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Beware Internship FLSA Wage & Hour Traps

Business and other organizations¹ considering offering or requests from students or other interns for unpaid or other internships seeking work experience that don't pay at least minimum wage and overtime in accordance with the Fair Labor Standards Act ("FLSA") should use care to verify that the internship does not qualify as employment subject to the FLSA.

The FLSA generally requires "for-profit" employers to pay interns in accordance with the minimum wage and overtime requirements of the FLSA if the internship results in the intern providing services as an "employee" within the meaning of the FLSA. If analysis of these circumstances reveals that an intern or student is actually an employee, the FLSA requires that the employer pay the intern at least minimum wage and for any overtime. On the other hand, if the analysis confirms that the intern or student is not an employee, the FLSA does not obligate the employer to pay either minimum wage or overtime pay under the FLSA. Guessing wrong is an expensive mistake.



As is generally the case under the FLSA, an employer that violates the FLSA by failing to pay an intern who is an employee at least minimum wage for regular hours of work or time and a half for any overtime worked risks being required to pay back pay, interest, and liquidated damages plus attorneys fees and costs of enforcement in the case of private enforcement or administrative penalties in the case of enforcement by the Department of Labor Wage and Hour Division.

One clear way to sidestep these risks would be to ensure that all internships pay the intern at least minimum wage for regular hours of work and time and a half for any overtime hours of work.

Where an employer is unwilling to offer the internship opportunity under these terms, however, the employer should carefully structure and administer the relationship to preserve the necessary evidence to prove the intern was not an employee for purposes of the FLSA.

Employers should keep in mind that the FLSA places the burden upon the employer to prove the justification for not treating and paying an intern as an employee under the FLSA by showing that the intern and not the employer is the "primary beneficiary" of the internship.

Under this "primary beneficiary test," the courts examine the "economic reality" of the unique facts and circumstances of the particular intern-employer relationship to determine whether the employer or the intern is the "primary beneficiary" of

¹ Special rules may apply to government entities and some (but not all) nonprofits. For instance, the Department of Labor Wage & Hour Division ("WHD") recognizes that unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. It also agrees that the FLSA exempts certain people who volunteer to perform services for a state or local government agency or who volunteer their time freely and without anticipation of compensation for religious, charitable, civic or humanitarian purposes to non-profits. Because these exemptions depend upon the person volunteering freely with no expectation of compensation for an allowed governmental or non-profit service, however, parties engaging in these relationships are well-advised to document the understanding and terms of those relationships necessary to demonstration qualification for exemption.

the relationship. While no single factor is determinative, courts historically have identified the following seven factors as relevant for purposes of determining the economic reality of the relationship:

- 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.
- The extent to which the 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.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Because of the potential risks of misclassification of the relationship, an employer contemplating involvement in an unpaid or below minimum wage internship arrangement should carefully document and preserve all evidence relevant to prove that the internship was not employment under the economic realities. Because of the heightened requirements and liability exposures, this is even more critical when providing internships to an individual who could be covered by child labor laws.

To reduce the risk of missteps or unexpected consequences, employers also may wish to ask legal counsel experienced in the FLSA and other workforce laws to provide guidance about the proposed relationship under the FLSA and other laws. Employers should keep in mind that state minimum wage and other pay laws, OSHA and other safety, tax and other law may apply different definitions for purposes of deciding their treatment of an internship relationship. The business will want to understand and preserve analysis and relevant evidence to help support its characterization under the FLSA and other laws.

Additionally, whether paid or unpaid, employers also should carefully document the understanding between the parties about the relationship and its terms. Employers also keep careful time and other records needed to show or defend compliance and other elements of the relationship. Even where the relationship is not characterized as an employment one, employers also will want to use care not to skip or cut corners on background checks, privacy, security, intellectual property, safety, or other requirements. If the relationship is not one of employment, the employer also should consult with its insurance broker about the availability of or advisability of securing coverage for injuries or other actions or events involving the intern.

