



# EMPLOYMENT AGREEMENT

1. For good consideration, between \_\_\_\_\_ (the "Employee"), \_\_\_\_\_ (the "Company"),
2. Term of Employment, the Company employs the Employee on \_\_\_\_\_, 20\_\_\_\_, unless sooner terminated.
3. Salary. The Company shall pay Employee a salary of \_\_\_\_\_ per year, payable at regular payroll periods.
4. Duties and Position, the Company hires the Employee to Devote Full Time to Company, the Employee's business of the Company, and, during this employment, the Employee shall be prohibited from making personal investments in any type of business that requires active involvement in the operation of said company.



## Employment Law Issues For Internships

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# Employment Law Issues For Internships

Internships have become a rite of passage for college and university students. They are often viewed as the gateway to admission into more prestigious graduate schools and more financially rewarding employment. Many institutions of higher learning have incorporated internships into their undergraduate curriculum.<sup>1</sup> These internships provide students with practical experience and enhance the educational process. The explosion of student internships, closely followed by an equally explosive number of lawsuits brought by interns against their sponsoring companies, however, has created a perilous legal condition for both employers and educational institutions who sponsor or host internship programs.

This Section will discuss employment law issues for organizations that host student interns or internship programs. Its analysis will focus primarily on federal employment law issues, but will contain references to state law where applicable. It will highlight potential issues that organizations should be aware of and how they should structure their internship programs in such a fashion so as to decrease the potential likelihood for violating federal or state employment laws. Finally, this Section will examine the conflict among courts and governmental agencies regarding the test to be applied in determining whether an intern is, in fact, an employee, eligible to receive the protections afforded him or her under federal, state and local laws.

<sup>1</sup> This chapter was prepared by Michael R. Brown, a Partner in the Boston office of Seyfarth Shaw LLP, who gratefully acknowledges the invaluable assistance of Vincent Domestico, a legal intern from Northeastern University Law School.

<sup>1</sup> For instance, both Northeastern University and Endicott College in the Boston, MA area condition graduation upon the successful completion of internships of varying lengths.

## EMPLOYEE V. VOLUNTEER

Is a paid student intern an “employee” of the organization hosting an internship program? Is an unpaid student intern a “volunteer” or a “trainee”? Does the intern attain a different status by virtue of the educational component of an internship program? It should be emphasized that the analysis of employee status varies depending upon the particular facts and circumstances of each potential situation. Also, the ultimate determination will depend in large part upon what federal or statute employment law is being applied to the particular intern and the internship program.

Although the U.S. Supreme Court has declined to rule on the issue to date, the U.S. Department of Labor (“DOL”), in Fact Sheet #71, published in April 2010, has established a six-part test to determine whether a student intern is an employee for the purposes of the Fair Labor Standards Act (“FLSA”).<sup>2</sup> Under this test, a student intern will not be considered employee unless all of the following six factors are satisfied. The factors are as follows: (1) the internship, even though it includes actual operation of the facilities of the employer, is similar to that



which would be given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the interns do not displace regular employees, but work under their close supervision of existing staff; (4) the employer that provides the training receives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded; (5) the intern is not necessarily

<sup>2</sup> While this test has been consistently applied by the DOL in its opinion letters and utilized by courts in wage and hour actions, it holds no precedential value. Moreover, this test is applicable to the employee status of an intern under the FLSA, and does not address state wage and hour claims, workers’ compensation claims or other state employment issues.

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entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand the intern is not entitled to wages for the time spent in the internship.

As noted earlier, the DOL has taken an all or nothing approach with respect to the application of its six part test. Thus, a student intern is an employee of the host organization unless the student satisfies each of the six criteria. The DOL has consistently stated (and some courts have agreed), that no single prong of the test is by itself dispositive. For example, the fact that a student intern and the host organization have an understanding that he is not entitled to a job at the completion of the internship does not preclude a finding of employee status. An employer must determine whether an internship satisfies each and every prong of the test. A finding of “employee” status means, at the very least, that the intern must be paid minimum wage and overtime pay for hours worked over forty in any workweek.

Paid interns are almost always considered to be employees of the host organization because paid employment would not satisfy the sixth prong of the DOL’s six part test (that the intern understands that he/she is not entitled to wages for the time spent in training). In contrast to the unpaid intern, the paid student intern accepts and works at the internship with the explicit understanding that he or she will be compensated for the time spent working for the host organization.

