



**THE LOWDOWN ON**

**UNPAID**

**INTERNSHIP PROGRAMS**

By Steve Taylor

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## New standards require extra care in administering unpaid internship programs.

**A** college student or recent graduate is eager to make an impression. So is the early-in-career professional who's been laid off by another company. You placed them both in an unpaid internship program because you want to give your company a chance to evaluate them as future employees. What could be wrong?

At job sites across the United States, interns not paid or earning less than minimum wage are given all sorts of jobs: answering phones, loading paper in the copiers, managing company social media campaigns.

"I once worked for a financial services company [that] used unpaid interns to cold call potential customers," recalls Greg Szymanski, SPHR, HR director for Geonerc Management Inc., a real estate development firm in Seattle. Szymanski says it was "pretty unethical and quite sleazy" that his unpaid labor was used to boost his employer's bottom line.

Recent college graduate Andrea Summers had a more positive experience with her unpaid internship. A public relations major at George Mason University in Fairfax, Va., Summers interned with a city government during her final semester. Her internship involved writing press releases, a task fitting nicely into her career plans. Although admitting that it was hard to work for no pay, she suspects the experience will "help me in my job search."

It certainly won't hurt. In a November 2009 Society for Human Resource Management poll, 70 percent of HR professionals said that companies prefer to see a resume showing an unpaid internship directly in the candidate's career field above paid job experience that is not.

Despite internships' value, federal guidelines released by the U.S. Department of Labor in April are raising concerns that employers might decide to provide fewer internship opportunities. The guidelines apply to "for-profit" private-sector employers. They define what makes an intern an "employee" as opposed to a "trainee." If a court or government agency decides that interns' work qualifies them as employees, the company could face penalties that include owing back pay; taxes not withheld;

Social Security; unemployment benefits; interest; attorneys' fees; plus liquidated damages, defined by federal law as double the unpaid wages.

Federal and state labor departments are cracking down on unpaid internships, "due to a concern that paid jobs are being displaced and to increase payroll tax revenues," says employment lawyer Terence P. McCourt of Greenberg Traurig in Boston.

With so much at stake, it's a good time for HR professionals to review their company's internship policies to ensure they comply with government requirements.

### Legal Exposure

The federal Labor Department standards state that most nonexempt individuals "suffered or permitted" to work must be compensated for the services they perform for an employer unless certain conditions are met.

In general:

- The internship program must be similar to training that would be given in an educational environment, such as a college, university or trade school.
- The intern and the employer must

both understand that the intern is not entitled to wages.

- The company must receive no immediate advantage from the internship and in fact may find its operations disrupted by the training effort.
- The intern must not take the job of regular employees.

While a company may get away with using its interns as free labor, "You're going to get nailed by the government if they catch you," advises Terry Henley, SPHR, director of compensation services at Employers Resource Association. His organization provides HR consultation to 400 small and medium-sized businesses in Indiana, Kentucky and Ohio.

Cleveland attorney L. James Juliano Jr. of Nicola, Gudbranson & Cooper LLC says that, legally, it doesn't matter if interns agree to forgo pay. "The misconception is that if a student is

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willing to get industry experience by working for free, then why not take advantage?"

And legal exposure may not be limited to government action. A company might face a private-practice lawyer assembling a class-action lawsuit.

"There is a tremendous number of internship programs that are not in compliance with federal or state law," says attorney Christopher Davis of The Ottinger Firm PC, employment law specialists in New York City. Davis predicts that class-action suits against those programs are "the next round of litigation for plaintiffs' firms." Since internship programs usually involve groups of people, Davis explains, it's easy for lawyers to show that an aggrieved class exists. "You're talking about one violation that applies to 100 people. Or 1,000 people."

### Unpaid Programs on the Rise

Despite the risks, unpaid internships appear to be on the rise. In a May survey by Internships.com, an online clearinghouse for companies and would-be interns, two-thirds of the more than 300 college and university career center professionals who responded said that overall internship postings on their campuses increased from 2009 to 2010. However, more campuses reported lower numbers of paid internships than those reporting increases.

"Unpaid internships do appear to be on the rise," says attorney James M. Coleman of the labor and employment law firm Constangy, Brooks & Smith LLP in Fairfax, Va. Whether that is in "reaction to the difficult economy and an effort to save on labor costs is not completely clear."

There are ways for HR professionals to protect themselves and their unpaid internship programs from government challenges. "The student goes to his or her college professor and says, 'I want to work for this employer. Why don't you give me academic credit?'" suggests Juliano, who says the student then works for free but under the professor's supervision. "It's not complicated to set up something like that, and most schools will go along," he adds. For example, Summers' internship was coordinated with her university. Employers should coordinate with an intern's school to determine requirements mandated by the educational institution, experts say.

## Six Standards

The U.S. Department of Labor's Wage and Hour Division lists six factors to use in determining whether an intern is a trainee or an employee under the Fair Labor Standards Act.

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or educational instruction.
2. The training is for the benefit of the trainees.
3. The trainees do not displace regular employees, but work under their close observation.
4. The employer that provides the training derives

no immediate advantage from the activities of the trainees, and on occasion the employer's operations may actually be impeded.

5. The trainees are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

If all of the factors listed above are met, then the worker is a "trainee," an employment relationship does not exist under the act, and the act's minimum wage and overtime provisions do not apply to the worker.

An internship is more likely to be viewed as training if it provides interns with skills that can be used in multiple settings, as opposed to one employer's work-specific skills.

Interns should be "allowed to observe aspects of the employer's operations, such as job shadowing, without needing to perform services at all times," says McCourt. He says an intern should not supervise regular employees or other interns, and the company should define the arrangement clearly and in writing, specifying that there is no expectation of a job offer at the conclusion of the internship.

HR professionals and lawyers say it may be useful for companies to keep written records of what an intern expects to gain from an unpaid program. Attorney Oscar Michelen of Sandback & Michelen in New York suggests preserving memos, e-mails and other documentation covering what each intern does, such as attending scheduled training sessions and luncheon meetings with regular employees, and what type of training and supervision will be provided.

Henley suggests that HR professionals document the disruptions to the company from the program. "If you're doing it the right way, it actually is a drain [for] the employer, because of making time to educate and train," he points out. "You're not getting production out of it."

Sometimes, former unpaid interns eventually land paying jobs. Jonathan Ezor, an assistant professor at Touro Law Center in Central Islip, N.Y., says that each semester a dozen or more of the students in his classes find unpaid internships at law firms, and "at least one per semester gets an offer of paid employment." ■

### Online Resources

For additional information about federal regulation of internship programs, see the online version of this article at [www.shrm.org/hrmagazine/1110Taylor](http://www.shrm.org/hrmagazine/1110Taylor).