



by Rochelle Kaplan, Esquire

Copyright 2005 by the National Association of Colleges and Employers

Internship programs vary from organization to organization, and it's likely that there are legal issues unique to your program. (You should always check with your organization's legal counsel before putting any employment policies and practices in place.) However, there are a number of questions that are common, such as *Must we pay our interns?*, *Can we require interns to sign noncompete agreements?*, and the like. Following is a review of common questions and their answers.

What is the nature of the relationship between the intern and the employer?

In general, most of the legal issues surrounding internship programs arise from this source—the nature of the relationship between employer and intern. What *is* the relationship? Is the intern a “trainee,” “volunteer,” or some version of “employee”? In fact, questions regarding pay (which is the most common question) and liability are tied to this issue.

It is probably best to assume your 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 you pay the intern. (See below for information about treating interns as independent contractors or volunteers.)

If interns are employees, then that means they are entitled to the same protections as other employees. There are advantages to this: For example, worker's compensation can be far less costly than having to pay for pain and suffering, loss of the ability to work in the future, and other claims.

Must we pay our interns?

Although there are reasons beyond the legalities that you'll want to consider when you are deciding whether to pay an intern, the answer to whether you *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 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.
- 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.

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.

(See the checklist at the end of this column to help you determine whether your intern is an employee or trainee.)

Can I classify our interns 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. (At the end of this column, see the checklist to determine whether an individual is an independent contractor or an employee.)

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 employers 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, as an employer, you are required to comply with the Fair Labor Standards Act before determining whether you should or should not pay the intern. You can-

not 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 immigration expert before agreeing to permit an international student to participate in an unpaid internship without receiving appropriate INS work authorization approval.

Can my company require interns to sign a noncompete and/or nondisclosure agreement?

Depending on the nature of your business and the scope of the internship experience, you may wish to ask interns 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 places 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 your organization wants its interns to sign noncompete or nondisclosure agreements, you should:

- Explain to the student that the internship is conditioned upon the signing of a noncompete or nondisclosure agreement, and discuss the agreement with students, focusing on its purposes, intent, and critical provisions.
- Ensure that nondisclosure agreements carefully define the information that is to be protected. Explain to students the reasons why the information must be protected and other steps the company has taken to maintain the confidentiality of the information.
- Ensure that noncompete agreements define the competitive activity that is to be restricted. It should be limited to the activity that would have a direct impact on your company's business. The time in which the student will be limited in seeking employment from competitors should be related to the time needed to protect your company's business. This restriction must be carefully crafted because the student may not be restricted from seeking any other position after graduation unless your organization is prepared to pay the student a salary for the time period during which your organization does not want the student to work for a competitor.
- Give a reasonable period of time for the intern to review the documents, alone or with an attorney. If a student asks for a modification, the request should be considered, and if the modification is not accepted, the reasons for the rejection should be explained.

Should my company cover interns under its workers' compensation insurance? Who is responsible if the intern gets injured?



The law varies from state to state, so check your state's workers' compensation law to determine whether it requires you to cover interns under your workers' compensation insurance.

If your state law doesn't delineate the responsibility for providing workers' compensation, it should define the terms "employer" and "employee." Such definitions may help you determine whether your organization or the intern's school is responsible for covering the intern's workers' compensation. Your state law also describes the types of remedies injured employees may receive and how the benefits are calculated.

There may be court cases in your state that address whether unpaid interns are eligible for lost wages.

In general, it is probably best to cover your interns under your workers' compensation insurance even if you are not required to do so by law. Why? Because coverage limits your organization's liability for job injuries to medical expenses and lost wages only—something that general liability doesn't do. But it is important that you tailor your workers' compensation insurance policy to meet the needs of your internship program.

Final advice on this issue: Establish and explain your organization's safety policies and procedures to your interns, and be sure to document that you have reviewed the material with your interns. Companies with good safety records seldom see an increase in safety problems when interns are on site.

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

An employer's potential for liability in sponsoring an internship is similar to the liability that it faces from regular employees. Among an employer's concerns would be employment discrimination, harassment, workers' compensation, wage and hour concerns, unemployment compensation, and other employment-related issues. Another potential problem is that the student's conduct could harm the employer's customers or clients, just as other employees might cause injury.

If workers' compensation does not apply, an injured student could sue the employer for the loss from the injury—medical, pain and suffering, loss of future earnings, etc. In a personal injury case, the student must prove that his or her injury is due to the negligence of the employer. The court will determine if there is a duty of care to protect the student, and if that duty was breached by an unsafe work environment, the injury was a result of the breach, or the student was actually to blame. Accordingly, the court will consider such factors as who controls the work site, who has supervisory responsibility over the student, whether supervision of the student was adequate, the safety rules and regulations of the workplace, and what promises or guarantees were made

to the student regarding safety. In most internships, the employer bears the risk of liability; because the employer has control over where the intern works and what the intern does during the course of his or her internship.

Because of the concern over liability, some employers are asking schools and/or the student to sign a hold-harmless or indemnity agreement. In other cases, employers are asking students to sign a release of liability as a condition to accepting the internship. Indemnity or hold-harmless agreements require the school to assume responsibility not only for the actions of the intern in the workplace but also for any loss that might arise out of the internship relationship; the agreements also may require the school to defend the employing organization and pay its legal fees should the intern sue the employer. 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: Its 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.

