

Student Interns: To pay or not to Pay?

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With the school year just underway, thousands of students are heading off campus to begin student internships. (Hollywood is [paying](#) attention [too](#).) Of those interns, many go unpaid. In recent years, the number of students challenging their unpaid status and seeking minimum wage and overtime protections afforded by the Fair Labor Standards Act (FLSA) has increased dramatically. In the wake of these challenges, employers must carefully evaluate their internship programs, and answer this question: to pay or not to pay.

In the recent case of *Schumann v. Collier Anesthesia, P.A.*, for example, the 11th Circuit Court of Appeals adopted the 7-factor “primary beneficiary” test set forth by the 2nd Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, to determine whether a student is an employee under the FLSA. *Schumann* involved claims for unpaid wages brought by a group of student registered nurse anesthetists (SRNA) who completed unpaid internships as part of their master’s degree program. On appeal, the Eleventh Circuit [laid out the proper test for determining whether the SRNAs were “employees”](#) under the FLSA. The opinion, therefore, offers employers useful (and possibly surprising) guidance on how to answer the pay or not to pay question; in other words, this decision is just the latest reminder that the system of unpaid interns that many employers take for granted is not as simple as they might prefer.

Thus, without further ado, here are some tips to help you answer the pay or not to pay question, along with some insight on how to structure unpaid internships in a way that will not expose your company to liability for unpaid wages.

1. *If you promise or suggest you’ll pay interns in the future, you may have to pay.* Do not state or suggest that the student will be paid in the future. To memorialize this understanding, have the student sign an acknowledgment form stating she understands she is not entitled to compensation.
2. *If the job is structured like an entry level position, you may have to pay.* The goal is to provide students with the type of training it could receive in educational program providing hands-on training. Therefore, structure the position in a way that mimics the classroom. For example, provide the student a “syllabus” outlining the student’s learning objectives; assign each student a supervising employee to provide specific feedback and to evaluate assignments; allow students to shadow their superiors, or, if feasible, work under their direct supervision; provide classroom training on the types of skills the student will need to complete her

assignments; if classroom training is not feasible, assign students reading materials that will provide them additional training.

3. *If your intern is not receiving academic credit, you may have to pay.* Limit unpaid internships to students who will receive academic credit for the internship from their school, or must complete the internship to meet a course requirement (despite not receiving actual credits).
4. *If your internship does not accommodate the intern's academic schedule, you may have to pay.* Schedule the student's internship hours around her class schedule. Also, limit the schedule to days on which school is in session. Do not schedule a student to work on weekends, holidays, or in excess of eight hours per day unless there is a legitimate reason training must occur on those days.
5. *If the length of the internship greatly exceeds the period of beneficial learning, you may have to pay.* Determining the appropriate length of an internship is not an exact science. Do your best to determine the amount of time needed to achieve the educational goals of the internship. In cases where the internship is required to meet licensure hours requirements, this may be as simple as scheduling the internship for the number of required hours. Where licensure requirements are based on performance of a specific number of discrete acts, such as patient cases, determining the appropriate duration is more difficult. Assess, as best you can, the amount of time needed to achieve the required number of acts. The key is that the duration not be grossly excessive in comparison to the period of beneficial learning.
6. *If your intern is completing work that would be completed by an employee in her absence, you may have to pay.* Do not use students to complete the work of paid employees. Tailor duties to provide on-the-job training, similar to what might be provided in a vocational school setting.
7. *If your intern expects to receive a job offer at the conclusion of her internship, you may have to pay.* Make clear to the student she will not be entitled to a job at the conclusion of the internship. Have the student sign an acknowledgement that she understands she is not entitled to future employment.
8. *Finally, if your nursing intern is painting your house, you will have to pay her for painting your house.* While you may not be required to pay the intern for duties related to her training, you will have to pay her for duties falling outside the scope of the training objectives.

In the end, no one factor is determinative. Instead, courts weigh these factors to determine the primary beneficiary. The more that weigh in favor of the employer, the more likely the intern will be classified as an employee protected by the FLSA, and vice versa. Keep in mind, it's not always feasible to offer unpaid internships. Sometimes the answer is pay.

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Topics

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