

# Recruiting and Hiring Interns

## Legal Considerations For Recruiting and Hiring Interns


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# Recruiting and Hiring Interns

**Historically, unpaid internships have given college students and young professionals a chance to get their feet wet and network in their chosen field. Companies often considered these non-monetary benefits compensation enough. However, many internships do not actually qualify to be unpaid, a fact that can create serious compliance obligations.**



Hosting unpaid interns, depending on the situation, could expose a business to significant liability.

- If your organization is a non-profit charitable entity or in the public sector, interns may count as volunteers, in which case they might not need to be paid. However, there are situations in which even non-profit internships may not qualify as unpaid.
- If you run a for-profit business, determining the applicability of unpaid internships is more complicated. Unless an internship meets specific (and complex) criteria for an exception or exemption, any work performed is subject to minimum wage, overtime pay, and other requirements.

This guide provides insights into key potential pitfalls of recruiting and hiring interns, along with some best practices for navigating the process in the context of Fair Labor Standards Act (FLSA) compliance.

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\* **IMPORTANT NOTE:** This article addresses federal requirements. Applicable state and local wage and hour laws may impose additional or different requirements. In addition to FLSA compliance, employers may also have obligations with respect to interns under other federal, state, and local employment laws, such as, complying with all applicable anti-discrimination and anti-harassment laws, among other statutes.



# A Primer on FLSA & Internships

**Employers and interns historically have seen internships as a win-win — employers can get low-cost labor and interns can get valuable experience. It's true that internships can be mutually beneficial, but in most cases employers must comply with minimum wage, overtime pay, and other requirements under the FLSA unless unpaid interns are not employees for purposes of the FLSA.**



## A Brief Overview of the FLSA

Introduced in 1938, the FLSA is a federal law which regulates minimum wage, overtime, equal pay, record-keeping, and child labor. This law applies to most employees, including many interns. If your organization utilizes interns, or is thinking about doing so, it's very important to know how and when this law applies.

## Unpaid Intern or Employee: The Primary Beneficiary Test

The U.S. Department of Labor (DOL)'s [Primary Beneficiary Test](#) is used to determine if an internship program can be unpaid or not. These seven factors are used by the DOL to determine whether an intern is, in fact, an employee for purposes of the FLSA. The DOL considers the following factors:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise or expectation of compensation, express or implied, suggests that the intern is an employee.
2. The extent to which the internship provides training that would be similar to what would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

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6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The DOL will review each case individually using the primary beneficiary test. It's a flexible test, with no single factor being determinative. So, unless an internship fully meets every component of this seven-part test, it may not qualify as an unpaid internship.

## Practical Considerations

There are limited circumstances in which an internship can be unpaid. Internships can be of great benefit to employers and student workers alike, but it's important to remember that, with few exceptions, these workers should, in fact, be paid employees.

## FLSA Compliance Highlights

If an internship does not qualify to be unpaid under the Primary Beneficiary Test, that doesn't mean your company can't have interns. It just means that you need to pay them in a manner that [complies with the FLSA provisions](#), as well as any applicable state and local wage and hour requirements. Justworks' [Guide to Paid internships](#) provides a helpful overview of how to move forward. Key highlights to consider:

**Minimum Wage**

Internships that do not meet the Primary Beneficiary Test must be paid at least minimum wage. As of 2021, federal minimum wage is \$7.25/ hour. Many states, counties, and municipalities have a higher minimum wage that would apply based on where the intern is performing work for your company.

**Overtime**

Most, if not all, intern jobs do not qualify as exempt from overtime. This means that interns who work over 40 hours in a workweek will need to be paid overtime, as with any other employees. Again, it's important to note that state and local overtime pay requirements may vary.

**Child Labor**

Do you work with interns who are under 18 years old? If so, you'll need to comply with the [FLSA's child labor provisions](#), which are designed to protect minors in the workplace. Some states have additional child labor standards and age limitations vary from state to state.

**Record Keeping**

Employers are required to keep records on wages, hours, and other items as specified in the FLSA [recordkeeping requirements](#) (and applicable state and local laws), such as the employee's home address and occupation.