The fourth prong of the DOL test provides that an intern cannot provide an employer with any immediate advantage or benefit. For instance, the DOL was asked in 1994 about an internship program assisting in the daily management of hostels. The DOL was asked whether the arrangement whereby students received a free room (approximately \$15 a night) in exchange for 25 hours of work per week would violate the FLSA for failure to pay minimum wage to the students. The DOL stated that “[b]ased on the information in your letter, it is our opinion that criterion number 4 discussed above would not be met since it is apparent the employer derives an immediate advantage from the duties performed by the interns in question. Therefore, such interns would be considered employees under the FLSA and subject to its minimum wage and overtime pay provisions.”

A corollary to the fourth prong of the test is the third prong which precludes the intern from displacing regular employees. This prong of the test can be particularly troublesome for a host organization that relies heavily on its interns to do tasks that otherwise would fall to regular employees. An organization should be particularly careful if it readily admits or states that, without its interns, it would have to hire regular employees to do the jobs undertaken by interns. Such statements or actions will be sufficient to fail the fourth prong of the DOL test and therefore expose the employer to liability for violations of the FLSA.

Thus, an organization should pay particular attention to the third and fourth prongs of the DOL test. If it can be demonstrated that the employer gains an immediate benefit from the activities of the students, or if the intern displaces regular employees, the student will be considered an employee under the FLSA and thus subject to the wage and overtime laws contained therein. As discussed more fully below, it would be good practice to have the student intern sign an agreement acknowledging satisfaction of each prong of the DOL test. While this practice will not necessarily shield the hosting organization from liability under the FLSA, it will certainly strengthen the organization’s defense against a potential FLSA violation assuming the acknowledgement is truthful. Additionally, the organization should emphasize to prospective interns in any application materials that they are not employees of the organization. Such language would serve to put the student on notice of the internship status, and including such language in solicitation materials would alert the school about the classification.

Companies who are hosting internship programs and are uncertain whether such programs would create a potential liability under wage and hour laws, may want to consider asking the DOL for guidance regarding their particular programs by requesting an opinion letter from the agency. Although the opinion letters issued by the DOL on such subjects are not considered to be persuasive authority by courts, they are given deference in determining the question of whether the employer willfully violated wage hour law. In May 2013, for example, the President of the American Bar Association (“ABA”), Laurel G. Bellows, appealed to the DOL

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to allow law firms to offer unpaid internships to law school students in order to provide them with hands-on experience to successfully compete in the dwindling legal job market. In September 2013, the DOL advised that: if the tasks involved in the internship provide training similar to what would be received in an educational environment; if the internship doesn't displace regular employees; and if the intern does not provide the law firm with an immediate advantage, the internship is permissible. The DOL stressed that, in order for the legal internship to pass muster, the firm must provide the law students with written assurances that they would receive educational experience related to the practice of law in a clinical program and be assigned exclusively to pro bono matters that don't generate a fee for the firm. This clarification, however, has limited value to most for-profit host organizations whose internships do not allow for the segregation of tasks in the same efficient and well-documented manner as hours worked in a law firm. In a 2010 *New York Times* article regarding internships, the acting director of the DOL's Wage and Hour Division, Nancy J. Leppink, stated: "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."

There is currently an ongoing dispute among the federal circuits relating to the amount of deference to be paid to the DOL's six-factor analysis, with the Supreme Court refusing to weigh in on the question. In *Kaplan v. Code Blue Billing and Coding, Inc.*, an FLSA claim brought in Florida's Southern District by former interns placed into externships by MedVance Institute's medical billing program, the court dismissed the intern's claims, finding them to be non-employees and not eligible for the FLSA's protection. The

Court of Appeals for the Eleventh Circuit affirmed the dismissal. The interns subsequently petitioned the U.S. Supreme Court to offer guidance on the proper test to be applied in evaluating whether interns should be classified as employees for the purposes of state and federal wage and hour laws and the amount of deference to be given the DOL's six factor analysis. On November 12, 2013, the Supreme Court denied the certiorari petition, leaving the federal circuits free to continue to apply different, and often conflicting standards to the intern/employee analysis.

## WAGE ISSUES

In light of the startling increase in the number of lawsuits brought by unpaid interns, both employers and educational institutions should be aware that student internship programs could raise a number of issues regarding potential violations of wage and hour laws. The FLSA mandates employers to pay their employees a regular wage that is at least equivalent to the federal minimum wage. If the state minimum wage is higher than the federal minimum, the higher wage must be paid. In direct contrast to this requirement, a significant percentage of student internships are unpaid. Does



having student interns work without receiving pay constitute a violation of the FLSA and other state wage and hour laws? Also, even if the host organization does not pay the student intern, are they nevertheless employees? Even if an unpaid student intern clearly understands that he or she is not entitled to wages for the time spent in training, does the work provided to the host organization provide more benefit to the host organization than training to the intern, thereby allowing the unpaid student intern to acquire employee status under the FLSA and state wage and hour laws.

