TEXAS YOUNG LAWYERS ASSOCIATION
AND THE STATE BAR OF TEXAS

HIRING AN INTERN

This guide brought to you by the Texas Young Lawyers Association addresses topics and frequently asked questions employers face when hiring interns. We hope that it proves to be a helpful resource.

What is an intern's 'employment' status?

Generally speaking, the various employment laws do not use the term "intern," nor do they provide a detailed definition of the term "employee." For example, workers' compensation laws typically define "employee" as an individual who "performs services for another for valuable consideration." Similarly, Title VII of the Civil Rights Act, the federal employment discrimination law, defines an employee as "an individual who is employed by an employer."

In cases involving the issue of a worker's status, the courts consider several factors to determine if the worker is, in fact, an employee or an independent contractor. These factors include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the equipment and tools needed to accomplish the work; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the worker's discretion over when and how long to work; the method of payment; the worker's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the worker provides services to any other organization; the provision of employee benefits; and the tax treatment of the worker by the hiring party. Although no single factor is definitive, the courts place the greatest emphasis on the first factor—that is, on the extent to which the hiring party controls the manner and means by which workers complete their assigned tasks.

Based on a review of these factors, it is unlikely that any court would consider an intern an independent contractor. If interns are considered employees under the law, the employer must not only pay payroll taxes on the interns' salaries, but also afford the interns the same legal protections as other employees, such as nondiscriminatory treatment, right to sue for harassment, and eligibility for workers' compensation.

Must an employer pay wages to an intern?

The answer to this question depends upon whether the intern is considered a "learner/trainee" under the federal Fair Labor Standards Act (FLSA) or the state equivalent. The U.S. Department of Labor (DOL) has developed six criteria for differentiating between an employee entitled to minimum

wage and a learner/trainee who, while an employee, may be unpaid. The criteria are:

1. The training, although it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the students.
3. The students do not displace regular employees, but work under the close observation of a regular employee or supervisor.
4. The employer provides the training and derives no immediate advantage from the activities of students, and, on occasion, the operations may actually be impeded by the training.
5. The students are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the student understand that the student is not entitled to wages for the time spent in training.

While some factors are more straight forward than others, several court rulings, while not addressing the criteria head on, suggest that as long as the internship is a prescribed part of the curriculum, is part of the school's educational process, and is predominately for the benefit of the student, the fact that the employer receives some benefit from the student's services does not make the student an employee for purposes of wage and hour law. Moreover, not all six factors have to be present for a student to be considered a trainee. *Ultimately, the experience should look more like a training and learning experience than a job.*

If the intern does not meet the criteria of a "trainer/ learner," can an employer consider the intern a volunteer?

Only if the intern is volunteering at a public agency for civic, charitable or humanitarian reasons with no expectation of pay. The DOL regulations define "volunteer" as an individual who provides services to a public agency for civic, charitable, or humanitarian reasons without promise or expectation of compensation for services rendered. Thus, an intern at any for-profit company would not fit the definition of volunteer.

Are paid interns entitled to overtime pay if they work more than 40 hours a week?

If a paid intern works more overtime, he or she is likely entitled to overtime pay. The overtime pay requirements of the FLSA apply only to those workers classified as "nonexempt" or hourly employees. Those considered "exempt," or salaried, are not entitled to overtime pay if they work more than 40 hours. To

be exempt, employees must be paid on a salary basis and fall within certain specific occupational classifications. If either of those criteria is not met, an employee is considered nonexempt.

The “salary basis” test means that an employee receives a predetermined salary regardless of the number of hours worked per week. The salary cannot be reduced because of quality or quantity of work performed. According to DOL regulations, if a salaried employee is subject to an hourly reduction in pay because of an attendance or discipline problem (except for discipline for severe safety violations), the employee would no longer be considered exempt.

The occupational classifications that are considered exempt from overtime requirements are “white-collar” classifications: executive, administrative, professional, computer-related, and outside sales. (Since an intern is rarely assigned to jobs in the executive and outside sales classifications, they are often not exempt.)

The key characteristic of exempt classifications is the exercise of independent judgment and discretion. It is unlikely that your interns have such responsibility.

Is an intern entitled to workers’ compensation if injured on the job?

Workers’ compensation laws have been enacted in all states to provide specific amounts of recovery (lost wages and medical benefits) by employees for injuries arising out of, or in the course of, employment. This is a “no-fault law,” meaning that there does not need to be proof of fault by the employer only proof that an injury has occurred either at the workplace or while pursuing the employer’s business purposes.

The underlying principle of workers’ compensation is common to all states, but the amounts and methods of payment, types of injury covered, and options open to employees vary considerably under the laws of the states. If the intern receives workers’ compensation benefits, he or she is barred from suing the employer for negligence with unlimited damages. It, then, behooves the employer to provide such coverage for interns.

Some of the state workers’ compensation statutes specifically exclude interns from coverage, while others do not specify whether an intern is entitled to coverage. In those states, the courts and workers’ compensation boards often find that an intern’s contribution to an organization is sufficient to establish employee status with the participating employer organization for workers’ compensation purposes, regardless of whether the worker is unpaid or paid wages or a stipend.

In Texas, if a company has worker's compensation, interns are generally eligible for the same coverage as full-time employees.

Can an intern sign a non-disclosure agreement?

Yes, and if the intern will be exposed to confidential information, it is a good idea for you to ask this of your intern.

Nondisclosure agreements prohibit an intern from disclosing an organization's confidential and/or proprietary information to third parties during both the tenure of the internship and after. In other words, by signing a nondisclosure agreement (also referred to as a "confidentiality agreement") the individual agrees that he or she will not reveal anything the company considers confidential, such as customer lists, marketing and business plans, pricing lists, research and development plans, and any other information that is not publicly known or ascertainable from outside sources.

A nondisclosure agreement does not restrict an individual's ability to obtain work upon the termination of the internship; it merely limits the information he or she can use once alternative employment is obtained. Courts routinely find such agreements valid as they do not restrict an individual's ability to perform in his or her chosen profession.

Because interns are generally provided with unlimited access to an employer's business, it is not unusual for a company to require interns to sign a nondisclosure agreement upon the commencement of the program. Employers are generally advised to have interns sign such agreements to protect their organizations' interests, and such agreements should be provided during an intern orientation period. Because most interns have limited, if any, experience in the work force prior to the internship, the impact of the nondisclosure agreement may escape them. Therefore, it is recommended that employers carefully explain the impact and legal ramifications of the nondisclosure agreement to the intern at the time it is provided.

Questions?

For additional information, the following may be helpful:

- The Texas Workforce Commission's Frequently Asked Questions about Internships at http://www.twc.state.tx.us/jobseekers/frequently-asked-questions-about-internships.

- United States Department of Labor Fact Sheet on Internship Programs and the Fair Labor Standards Act at http://www.dol.gov/whd/regs/compliance/whdfs71.htm.

Prepared as a Public Service by the
Texas Young Lawyers Association
and Distributed by the State Bar of Texas

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SB0201E-0416

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