

# Ivanka Trump Intern Controversy Offers Key Reminders for Businesses

LABOR & EMPLOYMENT | SEPTEMBER 2, 2016



**Allison Oasis Kahn**

A recent blog post by one of Ivanka Trump's interns suggests the Presidential candidate's daughter uses unpaid interns to help run her website, [IvankaTrump.com](http://IvankaTrump.com).

The intern offered tips on staying financially afloat while living in New York and being paid in experiences, rather than wages. Ivanka Trump tweeted the blog post and criticism ensued.

Actual educational experiences can amount to a proper unpaid internship; but, the longstanding practice of using interns as free labor can be risky. For that reason, it is an increasingly unpopular practice. Only businesses with altruistic motives should seek out unpaid interns. That's because most courts look to who receives the primary benefit of the working relationship, the business or the intern, when determining whether an intern should be paid. If you use interns as an "extra set of hands," you may be violating the Fair Labor Standards Act (FLSA), the federal wage and hour law governing employment relationships.

An insufficiently structured internship program creates risks to your business, including reputational damage; investigations by the Department of Labor (DOL), which implements the FLSA regulations; and private lawsuits under the FLSA, some of which may be costly collective (class) actions.

The DOL has developed a six-factor test to analyze whether an employment relationship exists between a business and intern. Many courts find these factors too rigid and reject them, but they are helpful to illustrate the types of issues argued, and considered, by the DOL and private attorneys in internship litigation. The trend is for courts to analyze who received the primary benefit of the work, and no one factor is dispositive.

The best practices below draw on a combination of the more stringent DOL six-factor test factors, and consider internship programs that courts have found primarily benefit the interns and do not create an employer-employee relationship covered by the FLSA. When establishing and running your internship program, aim for a generous combination of the following best practices.

## **Best Practices for Your Internship Program**

**College credit.** Work with schools to get interns college credit. This is listed first because it is strikingly persuasive evidence that the primary benefit of the relationship inures to the intern.

**Make the internship educational.** If the intern attends school, to the extent the school has internship requirements, be sure to tailor the program to meet them. You can also do this by: obtaining course materials and syllabi from a school so you know the interns educational training needs; speaking to school instructors about student tasks to ensure the school believes the assigned tasks have educational value; check in with the school and give updates on interns' progress; provide student evaluations to the school; invite the school to visit your business to observe the students.

**Take what you get.** Avoid conducting interviews, which are an indicia of employment, to choose your interns. To the extent a school can send interns, without having your business interview them, this "take what you get" approach is helpful. Also, if interns can pick the hours and days they work, this also militates against a showing of employment, as most employers pick the dates and hours of work. Still, the internship should have fixed start and stop dates and not continue indefinitely. The longer the relationship lasts, the more likely it will be argued to be an employment relationship.

**Hands-on training.** Provide training that your interns will be able to use within your industry, not just training specific to your business. Focus on teaching and observing the interns. An employee should remain responsible for the tasks assigned to them, and should double-check their work.

**Field Trips:** Plan activities that offer no benefit to the business whatsoever. Take the interns on an educational field trip. Bring in a guest speaker. Think about what kind of educational activities would benefit interns in your industry. Consider the types of experiences you can offer that interns could not get in a classroom. Build on their classroom experiences.

**Don't displace any employees.** Do not depend on an intern's work to run the business. Be careful not to delegate significant duties to the interns while you or other employees devote time to other matters. You do not want it to appear that the interns have displaced any paid employees.

**Provide supervision and feedback.** The more supervision and feedback your company provides to interns from knowledgeable and experienced employees, the better. Monitor the interns. Let them shadow your employees. Although it may seem counterintuitive, your interns should actually *slow down* employee work. Answer interns' questions, guide them, and give them written evaluations (ideally, daily). These evaluations need not be terribly time-consuming. You might create and use a standardized form. The students could evaluate their own work, detailing what they learned during the project.

**No post-internship employment.** Be sure the interns understand they are not guaranteed jobs after the internships. Consider including this reminder in a written form for them to sign at the start of the internship. Don't make interns commit to employment should you make an offer at the end of the internship. And, don't use the internship as a trial or probationary period.

**No payment.** Include in the form for the interns to sign their acknowledgment that the internship is unpaid and that they understand they are not entitled to minimum wage as non-employees. Don't offer them benefits, that only aids in an employment relationship argument. Tout the educational worthiness of the non-employment program in any marketing pieces for the program.

These are aspirational goals, a combination of which will help you structure your internship program to maximize the chances of a favorable outcome should your business be charged with failing to pay an intern minimum wage and overtime.