For the full text of "Hold Harmless Agreements: A Principles for Professional Conduct White Paper," see www.nacweb.org/committee/whitepapers/hold_harmless.htm.

Can we have an "exclusive" internship program, one that, for example, is limited to racial/ethnic minorities?



The Supreme Court has ruled against "exclusive" programs, and a "minority-only" internship program would fall into this category. A better option is to diversify your intern candidate pool to encourage minority participation in your program.

Besides legal difficulties, a "minority-only" internship program—or

any other "exclusive" program that is based on race, ethnicity, sexual orientation, religion, disability, or gender—also has the potential to backfire and create ill will and image problems for your organization. (Anecdotal information from college career services counselors who work with minority students suggests that students can view exclusive programs with disdain and suspicion. "Why is there a special program just for me? Aren't I good enough for the 'real' program?" are *not* questions you want students to ask about your organization's program.)

Are my interns covered by sexual harassment, ADA, discrimination, and other laws like my 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 your other employees. You should follow the same guidelines with interns that you follow with employees.

For example, if an intern requests that you provide a reasonable accommodation to enable him or her to perform the essential functions of the

internship, you are required to do so under the Americans With Disabilities Act. You may not exclude a candidate simply because he or she requests an accommodation. (There is a slight wrinkle here: Depending on how your internship program is structured—if, for example, it is school sponsored—the intern’s school may be jointly responsible for the cost of the accommodation. Check with your legal counsel.)

Checklist “Employee” or “Trainee”

Is your intern an employee or a trainee? Here are some considerations to review to help you determine if your interns meet the six criteria set forth by the Fair Labor Standards Act (see page 1). If you can affirm that your intern meets these criteria, your intern is a “trainee.”

- _____ The work is an integral part of the student’s course of study.
- _____ The student will receive credit for the work or the work is required for graduation.
- _____ The student must prepare a report of his/her experience and submit it to a faculty supervisor.
- _____ The employer has received a letter or some other form of written documentation from the school stating that it sponsors or approves the internship and that the internship is educationally relevant.
- _____ Learning objectives are clearly identified.
- _____ The student does not perform work that other employees perform.
- _____ The student is in a shadowing/learning mode.
- _____ The employer provides an opportunity for the student to learn a skill, process, or other business function, or to learn how to operate equipment.
- _____ There is educational value to the work performed, i.e. it is related to the courses the student is taking in school.
- _____ The student is supervised by a staff member.
- _____ The student does not provide benefit to the employer more than 50 percent of the time.
- _____ The employer did not guarantee a job to the student upon completion of the training or completion of schooling.

Checklist

“Employee” or “Independent Contractor”

Is your intern an employee or an independent contractor? Below are the questions the courts will review to make a determination. Note that there are factors that are common to both “independent contractor” and “employee”; therefore, it is best to look at the relationship as a whole rather than focusing on one or two factors. The bottom line: The more your relationship with your intern looks like an employer/employee relationship, the more likely it is that the courts will view it as such.

- Is the worker required to follow specific instructions as to the means and manner of performing the work? (Yes=Employee; No=Independent Contractor)
- Is there a set amount of hours and days that the person must work each week? (Yes=Employee; No=Independent Contractor)
- Does the employer supply the office, equipment, and tools needed to accomplish the work? (Yes=Employee; No=Independent Contractor)
- Must the work be performed on the employer’s premises? (Typically, a “yes” answer would indicate the person is an employee; however, there are instances where an independent contractor would be required to perform on the premises. You would need to consider your answer to this question in relation to everything else.)
- Is the worker trained by the employer to perform the assignments? (Yes=Employee; No=Independent Contractor)
- Is the assigned work a part of the regular business of the employer? (Yes=Employee; No=Independent Contractor)
- How long does the relationship continue? (In general, the longer the relationship continues, the more the worker looks like an employee.)
- Can the employer assign additional projects to the worker? (Yes=Employee; No=Independent Contractor)
- Is the person paid in the same manner as employees, e.g., biweekly? (Again, typically a “yes” indicates the person is an employee, but there may be instances where the independent contractor is paid in the same or similar manner. Here again you will need to consider this factor in relation to all other factors.)
- Can the worker hire assistants? (Yes=Independent Contractor; No=Employee)
- Does the worker provide services to more than one firm? (Yes=Independent Contractor; No=Employee)
- Does the worker make his or her service available to the general public? (Yes=Independent Contractor; No=Employee)
- Is there a written contract between the parties delineating their rights and responsibilities? (Yes=Independent Contractor; No=Employee)
- Can either the worker or the employer terminate the relationship at will? (Yes=Employee; No=Independent Contractor)
- Is the worker making any investment into facilities or equipment, and will the person realize a profit or risk of loss? (Yes=Independent Contractor; No=Employee)

Legal Resources on NACEWeb
www.naceweb.org/info_public/legal.htm



Rochelle Kaplan, Esquire, specializes in labor arbitration, employment law, and related issues. She provides legal guidance to NACE members through regular columns in the NACE Journal, and is a frequent and popular speaker at conferences, workshops, and web seminars.

Legal information is provided as a resource and should not be construed as legal advice for any particular situation. NACE is not able to give advice about specific legal issues regarding situations particular to your organization, nor answer questions from students or alumni. For specific legal advice, please contact your organization's legal counsel.



National Association of Colleges and Employers

62 Highland Avenue
Bethlehem, PA 18017-9085
610/868-1421 • Fax: 610/868-0208
800/544-5272
www.naceweb.org