Your Legal Questions Answered

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Following is a review of common legal questions and their answers. The following information has been provided by the National Association of Colleges and Employers.

What is the nature of the relationship between the intern and the employer?
For most employers, it is probably best to assume the interns are a type of employee. Why? The fact that the intern acts like an employee—performs work like other employees, and is supervised and directed like other employees—is what the courts would be most likely to look at. And this can be true regardless of whether or not the intern is paid.

Must the employer pay the intern?
Although there are reasons beyond the legalities that employers consider when deciding whether to pay an intern, the answer to whether they must pay an intern for his or her work relates to the Fair Labor Standards Act and lies in an analysis of the on-the-job experience the intern will have in relation to the standards set forth by that act. Pursuant to that law, the U.S. Department of Labor (DOL) has developed six criteria for identifying a learner/trainee who may be unpaid. (Note: Neither the law nor the regulatory guidance uses the term "intern.")

The DOL criteria are:

- The training, even though it includes actual operation of the employer's facilities, is similar to training that would be given in a vocational school.
- The training is for the benefit of the student.
- The student does not displace regular employees, but works under the close observation of a regular employee.
- The employer provides the training and derives no immediate advantage from the activities of the student. Occasionally, the operations may actually be impeded by the training.
- The student is not necessarily entitled to a job at the conclusion of the training period.
- The employer and the student understand that the student is not entitled to wages for the time spent training. (Note: Many employers pay a stipend to students for meals and lodging, or provide tuition assistance; however, stipends and tuition assistance are not considered payment of wages for the purposes of determining whether a student is an employee.)

Although not all six factors have to be present for an individual to be considered a trainee, the experience should ultimately look more like a training/learning experience than a job. This raises the issue of the fourth criterion—that the employer derives no benefit from the student's activities. This seems to fly in the face of contemporary practice. In the same way that a student working in a college laboratory is expected to become actively involved in the work at hand, an intern is expected to participate in the work of the organization to make the experience educationally valid.

Several DOL rulings, while not addressing the criteria head on, seem to suggest that as long as the internship is a prescribed part of the curriculum and is predominantly for the benefit of the student, the mere 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.

Can interns be classified as independent contractors or volunteers?
Probably not. The "independent contractor" designation doesn't fit in with the operation of most internship programs.

In the typical internship program, the employer exercises control over "the result to be accomplished and means and manner by which the result is achieved." Because of this (although there are some other considerations), the courts are apt to consider the intern an employee, not an independent contractor.

Classifying interns as "volunteers" is equally problematic. DOL regulations define a "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. Most internships don't fit with that definition.

Must an international student serving an unpaid internship claim the internship time period as part of his or her practical training time? Can the student serve the internship without authorization from the INS?

Some have suggested that if the international student is not paid, then the internship is not practical training and the student does not have to claim the internship as part of his/her 12-month allotment of practical training time. Others suggest that if the training is unpaid, students do not have to seek authorization from the U.S. Immigration & Naturalization Service (INS).

Those arguments aside, there is no clear answer to the question. Whether the "training" is paid or unpaid is something of a red herring: First, employers are required to comply with the Fair Labor Standards Act before determining whether an intern should or should not be paid. The employer cannot simply decide not to pay an intern as a way of helping the intern sidestep a regulation. Moreover, practical training regulations do not even speak to the question of paid or unpaid practical training.

Immigration law states that if a foreign student is found to be "out of status," which *could* include working in practical training without the appropriate authorization, the student may be barred from re-entry into the United States for a period of five years. Thus, you should seek legal counsel from an attorney before agreeing to permit an international student to participate in an unpaid internship without receiving appropriate INS work authorization approval.

Can interns be required to sign a noncompete and/or nondisclosure agreement?

Depending on the nature of the business and the scope of the internship experience, an employer may wish to ask an intern to sign a noncompete and/or nondisclosure agreement.

First, let's review what these agreements cover. A nondisclosure agreement prohibits an employee or intern from giving a new employer proprietary information. That can include product or process information; customer lists and profiles; marketing, business, and strategic plans; technological innovations; and any other information that is not publicly known or ascertainable from outside sources. The agreement does not restrict the person's ability to work elsewhere, but it does place limitations on the information the person can use in his or her new position. Such an agreement is typically enforceable because it does not limit a person's ability to work.

In a noncompete agreement, an employee or intern agrees not to compete with the current employer after leaving the company. Such agreements can prohibit the solicitation of former customers, employment by a competitor, or the establishment of a competing business. Typically, the agreement describes the prohibited competitive activity, the geographic area within which the individual may not compete, and the duration of the noncompete promise.