The Second Circuit Court of Appeals has become the most recent battleground for the conflict among federal courts in



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evaluating the protections to be afforded interns under wage and hour statutes. In June 11, 2013, Judge William H. Pauley of the Southern District of New York granted the motion to certify a class of unpaid interns in *Eric Glatt v. Fox Searchlight Pictures*. The unpaid interns, who had worked on production of the film *Black Swan*, claimed that they did not fall under the trainee exception promulgated by the DOL, because they were asked to perform routine tasks that would otherwise have been performed by regular employees. Noting the conflict among courts with respect to the interpretation of the trainee exception to the FLSA, the court chose to apply a “totality of the circumstances” standard to its evaluation of whether the interns would be considered covered employees under the FLSA. Weighing all of the factors, and giving clear deference to the DOL’s six-factor test, the court denied the defendant’s motion to dismiss the class, thereby allowing the interns to proceed as a class under the FLSA as “employees.”

Prior to the court’s decision in *Glatt*, however, Judge Harold Baer of the Southern District of New York had reached an entirely opposite result in *Wang v. The Hearst Corporation*, a lawsuit brought by a class of unpaid interns working for the magazine publisher. Like the interns in *Glatt*, the *Wang* interns contended that they were required to perform routine tasks that could have been performed by regular employees, a contention that was supported by internal emails that instructed the staff to use unpaid interns rather than paid messengers to save costs. Contrary to Judge Pauley’s admonition about the irrelevance of the interns’ understanding that they would not be paid for their labor, Judge Baer considered, as an important factor, that the interns “understood prior to their internship that the position was unpaid.” With facts that were almost identical to those in *Glatt* and giving limited deference to the DOL’s six-factor test, Judge Baer ruled that the interns could not, as a matter of law, prove that they were employees under the FLSA and the New York Labor Law (“NYLL”) and denied the interns’ motion for class certification under the NYLL.

The attorneys representing the intern classes both in *Glatt* and in *Wang* appealed to the Second Circuit for an interlocutory order for clarification as to how cases brought by interns should be evaluated since the recent trend of interns filing

suits began. On November 27, 2013, the Second Circuit granted the motions to pursue the interlocutory appeals of the two cases, acknowledging the confusion over the test for evaluating whether interns should be more properly classified as employees.

The confusion reigning in the federal courts is similarly found in state court cases. Due to the differing tests for determining employee status under state wage and hour laws, it is crucial that an organization evaluate its jurisdiction’s statutory and common law to determine whether interns are considered employees and thus subject to state minimum wage and hour laws. For example, the Massachusetts Department of Labor (“Mass. DOL”) was called on to answer a related question.<sup>3</sup> The Mass. DOL stated that “employment through the NU [Northeastern University] co-op program is work under a training program in an educational institution, therefore, it is not an ‘occupation’ covered by the Massachusetts Fair Wage Law.” Unfortunately, the Mass. DOL did not on its own initiative answer the more important question for our purposes; i.e. is a student intern an employee for purposes of Massachusetts wage and hours laws. Nonetheless, the Mass. DOL’s analysis appears to lean towards a finding of non-employee status for student interns. Thus, it is possible that the Mass. DOL (or other state DOL), would find that a school sponsored program such as Northeastern’s co-op program precludes a student intern from seeking protection under the Massachusetts wage and hour laws. Additionally, the Mass. DOL opinion letter does not address the impact of compensation in its analysis. The Mass. DOL’s failure to address this issue does not clarify whether student interns are entitled to be paid minimum wage. As a result, it appears possible that an organization may compensate its student interns working under a school-sponsored internship program at a rate less than the Massachusetts minimum wage.

<sup>3</sup> Unfortunately the requesting organization asked the wrong question. Rather than asking whether co-op students were employees under Massachusetts wage and hour laws, it asked whether the student interns were professionals, and as such whether they were exempt from the Massachusetts Minimum Fair Wage Act.

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## **WILL AN AGREEMENT PROTECT THE EMPLOYER?**

Employers often require employees to sign an employment agreement. This agreement establishes the particulars of employment including compensation, sick pay, vacation pay, and duration of employment. Employees are often hired with the expectation that they will remain employed for an indefinite period of time. In contrast, student interns are usually engaged for a discrete, well defined period of time. These periods may range from a few weeks to many months and are often tied to the university's academic calendar. Must these employers have the school (if school sponsored) or the intern sign an agreement establishing the terms and conditions of his/her engagement?