# Potential Consequences of Unpaid Internships

**It's understandable that people might think hosting unpaid interns is good business. However, it's crucial to remember that internships aren't about free labor; they're about educational experiences. Internships that are classified as unpaid but do not meet the Primary Beneficiary Test pose risks that can be quite costly for your company.**



- Incorrectly classifying internships as unpaid could result in back pay, liquidated damages, punitive damages, interest, and attorneys' fees and costs. Claims could be brought as a class action on behalf of all unpaid interns during the relevant time period.
- If it is determined that an unpaid intern should really have been a paid employee, your company may also be liable for workers' compensation contributions (and injuries), unemployment insurance and benefits, and the state and federal taxes that were not withheld.
- On top of the financial consequences, your company could face bad publicity, investigations by the DOL, and civil fines. The legal costs of defending such claims can be astronomical.

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\* The bottom line is that it's important to follow the law when it comes to internships. If there is any question as to whether an internship qualifies as unpaid, the best — and often the least costly — option may be to pay at least minimum wage and comply with all relevant employment laws.



# Key Considerations and Tips for Hiring Interns

As you've probably gathered, when it comes to recruiting and hiring interns, there are right ways and wrong ways. This chapter will give you tips to help with your internship programs. Considering the following criteria can help you make wise compliance decisions about internships.

**For-profit vs. Nonprofit**

Unpaid interns for nonprofit charitable organizations (where the intern volunteers without expectation of compensation) are more likely permissible.

**Primary beneficiary**

Think through the seven factors the DOL uses to determine whether an employer legally has to pay an intern or trainee. Seek legal advice if you are unsure of whether your approach to internships meets the criteria.

**Offer college credit**

One way to help ensure educational value is to coordinate with a school to offer course credit instead of pay. However, your internship program is still required to meet the factors of the Primary Beneficiary Test.

In July of 2015, the court upheld [Hearst and Fox Searchlight unpaid internships](#) because of their educational value. Of course, the court battle was an expensive one.

**To hire or not to hire**

Not having unpaid interns may be seen as the head-in-the-sand approach, but it's also a safe one. You can avoid the to-pay-or-not-to-pay conundrum by simply doing away with the practice of having interns.

**Pay interns**

The easy (and comparatively cheap) way to avoid future intern woes is to simply pay interns at least minimum wage for the work that they do for your organization, and follow all FLSA requirements.

**Remote interns**

If you plan to employ [remote interns](#), be sure you're aware of — and comply with — all state requirements specific to where the intern will be working. These may include more than wage and hour requirements, such as workers compensation, state or local tax filings, break time, and more.



## Key Tip

A good way to ensure that your intern recruitment process complies with the law is to have it mirror your selection and hiring process for regular employees as closely as possible.

## Internship Hiring Best Practices

Armed with the tips above, you're on your way to [hiring unpaid interns the legal way](#). However, there is still more to consider. Incorporate the following best practices into your approach to hiring unpaid interns.

- Never promise or suggest a paid position will be waiting for the intern once the internship is complete. Not only does promising an intern a paid job jeopardize the legal status of your unpaid internship program, it may create a contractual agreement to do so.
- It's also important to avoid stating or even implying that your company prefers to only hire entry-level employees from among former interns.
- Be clear about the internship ground rules and expectations in advance. Ideally, create an internship agreement that is signed by both interns and their academic or internship advisors at school. Be sure to have the agreement reviewed by legal counsel in advance.
- Before you even begin recruiting, make sure you have details like compensation, school credit, supervisors, schedules, selection and performance criteria, and internship lengths worked out.

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- Prepare an intern-specific job description that explicitly maps out the duties, projects, and other expectations associated with the internship.
- Follow equal opportunity laws in recruiting and hiring interns.
- Cover interns under your worker's compensation policy to limit liability exposure. Companies are almost always required by law to provide workers' compensation coverage for **all** interns, whether they're paid or unpaid.



# Justworks Can Help

By now, you're probably aware that recruiting and onboarding unpaid interns can be risky. Without the proper procedures, you open your business up to government investigations, expensive lawsuits, and damaging PR. Trying to comply with applicable laws and regulations without proper procedures or systems in place can be difficult.

That's where [Justworks](#) comes in. We can help simplify the process of hiring quality talent, including interns. While we don't provide legal advice, we do provide HR best practices and resources to help our customers comply with employment requirements throughout the United States. In other words, we help you get back to what you do best: growing your business and creating a great place to work.



## Want To Get Started?

Call: (844) 749-7785 • Email: [hello@justworks.com](mailto:hello@justworks.com) • Visit: [justworks.com](https://justworks.com)

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