

MINNESOTA LAWYER



How To: Considering unpaid help? Check the law

By: Nancy Crotti March 6, 2014 0

Can't afford to pay a summer associate? They typically earn \$12 to \$17 an hour, depending on the sophistication of the practice and whether they must pay for parking, according to Nancy Lochner, director of career services at Hamline University Law School in St. Paul.

You might consider an unpaid intern, but beware: There's more going on here than just Paid v. Unpaid, and it could lead to a federal case: Jill Intern v. Your Law Firm.

How serious is this? Read up on Walling v. Portland Terminal Co. Bernice Bird, in the Feb. 28, 2012 Cornell HR

Review, writes that in its landmark ruling on this case, the U.S. Supreme Court established that student interns may not receive minimum wage and overtime protection unless they are considered student-employees by contractual obligation. The court created the "Walling factors" to create three classes of trainees or interns:

- Those who must be paid minimum wage.
- Those who may be paid subminimum wages.
- Those who need not be paid at all.

If the Department of Labor determines that an employer violated the Fair Labor Standards Act, it will first attempt dispute resolution, Bird writes. "However, if no resolution is attainable, the affected party must file a claim in a federal district court," she concludes.

The DOL allows for unpaid interns at for-profit businesses if the companies ensure their tenure will be educational. For-profits must meet the following test posed by the Fair Labor Standards Act:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment.
- The internship experience is for the benefit of the intern.
- The intern does not displace regular employees, but works under close supervision of existing staff.
- 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.
- The intern is not necessarily entitled to a job at the conclusion of the internship.
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Yes, you read that fourth item correctly. Having an intern may impede your firm's operations. Interns are there to learn from you, not work for you.

"You can't just bring in an intern and have them do what you would pay someone else to do," explained Emily Cooper, a partner in the Minneapolis firm Cooper & Reed. Cooper gave a CLE talk on the topic in 2012. "If you can pay somebody to do it, you shouldn't have an intern."

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By virtue of being official employees, summer associates can do the types of work that other paid employees do. Under the federal Fair Labor Standards Act, unpaid interns cannot be required to do the same types of work as employees, because their primary purpose is to learn. You (or another attorney or paralegal) have to teach them.

This may be more time-consuming than it's worth, according to Cooper, who specializes in Social Security disability law and sliding-fee family law.

Her firm had its interns certified as student attorneys and trained by Tubman Family Crisis & Support Services to handle order for protection cases. Each intern became the attorney of record for such a case, supervised by a law partner.

"It ended up being a lot of work for us because the students didn't know what they were doing," Cooper said. "The students had lots and lots of questions."

Law firms may accept paralegals or law students for internships, whose tenure at the firm will be determined by their schools. Solo practitioners and small firms should carefully consider if they will have the time it takes to train an intern to fulfill school credit requirements, Cooper advised.

Some law schools require second- and third-year students to do externships. Hamline looks at these as opportunities for students to learn how to be good employees, according to Lochner.

Students should be alert to the possibility that they're being asked to do work that's outside the scope of their internship. They needn't worry if they've done anything to violate the Fair Labor Standards Act, Lochner said. The burden is on the employer, she said.

Cooper believes her firm benefited somewhat from having interns, and said it was nice to have them around.

"I think the interns probably got more out of it than we did. That's the point," she said. "That also makes it a really difficult kind of program."

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