In general, noncompete agreements are difficult to enforce when interns are involved, and enforceability depends upon the reasonableness of the restrictions. Factors that influence their enforceability include:

- The business interests of the employer that are protected by the agreement.
- The time frame and geographic area in which the activities may not occur.
- The scope of activities that are limited or precluded and the resulting impact on the ability of the individual to earn a livelihood.

In the case of interns, noncompete agreements are less likely to be enforced because interns may not immediately enter the job market after their assignments, may not possess the expertise that regular employees have, and haven't been employed by one company for an extended period of time or involved in high-level decision making. As a result, courts will be reluctant to bar graduating students from the work force for several years without strong evidence of harm to the employer or the employer's willingness to financially support out-of-work students.

If a student is asked to sign a noncompete or nondisclosure agreement, check that the student has had the agreement explained to him or her. The student should understand that the internship is conditioned

upon the signing of a noncompete or nondisclosure agreement, and its purposes, intent, and critical provisions. In addition, the student should be given a reasonable period of time to review the documents, alone or with an attorney.

Are interns covered by sexual harassment, ADA, discrimination, and other laws like other employees?

Yes. In general, interns are deemed to be employees, and that means they are protected by the same laws and regulations that protect the organization's other employees.

For example, if an intern asks the employer to provide a reasonable accommodation to enable him or her to perform the essential functions of the internship, the employer is required to do so under the Americans With Disabilities Act. The employer may not exclude a candidate simply because he or she requests an accommodation. (There is a slight wrinkle here: Depending on how the internship program is structured—if, for example, it is school sponsored—the intern's school may be responsible for a portion of the cost of the accommodation. Check with your legal counsel.)

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 *Olsson v. Nyack Hospital*, the court found that an unpaid intern was an "employee" for purposes of workers' compensation because the training and experience that she gained as an intern was equivalent in value to wages. In another case, *Kinder v. Industrial Claim Appeals Office*, the court awarded lost wages to an unpaid intern under the workers' compensation statute.

Is it advisable to have the employer, student, or school sign "hold-harmless" or indemnity agreements or releases of liability?

Because of the concern over liability, some employers and colleges are asking their counterpart organizations and/or the student to sign a hold-harmless or indemnity agreement. In some cases, employers are asking students to sign a release of liability as a condition to accepting the internship. While no study supports or refutes the growing concern that hiring interns is risky, the increased demand for indemnity agreements and waivers of liability indicates that employers perceive a real liability in hiring interns.

The NACE Principles for Professional Conduct Committee issued a white paper in 2004 on hold-harmless or indemnity agreements: It's position is that, in the majority of internships, such an agreement is not appropriate. The committee's white paper states:

- *A hold-harmless agreement is not appropriate in those cases when the school's involvement with assisting employers in recruiting interns is limited to providing access to students by posting the opportunity, scheduling on-campus interviews, referring resumes, including the employers in career fairs, and the like. In such a situation, the school has no involvement in the selection of the student by the employer. The employer controls the workplace, work rules, and the intern. Under these circumstances, it is a violation of the Principles because the agreement is not within the framework of "professionally accepted recruiting, interviewing, and selection techniques." (Employer Principle 2)*
- *A hold harmless agreement is not appropriate when the employer has not "supplied the student with accurate information about the organization." (Employer Principle 3) Moreover, it is a violation of the Principles when the employer revokes an internship after an offer has been made or the student has*

commenced the internship because the school refuses to sign a hold-harmless/indemnity agreement. (Employer Principle 3) In such situations, as noted above, the student may have no alternative and could suffer consequences.

An indemnity agreement, however, may be appropriate when the school has a greater level of involvement in the internship, as is typically the case with a mandatory internship program. In such a situation, the employer can ensure its compliance with the Principles by adhering to the following parameters:

- *If the employer requires an indemnity agreement, the student must be informed of the purpose and effect of the agreement at the outset of the recruitment process.*
- *The agreement is between the employer and the school. Therefore, the employer, not the student, should send the agreement to the authorized individual at the school for review, negotiation, and execution of the agreement. The student should not be involved in delivering or apprising the school of the agreement.*
- *The employer and school must engage in negotiations to draft an agreement that meets the needs of both organizations. It is more likely that a school will agree to indemnify the employing organization if the agreement addresses risks that the school can control. The agreement should be crafted based upon the respective responsibilities of both the school and the employer as they relate to the internship.*
- *The negotiation should occur prior to the placement of the student at the internship site.*

As an alternative to an indemnity agreement, the Principles Committee recommends that the employer and school enter into a "memo of understanding" that defines the responsibilities of each party—the school, employer, and student—as they relate to the internship.