

# New York State Department of Labor Issues Opinion Letter on Internships

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**M**any employers have started to think about their 2011 summer internship programs. New York employers should be aware that on December 21, 2010, the New York State Department of Labor (NYSDOL) published a detailed opinion letter on whether an internship (including, but not limited to, a summer internship) may qualify for an exception to New York State's minimum wage law.

## ARE INTERNS EXEMPT FROM THE STATE MINIMUM WAGE LAW?

The New York State Minimum Wage Act, New York State Labor Law §§ 650-665 (the Minimum Wage Act or the Act), applies to all individuals who meet the statutory definition of "employee" codified at Section 651(5) of the Act. The Act carves out 15 categories where individuals are excluded from coverage and, therefore, are not considered "employees." A worker or individual who is not in an employment relationship is excluded from coverage under the Act. To determine the existence of an employment relationship with respect to interns or trainees, the NYSDOL reviews the totality of the circumstances, primarily using the six criteria relied upon by the U.S. Department of Labor, as well as five *additional* factors. In order to be exempt from the protections of the Minimum Wage Act, an internship must satisfy all 11 criteria. The rigorous test is designed to ensure that interns are protected from minimum wage law violations.

## INTERN/TRAINEE EXCEPTION TEST

The following 11 factors make up the NYSDOL's test:

1. *The training, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.*

This criterion does not require that the internship be directly administered by an educational or vocational institution. Rather, it will likely be satisfied when the internship is structured around classroom instruction,

and provides skills that would be applicable in multiple employer settings. Offering academic credit also will demonstrate training similar to training provided in an educational environment.

For example, an internship program that would require participants to attend weekly classroom sessions with extensive job shadowing and a great deal of supervision will likely satisfy this requirement. The more the internship provides participants with skills that can be used in multiple employment settings (rather than specifically for one company), the more likely the internship will satisfy this criterion.

2. *The training is for the benefit of the intern.*

Any benefit conferred upon the company providing the internship must be merely incidental to the benefits provided to the intern. The receipt of academic credit for participating in the training program, for example, demonstrates evidence of the beneficial nature of the program to the intern.

3. *The interns do not displace regular employees and any work they may do is under close supervision.*

Interns must not be used in lieu of hiring new employees. This criterion may be satisfied through an internship program that maintains close and constant supervision by regular employees, where the intern performs minimal or no productive work, emphasizing the educational nature of such a program.

4. *The employer that provides the training derives no immediate advantage from the activities of the trainees or students and, on occasion, operations may actually be impeded.*

This criterion helps to ensure the beneficial nature of the program to the intern. Any advantage that an employer may derive from the intern's participation in an internship program should be purely incidental to the supervision and training provided.

5. *The trainees or students are not necessarily entitled to a job at the conclusion of the training period and are free to take employment elsewhere in the same field.*

The internship program should be of a fixed duration (which is communicated to the intern prior to the internship) and not connected with any offer of employment or promise of a permanent position at the conclusion of the internship. The purpose of this criterion is to ensure that employers are not utilizing unpaid internships as a trial period to test out individuals seeking employment. The NYSDOL advises that if an intern is placed with the employer for a trial period with the expectation that he or she will be hired on a permanent basis, that individual would generally be considered an employee.

6. *The trainees or students have been notified, in writing, that they will not receive any wages for such training and are not considered employees for minimum wage purposes.*

This written notice must be clear and provided to the intern prior to the commencement of the internship.

The following five criteria are used by the NYSDOL in addition to the prior six factors utilized by the U.S. Department of Labor. As previously mentioned, New York has more rigorous requirements, and all 11 exclusionary criteria must be met in order for an intern to be exempt from minimum wage requirements.

7. *Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed.*

The NYSDOL will deem an individual to have sufficient knowledge and experience in the industry if "he or she is proficient in the area and in all activities to be performed by the trainee, and has adequate background, education, and experience to fulfill the educational goals and requirements of the training program." Additionally, the trainer must be sufficiently competent in providing training as demonstrated by previous experience training employees or students. Thus, an individual who supervises the intern

must have previous supervisory experience.

8. *The trainees or students do not receive employee benefits.*

The receipt of employee benefits conclusively demonstrates that an employment relationship exists, and those who receive employee benefits cannot be considered interns. Examples of such benefits include:

- Health and dental insurance;
- Pension or retirement credit;
- Employer-sponsored trips or parties; and
- Discounted or free employer-provided goods and services.

9. *The training is general, so as to qualify the trainees or students to work in any similar business, rather than designed specifically for a job with the employer offering the program.*

The skills offered in the internship program must be useful and transferable to any employer in the field, and not specific to the company offering the internship program. Any training that is specific to the company and its operation will be considered conclusive evidence of an employment relationship.

10. *The screening process for the internship is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program.*

This criterion helps to ensure that the employment process is separate and distinct from the internship selection process and that interns are not under the impression that the internship program will conclude with a job position. (See criterion #5.) The internship application should appear more similar to that of an educational program rather than an employment application.

11. *Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers*

*may indicate that qualified graduates may be considered for employment.*

The purpose of this criterion is to avoid an intern's misunderstanding of the nature of the internship program and/or an employer's misrepresentation of the program. The NYSDOL advises that advertisements should not describe internship programs as employment opportunities, or state that the employer will provide stipends or wages. However, employers may indicate that qualified graduates of the internship programs may be considered for employment.

#### WHAT EMPLOYERS SHOULD DO NOW

Since both the U.S. Department of Labor and the NYSDOL have ramped up their efforts in the investigation and enforcement of minimum wage laws, including the intern/trainee exception, employers must determine whether their internship programs meet the preceding 11 criteria. Otherwise, interns will need to be paid at least the minimum wage.

In particular, in order to meet the Minimum Wage Act exception, an employer should make sure that the program:

- Benefits the intern, not the employer;
- Is general to the industry, not particular to the employer;
- Is similar to what would be provided in an educational environment;
- Does not have requirements or a screening process similar to those of employees at the company; and
- Is advertised as an educational experience, not as employment.

The intern:

- Does not displace any employees; and
- Works under the close supervision of individuals who are knowledgeable and experienced in the activities being performed.

The employer:

- Does not gain a benefit from the internship;
- Does not guarantee employment at the conclusion of the internship;
- Does not provide an intern with employee benefits; and

- Informs the intern, in writing, that he or she is not an employee and will not receive compensation due to the internship. ☺

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