While departmental agencies and courts have not spoken directly this specific issue, it would appear to be good practice for an organization to have an agreement with the student intern and with a school (if a school sponsored internship) to document the understanding among all three parties relating to the academic content of the internship. This agreement should establish the parameters of the internship, including its measurable goals. It should establish the degree of supervision the organization will have over the training and work of the student intern and, most importantly, it should establish the expectation, or lack thereof, regarding the payment of wages and/or the availability of permanent employment.

School sponsored internships and externships have become increasingly common and popular in recent years. As mentioned earlier, some undergraduate and graduate institutions condition graduation upon the successful completion of multiple internships of varying lengths. It is likely that these internships will require greater supervision and evaluation than non-school sponsored internships.

Moreover, these agreements may specify the minimum number of hours a student is required to work and minimum amount of wages a student intern must be paid.

Despite the benefits of a well-designated internship agreement, however, neither an educational institution nor an employer should lull itself into believing that an internship agreement will effectively immunize it from legal challenge. In *Glatt v. Searchlight Pictures Inc.*, the court rejected the employer's argument that the interns had a clear understanding that they would not be paid. The court concluded that the Fair Labor Standards Act ("FLSA") does not allow employees to waive their entitlement to wages and that "[T]he purposes

of the Act require that it be applied even to those who decline its protections." Even a well-constructed internship agreement, willingly signed by an intern, may not adequately protect an employer from liability for unpaid wages under the FLSA and under most state wage and hour laws.

## **WORKERS COMPENSATION**

Another potential employment law issue involving interns is whether they are employees for purposes of a state workers' compensation act.<sup>4</sup> For example, the New York Workers Compensation Act governs all workers' compensation claims and is the exclusive remedy for employees who suffer work related injuries. Thus, if under New York law the interns are employees, then they are covered under the Worker's Compensation Act. However, much as the employee/

<sup>4</sup> Workers' compensation is a matter of state law, and therefore this section will address selected workers' compensation statutes and cases involving student interns as examples only. This section should not be considered exhaustive and it is encouraged that an organization determine whether an intern is covered under its workers' compensation policy or if an intern is covered under the school's policy.



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volunteer distinction was important under the FLSA, it is likewise crucial in determining the applicability of a state workers' compensation statute. If the interns are deemed to be volunteers, then they are not covered under a workers' compensation scheme and are not precluded from suing the organization for tort claims arising from their injuries sustained at work. This presents serious potential liability issues to host organizations who may be faced with claims for damages far in excess of the state's workers' compensation scheme.

For interns earning college credit or fulfilling graduation requirements, does the school's workers' compensation plan cover the student? While there is little case law and authority addressing this issue, a few courts have addressed the applicability of a workers' compensation statute to an intern for school credit. For example, in a case arising in Colorado, the court had to determine whether a paid student intern in a university-sponsored program was deemed an employee of the hosting organization for purposes of workers' compensation. The court held that the student was an employee of the organization for workers' compensation purposes and moreover that unpaid interns were also covered under the school's workers' compensation plan.

In a New York case, the court addressed whether an unpaid student intern was covered under the school's workers' compensation plan. This court also held that the unpaid student intern was covered under the school's workers' compensation coverage, stating that where "necessary training and experience gained ... is required for graduation and licensure, training is a thing of value and the equivalent of wages." While these cases are not dispositive on this issue, they do represent one avenue available to courts when confronted with these situations. As school sponsored

internships become more common this issue will attract more court attention. While the answer is not fully clear, it is likely that a paid student intern will qualify as an employee under the various state workers' compensation acts and that even unpaid interns may qualify under their schools' policies.

## VICARIOUS LIABILITY

May the actions of a student intern expose a host organization to liability? Vicarious liability may be imposed for the illegal acts of a company's employees committed within the course of their employment. Vicarious liability hinges on whether the individual is an employee or independent contractor. While the law of each jurisdiction will vary, the law in Massachusetts, for example, would render most interns

employees for the purposes of employer liability because an internship tends to be highly supervised relationship. Thus, although an intern may not be considered an employee under the FLSA and Massachusetts Wage and Hour Laws, that intern may nonetheless be considered an employee for liability purposes under state law.

Even if the interns are not considered to be employees, an organization may be still be

vicariously liable for negligence in selecting the intern or in directing the intern's work. For example, if an organization does not perform a background check for an intern, it may be vicariously liable for its negligence in selection. This can be a particularly worrisome situation for financial institutions, healthcare providers, or educational institutions hosting interns. Given the prevalence of student internship programs, it is likely that an issue involving vicarious liability will arise in the near future. As of now, it is yet another unresolved area in the law involving student interns.

