

Ensuring Your Intern Program is Compliant

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Summer is quickly approaching, and for many employers that means summer interns will soon be arriving. In anticipation of their arrival, employers should ensure that their internship programs are in compliance with applicable laws, including the **Fair Labor Standards Act** ("FLSA") and, in some situations, the **Affordable Care Act** ("ACA").

Employers with unpaid internship programs should carefully analyze whether their programs comply with state wage laws and the FLSA. As a general rule of thumb, if the employer derives immediate benefit from the work performed, the intern should be paid in accordance with state and federal wage laws. The U.S. Department of Labor employs the following six-factor test to analyze whether an internship program may be unpaid: (1) the training must contain a significant educational component; (2) the training must primarily benefit the intern; (3) interns may not displace regular employees but work under the close supervision of existing staff; (4) the company must not derive an immediate advantage from the intern's activities; (5) the intern should not necessarily be entitled to a job at the conclusion of the program; and (6) there must be a clear understanding that the intern is not entitled to wages.

Employers with unpaid internship programs should seek guidance from legal counsel to ensure their programs meet the Department of Labor's test for unpaid interns, and should also have clear and thorough written descriptions of their internship programs, which describe the training offered by the program and clearly disclose that the position is unpaid.

In addition, some interns may not only be entitled to wages, but employers may be required to offer them benefits. As most employers are already aware, the ACA requires that employers employing 50 or more full-time, or full-time equivalent, employees ("applicable large employers") offer affordable (premiums do not exceed 9.5% of household income), minimum value (it pays at least 60% of the cost of covered services) coverage to full-time employees and their dependents. Full-time status applies to any employee working an average of 30 or more hours per week. If an applicable large employer does not offer such coverage, it may face "pay-or-play" penalties if even one full-time employee receives a premium tax credit through a health-care exchange. An applicable large employer with an internship program should carefully evaluate whether healthcare coverage should be offered to interns. Failing to do so could result in hefty penalties. Three basic points to consider are outlined below:

- If an intern will be working for a period of less than three months, an applicable large

employer likely need not offer coverage.

- If an intern will be working more than 30 hours per week for six or more months, then an applicable large employer likely must offer coverage.
- If an intern will be working more than 30 hours per week for a period of between three to six months, this situation falls within a gray area. If the interns were considered “seasonal employees” then an applicable large employer could wait to offer coverage until after the expiration of a measurement period. However, “interns,” as a category, are not necessarily seasonal employees. Whether each intern is a seasonal employee could depend on a factual case-by-case determination. If interns are not seasonal employees, the applicable large employer likely would need to offer coverage.

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