More Information

If you need legal advice or representation on these or other legal, management or public policy developments, please contact the author Cynthia Marcotte Stamer via [e-mail](#) or via telephone at [\(214\) 452-8297](tel:2144528297). If you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information including your preferred e-mail by creating your profile [here](#) or connect with us on [Facebook](#), on [LinkedIn](#) or [Twitter](#).



About the Author

Recognized by her peers as a Martindale-Hubbe “AV-Preeminent” (Top 1%) and “Top Rated Lawyer” with special recognition LexisNexis® Martindale-Hubbell® as “LEGAL LEADER™ Texas Top Rated Lawyer” in Health Care Law and Labor and Employment Law; as among the “Best Lawyers In Dallas” for her work in the fields of “Labor & Employment,” “Tax: ERISA & Employee Benefits,” “Health Care” and “Business and Commercial Law” by D Magazine, Cynthia Marcotte Stamer is a practicing attorney board certified in labor and employment law by the Texas Board of Legal Specialization and management consultant, author, public policy advocate and lecturer widely known for 30+ years working as an on demand, special project, consulting, general counsel or other basis with domestic and international business, charitable, community and government organizations of all types, sizes and industries and their leaders on labor and employment and other workforce compliance, performance management, internal controls and governance, compensation and benefits, regulatory compliance, investigations and audits, change management and restructuring, disaster preparedness and response and other operational, risk management and tactical concerns.

Most widely recognized for her work with health care, life sciences, insurance and data and technology organizations, she also has worked extensively with health plan and insurance, employee benefits, financial, transportation, manufacturing, energy, real estate, accounting and other services, public and private academic and other education, hospitality, charitable, civic and other business, government and community organizations. and their leaders.

Ms. Stamer has extensive experience advising, representing, defending, and training domestic and international public and private business, charitable, community and governmental organizations and their leaders, employee benefit plans, their fiduciaries and service providers, insurers, and others has published and spoken extensively on these concerns. As part of these involvements, she has worked, published and spoken extensively on these and other human resources, employee benefits, compensation, worker classification and other workforce and other services; insurance; health care; workers’ compensation and occupational disease; business reengineering, disaster and distress; and many other performance, risk management, compliance, public policy and regulatory affairs, and other operational concerns.

A former lead advisor to the Government of Bolivia on its pension project, Ms. Stamer also has worked internationally and domestically as an advisor to business, community and government leaders on these and other legislative, regulatory and other legislative and regulatory design, drafting, interpretation and enforcement, as well as regularly advises and represents organizations on the design, administration and defense of workforce, employee benefit and compensation, safety, discipline, reengineering, regulatory and operational compliance and other management practices and actions.

Ms. Stamer also serves in leadership of a broad range of professional and civic organizations and provides insights and thought leadership through her extensive publications, public speaking and volunteer service with a diverse range of organizations including as Chair of the American Bar Association (“ABA”) Intellectual Property Section Law Practice Management Committee, Vice Chair of the International Section Life Sciences and Health Committee, Past ABA RPTE Employee Benefits & Other Compensation Group Chair and Council Representative and current Welfare Benefit Committee Co-Chair, Past Chair of the ABA Managed Care & Insurance Interest Group, past Region IV Chair and national Society of Human Resources Management Consultant Forum Board Member, past Texas Association of Business BACPAC Chair, Regional Chair and Dallas Chapter Chair, former Vice President and Executive Director of the North Texas Health Care Compliance Professionals Association, past Board President of Richardson Development Center (now Warren Center) for Children Early Childhood Intervention Agency, past North Texas United Way Long Range Planning Committee Member, past Board Member and Compliance Chair of the National Kidney Foundation of North Texas, a Fellow in the American College of Employee Benefit Counsel, the American Bar Foundation and the Texas Bar Foundation and many others.

For more information about these concerns or Ms. Stamer’s work, experience, involvements, other publications, or programs, see www.cynthiastamer.com or contact Ms. Stamer via e-mail [here](#).