

LEGAL Q & A

By Mark B. Rhoads, and Helen L. Konrad

Q. *What are the legal issues surrounding international students and unpaid internships?*

A. *Recently, the U.S. Department of Labor (DOL) announced that it will more rigorously investigate “unpaid internship” programs to determine if the work performed is legally “volunteer” work, or whether the work should be compensated. Contrary to many news reports, the DOL rules governing unpaid internships are not new, and have been in place for many decades. However, until recently, enforcement of these rules by the DOL has not been a priority.*

With the new DOL emphasis on enforcement, it is important for employers, college career service personnel, and students to understand the rules governing volunteer work and unpaid internships. This article summarizes those rules and discusses the ramifications for international students who engage in improper unpaid internship programs.

Unpaid Internships and The International Student: Reason for Concern

Over the years, many employers and many students (U.S. citizens and international) have engaged in unpaid internship programs that are in flat violation of DOL rules and the requirements of the Fair Labor Standards Act (FLSA), which prevents exploitation of workers by U.S. employers. For students who are U.S. citizens or permanent residents, there is no risk to the student if the student engages in an improper unpaid internship program. Although the employer may be required to pay back wages to the

“unpaid” intern, there is no penalty to the U.S. student.

Foreign students, however, risk violating their visa status and risk deportation if they engage in an improper unpaid internship program. As a result, foreign students need to know the rules about unpaid internships.

Determining Whether an Unpaid Internship Is Proper

Are your international students or interns at risk of violating their immigration status by engaging in a volunteer internship program? The answer requires the following analysis:

- Does the internship program satisfy DOL rules regarding “volunteer work”? If so, then the work is legally “voluntary” and is not considered employment. International students can engage in this type of internship without pay, and without any type of additional work authorization.
- If the program does not satisfy DOL rules regarding volunteer work, then the work is “employment.” In this case, an

international student can take the internship only if he or she has proper foreign student work authorization (i.e. F-1 optional practical training or curricular practical training; or J-1 academic training). If the student engages in work that does not satisfy DOL rules regarding volunteer work, and does so without proper work authorization, the student is engaging in unauthorized employment and is out of status, even if the student receives no pay.

The key point is this: Whether an international student in F-1 or J-1 status requires work authorization is not governed by whether the student is paid. An international student may need proper F-1 or J-1 work authorization even for unpaid work. Only if the work is properly “volunteer” unpaid work under DOL rules can the international student perform the work without proper work authorization.

DOL Rules Governing Unpaid Internships

The general rule under the FLSA is that, if an individual works under

the direction and control of a company or organization, and provides a beneficial service for the company or organization, the individual is supposed to be paid at least the federal minimum wage for the service.

There are exceptions to this rule, but the exceptions are very limited. For example, an individual can provide truly volunteer services for a charitable organization (such as working a church bake sale, helping the homeless, and so on). But what about volunteer training or internship programs with employers?

Many employers, students, and student employment administrators assume that “volunteer” training or internship programs, by which students volunteer their services for a company or employer to gain practical work experience, are also an exception to the FLSA rule requiring payment. In other words, many employers and students assume that, because it is volunteer work, it is not employment and therefore 1) does not have to be paid, and 2) if the student is an international student, no employment authorization is necessary.

However, this is a dangerous and frequently incorrect assumption. If, after a DOL audit, the DOL concludes that the internship was not properly volunteer work, but was in fact employment requiring pay, the foreign student may have violated status by working without authorization.

The DOL Wage and Hour Division has established a six factor test for determining whether work is legitimately volunteer training (for which no pay or work authorization is required) or whether it is employment (for which pay and work authorization is required). If all six of the following criteria apply, the trainees are not employees within the meaning of the FLSA, and are properly classified as unpaid volunteers:

1. The training, even though it includes actual operation of the employer’s facilities, is similar

to that which would be given in a vocational school;

2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under close supervision;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion the employer’s operations may actually be impeded (this is the most problematic issue in many cases);
5. The trainees are not necessarily entitled to a job at the completion of the training period; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Note that all six factors must be satisfied. This is not an easy test to apply. For example, a student works for the summer as an intern at a financial institution. If the student shadows regular workers, observing operations, sitting in on meetings, and so forth, that is probably permissible unpaid training. But what if the intern does research into financial markets, which is then included in a report to senior management? Is the employer “deriving an immediate advantage” from the work? Arguably, yes.

The DOL Wage and Hour Division issues opinion letters to employers that request guidance regarding “internship programs.” These letters have set forth certain scenarios:

- As a rule, DOL will not consider students as employees when they are involved in education or training programs that are “designed to provide students with professional experience in the furtherance of their education and training and are academically oriented for their benefit.” (“Wage and Hour Opinion Letter,” January 28, 1988). (In other words, the program has an academic component.)

