks and require the employee to double-check their work. Field trips and guest speakers may be appropriate.

- **Displacement.** Be careful not to delegate duties to students that would allow your employees to devote time to other matters. It must not appear that students have displaced any employee.
- **Supervision and Feedback.** The more supervision and feedback your company can provide, the better. Monitor the students, answer their questions, provide guidance, and give them frequent written evaluations. These evaluations need not be time-consuming. Work with your lawyer to create a standardized form. Students could evaluate their own work, detailing what they learned during the project and internship.
- **No post-internship employment.** Explain to the students that they are not guaranteed a job after the internship. Your lawyer can help you draft a form that students sign upon starting the internship.
- **No payment.** The form should include the student's signed acknowledgment that the internship is unpaid.

To the extent a company can show that its internship program is consistent with these factors, it will have a strong—albeit not risk-free—defense to any FLSA claim.

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