## DISCRIMINATION STATUTES

In light of the uncertain employment status of interns, may



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an intern nevertheless assert a federal or state discrimination claim against the host organization? The answer to this question may depend on the jurisdiction in which the internship is located.

On October 3, 2013, Judge P. Kevin Castel of the Southern District of New York ruled on state law claims of hostile work environment, quid pro quo sexual harassment and retaliation brought by a former unpaid intern working for a satellite television company. In *Wang v. Phoenix Satellite Television, Inc.*, the plaintiff, Lihuan Wang brought claims under the New York State Human Rights Law (“NYSHRL”) and the New York City Human Rights Law (“NYCHRL”), claiming that her supervisor subjected her to a sexually hostile environment by making unwanted advances during a business trip and failed to hire her for full-time employment when she refused his advances.

In an issue of first impression in the Second Circuit and in New York courts, the court concluded that an intern is not eligible for the protections provided under either the city or state anti-discrimination statutes. Citing the Second Circuit’s decision in *O’Connor v. Davis*, where the court dismissed a Title VII gender discrimination claim brought by an intern, the court concluded that, as under federal law, “compensation is a threshold issue in determining the existence of an employment relationship” under New York State and City law as well. The court firmly rejected Ms. Wang’s contention that the NYCHRL, which affords claimants broader protections than both its federal and state counterparts, would recognize an unpaid intern as an employee for the purposes of anti-discrimination protection.<sup>5</sup>

The result would have been quite different if Ms. Wang’s internship had been located in Oregon rather than in New York. On June 13, 2013, Oregon Governor John Kitzhaber signed into law a bill extending employment discrimination protection to interns under Oregon’s employment

<sup>5</sup> The court did, however, allow Ms. Wang to pursue her claim that she had been denied full time employment in retaliation for her rejection of her supervisor’s advances under a “failure to hire” theory that can be brought by both employees and applicants under both New York state and city laws.

discrimination laws for workplace violations including sexual harassment, unlawful discrimination and retaliation for whistle-blowing. The definition of “intern” for the purposes of eligibility for this extended protection tracks the test for unpaid interns who are exempt from the FLSA, thereby providing protections to those individuals who are expressly excluded from federal protection.

Because of the unsettled state of both federal and state law and responding to the sustained increase in intern lawsuits, a number of corporations, including publishing giant Conde Nast, have announced their decision to eliminate internship programs for 2014.

## SUMMARY

While internships of all kinds have become more popular, there are many legal issues that are still unanswered. Until we have more answers, a hosting organization should be aware of the distinct likelihood that an intern will be considered an employee under federal law and thus should be paid minimum wage and overtime, will most likely be eligible for workers’ compensation if injured on the job and could impose vicarious liability on the host organization.

As noted, these issues, and others, are subject to both federal law and the law of the state of the host organization. Hopefully, there will be more definitive answers in the years to come.

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# INTERN BRIDGE

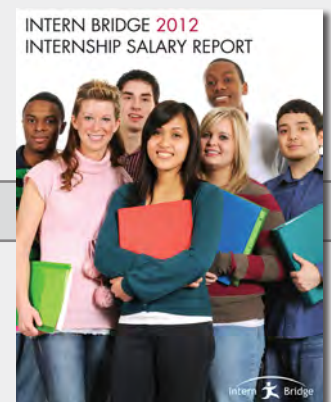
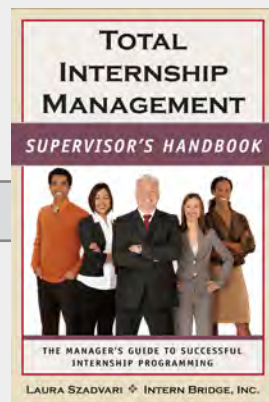
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We also the leading authority on the development of entry-level talent. Through the authoring, printing, and distributing leading internship management and college recruiting materials such as **Total Internship Management: The Employer's Guide to Building the Ultimate Internship Program** and the **Total Internship Management Workshop DVD**, as well as **hundreds of hours of recorded webinars**. We are also proud to offer free white papers and other resources on our website created by leading industry experts. The publishing team is capable of preparing a range of orders as little as one product to bulk orders and discounts for thousands.

At **Intern Bridge**, we view experiential education as a way to create a pipeline of highly talented students for organizations, foster relationships between higher education and employers, and infuse local economic development initiatives. It is our strong belief that all organizations can benefit from an effectively planned and properly structured internship program. We are the internship experts, and our goal is to create exceptional new internships and improve existing internships throughout the nation.



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