



**LOOPER REED**  
LOOPER REED & MCGRAW P.C.

## Unpaid Interns, Volunteers, and Trainees

### Who, What, Why . . .

*Who does it apply to:* Every employer who has or intends to hire unpaid interns.

*When must an intern be paid:* All “employees” of a business must be paid at least minimum wage unless they are a “trainee” under the law, regardless of whether they are called an “intern.” So, what makes a trainee? The United States Department of Labor (DOL) has established a six-factor test couched in terms of – you guessed it – training – to determine whether an unpaid intern should be considered an employee or trainee under the Fair Labor Standards Act (FLSA):

- the training is similar to that which would be given in a vocational school (even though it includes actual operation of the facilities of the employer);
- the training is for the benefit of the trainees;
- the trainees do not displace regular employees, but work under their close observation;
- the employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion operations may actually be impeded;
- the trainees are not necessarily entitled to a job at the conclusion of the training period; and
- the employer and the trainees understand that the trainees are not entitled to wages for the time spent training.

*When can I hire an unpaid intern or volunteer:* The six-factor test is primarily used in the, “for profit,” private sector. State and local government agencies and non-profit organizations can generally utilize interns or volunteers without an obligation to pay them under the FLSA. It is important, though, that the volunteers understand they are not to be paid for their time. Volunteer work at non-profit, religious, charitable, and civic organizations have specifically been cleared by the Texas Workforce Commission.

*What about true student interns:* Student interns are not evaluated differently by the DOL. They should easily meet the

trainee test. That said, there are special rules for individuals who have completed a professional degree like physicians, attorneys, and therapists, generally allowing them to volunteer their time as they choose.

*What do these factors really mean:* The more an internship program can be structured around a classroom or academic type experience the better. It is better if the employer can provide the individuals with skills applicable to various employment settings, not just skills particular to the employer’s business. Essentially, the employer needs to provide the intern or volunteer with valuable training. Ideally, the training would make them more marketable in the open job market. The employer must pay any intern or volunteer that is used as a replacement for a regular employee or to reduce their workload. The intern or volunteer should receive more supervision than a regular employee. If the employer would have to hire additional employees if the intern or volunteer were not performing certain work, the intern or volunteer would be considered an employee. Don’t rely on unpaid interns to do work of any real significance to your business. The work done by an unpaid intern should be secondary to their training. An intern that is hired by an employer on a trial basis with the expectation that they will eventually be hired full time will likely be considered an employee under the FLSA. Employers should indicate prior to the start of the internship that there is no guarantee or expectation of hiring the interns upon completing the internship. A written agreement indicating this is advisable. Employers should indicate prior to the start of the internship that there is no intention to pay the intern. A written agreement indicating that the intern will not be paid and does not expect to be paid is advisable.

*What happens if I don’t follow the test:* An employer violating the rule is subject to the same damages available to an employee who is not paid all of the wages they are owed. This may include minimum wage and overtime for all hours worked, plus an equal amount in liquidated damages for all interns over the past two or three years.

*What about discrimination laws:* It depends on whether the

person in question receives “significant remuneration” for their efforts. The EEOC has stated that things like a pension, group life insurance, workers’ compensation, or access to professional certifications constitute significant remuneration. However, Courts have determined that things like academic credit, practical experience, and scholarly research do not constitute significant remuneration. Because this point is subject to interpretation, however it is best to treat all interns and volunteers as though they are employees with respect to discrimination laws.

### **Common Situations:**

*Required training:* Safety First is ready to hire a new class of security guards. The company requires that security guard trainees receive 40 hours of training prior to performing any regular work under their service contract. According to their contract, the training is focused on “company practices, policies, and rules.” Does Safety First have to pay the trainee security guards even though they are not yet performing regular work? Yes. These trainees would be considered employees because: (1) the employer is directly benefiting from their training, (2) the training is given to security guards who will work on contract, and (3) Safety First can only employ specifically trained guards.

*Homegrown hiring:* Maverick Finance hires interns each summer. Maverick’s intern program is structured much like an academic program. The interns do not do the work of regular employees and are heavily supervised. The interns are not paid and are aware there is no guaranty of employment. However, Maverick hires its first year analysts almost exclusively from the unpaid interns it has each summer. Does the FLSA require Maverick to pay these interns at least minimum wage? Probably. Although Maverick substantially satisfies the six factor test, its practice of hiring analysts from the intern pool is likely enough to

tip the balance against the company in the face of a DOL audit.

### **What should I do:**

*Good:* Paying minimum wage to all interns probably is the safest bet. You avoid the risk of an audit of all your employment practices because of one dissatisfied intern that calls the DOL. If you go the trainee route, be sure to meet all the factors.

*Better:* If you have true “trainees” taking into consideration all the factors, it makes sense to put that understanding in writing in a short half-page agreement outlining the factors. If you use volunteers, it makes sense to have them sign a one-paragraph agreement acknowledging their status as a volunteer without expectation of pay or other “significant remuneration” to avoid the possibility of an EEOC complaint.

*Best:* In addition to the items above, require that the trainees keep track of their hours so you have a record of how much they might be entitled to if the DOL audits and rules them employees. Be sure they do not work more than 40 hours to avoid increasing the risk to include overtime. Have the trainees and their supervisors keep a log of their activities so that there is no confusion regarding the type of work they did.

Thanks to LRM future associate Cole Robinson for his assistance in preparing this piece.



Michael Kelsheimer is a Shareholder in the employment law section at Looper Reed & McGraw where he is joined by a number of employment law attorneys with experience in all areas of employment and labor law. Michael recognizes that the cost and expense of litigation makes resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@lrmlaw.com](mailto:mkelsheimer@lrmlaw.com) or by phone at 214.237.6346