

# Unpaid Summer Internships: A Boon To The Bottom Line Or A Complication For The Company?

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Now more than ever, students need work experience that sets them apart from their peers. As a result, companies are flooded with applications from eager high school, college, and even graduate students looking to pad their resumes with a summer internship. Many applicants are even willing to work for free. For companies trying to increase productivity in the current economic climate, or even those motivated to help students facing a bad job market, an unpaid summer internship may seem a win-win solution; the intern gets some front line experience and the company gets a worker without spending a dime.

Not so fast! Private sector, for-profit companies may violate the Fair Labor Standards Act ("FLSA") and/or applicable state wage and hour laws by accepting volunteer services from unpaid interns. A company's obligation to pay interns largely depends on the nature of the internship, the role the intern will play at the company, and the supervision the intern will receive. The United States Department of Labor ("DOL") recently issued fact sheet guidance to help for-profit businesses determine whether they may accept unpaid services from summer interns, or whether they must pay these students as regular employees in accordance with minimum wage and overtime laws.

## The Obligation To Pay An Intern Turns On Whether The Intern Is An "Employee"

The FLSA broadly defines "to employ" to include "suffer or permit to work." Accordingly, private sector for-profit companies are required to pay all individuals whom they "suffer or permit to work" in accordance with the minimum wage and overtime laws. The U.S. Supreme Court has recognized, however, that those who work for their own advantage or benefit are not entitled to the minimum wage and overtime protections of the FLSA. Accordingly, whether a company must pay its interns depends on whether those interns – as opposed to the company – will be advantaged by the internship. The DOL fact sheet issued this month specifies six factors that must apply to a particular internship before it may be unpaid.

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### The Six-Factor Test

For an internship to be excluded from the FLSA minimum wage and overtime laws, it must meet all six of the following factors:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

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#### A. An Internship Teaches and Benefits the Intern

The more academically structured a placement is, the less likely it is to be considered employment. An internship program that involves the students in real-life situations and provides them with a practical educational experience related to their course of study will be considered educational in nature. Indeed, the intern's receipt of academic credit for completing the internship will weigh heavily against employment status. The character of the skills acquired and duties performed by the student also weigh into the education or work



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analysis. Skills applicable in multiple work environments are likely to indicate an educational environment, while the performance of functions geared toward the company's particular business are likely to be deemed employment related. Similarly, when the company's business depends on the student's performance and directly benefits from it, the placement is more akin to employment.

#### B. An Intern is Not a Temporary Employee

A company cannot use an unpaid intern to supplement or replace its reg-

ular workforce. In other words, if the company would have hired an additional employee if not for the intern, that intern is entitled to payment. On the other hand, if an intern participates in an activity such as job shadowing, but performs little or no actual work, she will not be considered an employee.

#### C. An Internship is Not an Audition for Employment

A true internship will span a predetermined time period, and not resemble a "temp to perm" employment relationship. Indeed, an employer may not use an unpaid internship placement as a trial period for employment, and an unpaid intern should have no expectation or entitlement to a job at the end of the internship.

### Conclusion

Companies must analyze carefully any planned summer internships to determine whether its interns must be paid under both federal and state wage and hour laws. A company may not use unpaid interns to relieve the workload of current employees or to supplement the workforce on a temporary basis. Unless the internship experience clearly will be educational for the intern, and not more than marginally beneficial to the company, employers are well advised to treat summer interns as employees subject to the wage and hour provisions of FLSA and applicable state laws.

## Partners Notes

### Lowenstein Sandler Wins Motions To Dismiss In Multidistrict "Off-Label" Litigation Case

Lowenstein Sandler has won motions to dismiss amended complaints filed by the third-party payors and consumer plaintiffs in multidistrict litigation class actions involving oncology drugs Temodar and Intron. Lowenstein represented defendant Schering-Plough (now Merck) in the putative class action, which sought damages for the alleged "off-label" marketing of the two drugs. In June 2010, the federal district court for the District of New Jersey dismissed the class action complaints with prejudice, finding that the plaintiffs failed to allege injury sufficient to confer Article III standing.

The Lowenstein Sandler team included Gavin J. Rooney, Alan S. Modlinger and Miguel Alexander Pozo.

#### Lowenstein Sandler Receives Top Ranking For 2010 Chambers USA Guide

Lowenstein Sandler PC has once again received top honors for a number of its practice areas in *Chambers USA: America's Leading Lawyers for Business (2010)*. The firm's Corporate, Litigation, Bankruptcy/Restructuring and Environmental practices all maintained their tier-one standings for another consecutive year. Lowenstein's Corporate practice has been top-ranked since the guide's inception in 2003. The firm's Litigation practice has also been consis-

tently top-ranked, earning tier-one status for the seventh consecutive year. Lowenstein Sandler's Intellectual Property, Employee Benefits & Executive Compensation, Labor & Employment and Real Estate practices were also recognized for excellence in the 2010 *Chambers USA* guide.

In addition to its practice group recognition, 27 Lowenstein Sandler attorneys were individually recognized in the 2010 *Chambers* guide:

**Bankruptcy:** Bruce Buechler; Sharon Levine; Kenneth Rosen.

**Corporate:** Peter Ehrenberg; Robert Minion; Anthony Pergola; Steven Siesser (New York); Raymond Thek; Alan Wovsaniker; and Edward Zimmerman.

**Employee Benefits and Executive Compensation:** Andrew Graw.

**Environmental:** Michael Dore; Richard Ricci; Michael Rodburg.

**IP:** David Harris; Mary Hildebrand; Mark Kessler.

**Labor and Employment:** David Wissert.

**Litigation – General Commercial:** Robert Chesler; Douglas Eakeley; David Harris; Gregory Reilly; Lawrence Rolnick; Jeffrey Wild.

**Litigation – White Collar:** Michael Himmel; Robert Kipnees; Christopher Porrino.

**Real Estate:** Edward Hunter.