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- In a letter dated May 10, 1983, the DOL determined that students who received college credits for performing an “internship . . . which involves the students in real-life situations and provides the students with educational experiences unobtainable in a classroom setting” would not be considered employees.
- Other examples of exempt student trainees include interior design students working in exchange for an opportunity to receive supervised practical design experience as part of the school curriculum (Wage and Hour Opinion Letter, March 31, 1970); paralegal students earning credits for working under attorney supervision (“Wage and Hour Opinion Letter,” March 8, 1977);

gam-bit (*noun*) - any maneuver by which one seeks to gain an advantage.

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college or university has a “practical experience” requirement. There may be other acceptable programs, but each program must be evaluated pursuant to the DOL’s six factor test. The safe rule is: If the international student trainee will provide the employer with beneficial service, even if unpaid, then proper work authorization may be required.

Work Authorization for International Students

What is proper work authorization for an international student? That depends on the student’s status. International students in the United States can attend university in any one of a number of immigration statuses:

- Students using “dependent” visas (for example, dependents of spouses or parents who are in the US in a work-authorized visa status, such as A, G, H-1B, E-1/E-2/E-3, L-1, O-1). In general, students attending school using a dependent visa are ineligible to work, unless the work is voluntary under the six factor test.
- Students in F-1 status (which is a typical “student” status for students enrolled in an academic program).
- Students in J-1 status (for “exchange visitors” engaged in designated programs at a U.S. university).

and pharmacy students working for no pay as part of instruction required by the state for obtaining a license (“Wage and Hour Opinion Letter,” April 11, 1973).

These examples seem to indicate that volunteer work is acceptable for training programs in which the educational curriculum at the

F-1 and J-1 students are not permitted to engage in employment without the requisite authorization. For F-1 students, the work authorization options are as follows:

- **On-Campus Employment:** F-1 students maintaining their status may work on campus for up to 20 hours per week while school is in session and full time during school vacations, as long as they intend to register for the following term. The work must be on campus, or at an off-campus location educationally affiliated with the school. No U.S. Bureau of Citizen and Immigration Services (CIS) authorization is required for this employment.
- **Curricular Practical Training (CPT):** F-1 students can be approved by a school’s designated school official (DSO) to work for a specific off-campus employer for a specific time period as CPT. In order to qualify for CPT, the work must be an integral part of the established curriculum in the student’s course of study. CPT can be approved either for part-time (20 hours or less per week) or full-time employment (for example, in a cooperative situation). DSO approval, and notation of that approval to the student’s SEVIS record and Form I-20, are required prior to beginning CPT.
- **Optional Practical Training (OPT):** OPT is another common way for F-1 students to work as employees or trainees. OPT allows the student to work for any employer in a job related to the student’s degree program. Most students in F-1 status are eligible for a total of 12 months of OPT during their degree program. OPT can be part time while school is in session, or full time during breaks. OPT used during the degree program is subtracted



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from OPT time available after the degree is completed.

- **Economic Hardship:** An F-1 student who has maintained F-1 status for an academic year and is in good academic standing may apply for off-campus employment based on “economic hardship.” Economic hardship refers to financial problems caused by unforeseen circumstances beyond the student’s control. The student must apply to CIS for authorization to work based on economic hardship.
- **Designated International Organizations:** Certain organizations are permitted to hire F-1 students for work experience (United Nations, IMF, World Bank, and so forth).

For J-1 students, the options are:

- **On-Campus Employment:** J-1 students may engage in part-time employment on campus for no more than 20 hours per week while school is in session and full-time during breaks and holidays. The employment must be authorized in writing by the university foreign student advisor before it begins and can be for no longer than 12-month increments at a time.
- **Employment Related to Scholarships, Assistantships, and Fellowships:** This employment requires written approval in writing by the university DSO in advance of commencement of employment. If the J-1 program is sponsored by an agency other than the school, then the student will need to obtain from that agency written authorization for employment. The J-1 student can work no more than 20 hours per

week while school is in session and full-time during breaks.

- **Unforeseen Economic Circumstances:** A J-1 student may be authorized for off-campus employment when necessary because of serious, urgent, and unforeseen economic circumstances that have arisen since acquiring J-1 student status. This type of J-1 student employment is subject to the 20 hour per week maximum, while school is in session.
- **Employment Pursuant to Academic Training for J-1 Students and Post-Docs:** J-1 students are eligible for academic training during or after completing their education in the U.S. (18 months for most J-1 students; up to 36 months for post-doctoral research). This is similar to F-1 optional practical training; however, unlike F-1 students, the J-1 students engaging in academic training do not require formal employment authorization from the CIS. However, the J-1 student will need a written offer letter noting that the employment is directly related to their field of study. The DSO must also note the employment dates in the individual’s International Student and Exchange Visitor Program record.

Conclusion

Given the difficulty and ambiguity of the DOL six factor test, the safest rule for international students should be that, if a student is providing a beneficial service to an employer, whether paid or unpaid, the student should obtain proper authorization to work. 

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Note: This column provides general information regarding work options for foreign students. It is not intended as legal advice and does not establish an attorney/client relationship. Each situation is unique, and students and employers should consult their legal counsel to determine work eligibility.