Impact of Fair Labor Standards Act on Internship Programs

The State University of New York Career Development Organization recommends that all SUNY campuses and internship partners review the U.S. Department of Labor’s Fair Labor Standards Act to ensure compliance with federal law. Further information on this law’s applicability to higher education programs can be found in the attached NACUANOTE (some of which has been incorporated into this position statement).

According the U.S. Department of Labor (DOL), an unpaid internship will not violate the Fair Labor Standards Act (FLSA) if it is a training program which meets the following criteria:

1. The training, even though it includes actual operations of the facilities of the employers, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the student.
3. The student does not displace a regular employee, but works 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 the student; and on occasion, the operations may actually be impeded by the training.
5. The student is 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.

A student/intern not meeting all of the above criteria may be considered an employee covered by the FLSA, thus obligating the internship site to compensate that individual according to federal employment laws governing things like minimum wage and overtime. However, application of the FLSA to any particular program may be complicated and it is essential for internship sites to work closely with their own legal counsel to ensure compliance with applicable laws.

The third and fourth factors used by the DOL tend to cause the most problems for internship sites. Whether an intern displaces regular employees will largely depend on the level of responsibility assigned to the intern, the number of interns and the number of hours each intern works. Generally, the fewer the hours worked, the less likely it is that interns displace regular employees. Other important considerations when evaluating the third factor are the amount of supervision the interns require and the relative staffing levels when the interns are present or away. It stands to reason that if an employer must consistently assign employees to supervise interns, the interns are incapable of displacing those employees. Likewise, if staffing levels are constant regardless of the presence of interns, it is unlikely that those interns are impacting employment opportunities.

Properly understood, the fourth criterion does not necessarily prohibit the use of the intern’s work product unless the product is both substantial and ready for use by the internship site without adaptation or assistance. The more an intern’s work needs modification or revision, or involves collaboration between the intern and the internship site’s personnel, the more it can be said that the site “derives no immediate benefit.” Similarly, if the site or its staff must continuously supervise the intern, the benefits it will reap are not immediate.

For those us of in the public sector, the FLSA makes a special exception for individuals who volunteer to perform services for a state or local government agency and sometimes for religious, charitable, civic, or humanitarian non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. In the SUNY context, unpaid interns should be processed through human resources as volunteers. If they are paid anything, they must be paid at least minimum wage or only a stipend for expenses related to their internship such as transportation costs, meals, etc.

It is, of course, always preferable to seek and offer paid internships, whether in the public or private sector.
National Association of Colleges and Employers Position Statement on Unpaid Internships

“The National Association of Colleges and Employers (NACE), representing more than 3,000 higher education institutions and employing organizations, recognizes the enormous value of internship programs to individual student participants and both the higher education and employer communities. We believe that the U.S Department of Labor criteria for assessing whether internships in the for-profit sector may be unpaid must be reviewed and further clarified to ensure they account for the incredible diversity of students, higher education institutions, and employing organizations involved in such programs. Further, all interns, regardless of their compensation, should enjoy similar, basic protections in the work setting consistent with all laws, ethical considerations, and sound business practices.”

http://www.naceweb.org/advocacy/position-statements/unpaid-internships.aspx

Screening Guidelines for Internship Sites

Rochelle K. Kaplan, Legal Counsel, National Association of Colleges and Employers, has provided a quick review which may help internship sites determine if an unpaid internship is feasible. An internship site should be able to answer "yes" to at least half the following questions if an unpaid internship is being contemplated:

- Is the work that you are offering an integral part of the student’s course of study?
- Will the student receive credit for the work or is the internship required for graduation?
- Does the student have to prepare a report of his/her experience and submit it to a faculty supervisor?
- Have you received a letter or some other form of written documentation from the school stating that the internship is approved/spONSORED by the school as educationally relevant?
- Will the student perform work that other employees also perform, with the student doing the work for the purpose of learning and not necessarily performing a task for the employer?
- Is the student working and providing benefit to you less than 50 percent of the time and/or is the student in a shadowing/learning mode?
- Will you provide an opportunity for the individual to learn a skill, process, or other business function, or operate equipment?
- Is there educational value to the work performed, that is, is it related to the courses the person is taking in school?
- Is the individual supervised by one of your staff members?
- Is it clear that a job is not guaranteed upon completion of the training or completion of the person’s schooling?

Source: Rochelle K. Kaplan, Legal Counsel, National Association of Colleges and Employers, 62 Highland Ave., Bethlehem, PA 18017, (800) 544-5272 Ext. 10

Guidelines for SUNY Career Offices

Career Offices should endeavor to screen internship postings for compliance with state and federal employment law. This does not mean that unpaid internships may not be posted – unpaid internships may still be posted and promoted to students. Career offices and internship coordinators should, however, consider screening out postings that clearly violate the FLSA. The information above should provide some insight as to whether or not an internship should be posted. The New York State DOL provides additional guidance specifically regarding the screening process for an internship program:

“The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose. The screening only uses criteria relevant for admission to an independent educational program. This helps to ensure that employers do not mix recruiting of employees and interns. These searches must run independently from one another. Educational institutions or other organizations should not consider employment-related factors when they place students with for-profit employers. They should only consider the needs of the student and the educational program.”


Risk management continues to impact a number of issues related to career development and employment. Career Offices and internship coordinators should continue to seek legal advice from SUNY’s Office of General Counsel.

Submitted by SUNY Career Development Organization Ethics and Legal Concerns Committee in consultation with Seth F. Gilbertson, Associate Counsel, SUNY OGC (1/8/14)