Every year at this time, the ThinkHR Live hotline starts to get questions about hiring summer interns and determining what interns should be paid — or not paid.

Internships offer students opportunities to gain real-world experience and hands-on career development. The practical work experience derived from internships allows students to develop contacts, identify areas of interest and gain an edge in an increasingly competitive job market.

As an employer, hiring interns gives you access to highly motivated and educated young workers and allows your junior managers to gain more experience training and supervising. Some students might apply to work in your organization just for the experience with no expectations of receiving a paycheck.

This seems like a perfect solution for both intern and employer, right? You can get some much-needed work done and provide students with real-life business experience, but there are potential legal and administrative pitfalls that many employers overlook. By identifying and managing these risks, you and your company can avoid liability, employee relations issues and administrative hassles.

More interns will be hired for pay, even as the issue is debated.

According to the National Association of Colleges and Employers (NACE) Class of 2015 Student Survey, 58.8 percent of 2015 graduating seniors had internships in the for-profit, private sector, which is governed by the federal Fair Labor Standards Act (FLSA) regulations.

Enforcement efforts have increased regarding unpaid internships, and many experts advise that employers in for-profit businesses should pay interns at least the minimum wage to avoid potential scrutiny.

The idea of giving interested students meaningful work assignments is not the issue. The real issue is about pay.

Even within higher education where programs are evaluated based upon the success rate of placing students with businesses, career-services professionals say students should be paid at least minimum wage. Part of their rationale is that when employers ask that students receive college credit for their work in order to avoid having to pay them, this demand puts students from low- or middle-income backgrounds at a disadvantage because students have to pay for that course credit — a cost that can add up to several thousand dollars.
Others suggest that not paying students for their labor is an ethics issue. After all, they are working alongside regular employees — often doing some of the same tasks — and not being compensated for that work. This may send the message to employees that their work, or time, is not valued. Further, customers or the community may see you as an employer taking advantage of these students, which is not the message you want to portray.

There are a number of issues surrounding internships, one of which is whether the FLSA even applies to interns. The FLSA does not define “intern,” nor does it provide an exemption from minimum wage or overtime for them. But this does not necessarily mean that student interns must be compensated. The FLSA acknowledges that not all persons who perform some duties for an employer subject to the FLSA are “employees,” and thus entitled to compensation in accordance with wage and hour laws. Most HR and legal practitioners, however, take the view that an intern, by definition, is a professional in training and employers using an intern’s services should adhere to the standards set forth under the FLSA.

If you are struggling to decide whether or not to pay your interns, review the following FLSA requirements (generally considered the FLSA “six-factor test”) to determine whether the training you would provide meets the “learner/trainee” rules:

1. The training must be comparable to that given at a vocational school. (For example, the intern could pay to receive the training somewhere else.)
2. The training must benefit the student.
3. The student would not replace a regular employee. (The intern cannot fill in for someone on a short-term disability or out for the day.)
4. The employer does not immediately benefit from the student’s activities. (This requirement is especially troublesome for employers because the company does expect to receive a benefit from the intern’s labors. Practically, this means the intern cannot deliver mail, sort files, file papers, organize a person’s calendar, conduct market research, write reports, schedule interviews or any other job that assists the employer in any way in running their business.)
5. There is no promise of a job following the training.
6. Both the employer and the student understand that no wages will be given for the training period.

Review the Department of Labor fact sheet regarding student interns for more detailed information. In addition to the federal rules, states may have additional conditions that employers must satisfy. Failure to offer training meeting these mandates for unpaid status could lead to employer penalties, including back wages and possible overtime pay to both present and former interns.
Hiring interns can be a great business decision, both for the employer and the student. According to a 2015 survey by NACE, “The primary focus of most employers’ internship and co-op programs is to convert students into full-time, entry-level employees (70.8 percent and 62.6 percent, respectively).” While the student gains valuable hands-on experience with the company, the employer benefits from the intern’s new perspectives and fresh ideas.

Our best advice is that if there is any doubt, pay the student. Recently there has been an increase in the number of lawsuits filed by unpaid interns claiming back wages and possible overtime under both the federal FLSA and state laws. If the job training program primarily provides professional experience that furthers a student’s educational goals, a student may not be considered an employee entitled to compensation. However, if students are doing work usually done by employees and are not receiving training and close mentoring, they should be paid wages.

What Should You Pay?

You have reviewed the FLSA six-factor test listed previously, checked your state law requirements, and determined that your summer students are really employees entitled to some compensation. The next issue is FLSA compliance as to whether the intern is exempt or nonexempt. To be considered exempt, the intern must be paid a salary or guarantee meeting the FLSA salary threshold (or higher state amount) and meet the “duties test” for at least one of the FLSA’s white collar exemptions. Practically speaking, in the vast majority of cases, interns will not be exempt, either because they do not meet the duties test for any of the white collar exemptions or because they are paid less than the statutory minimum salary, or both.

Employers must comply with federal labor laws and with state laws that are more restrictive, so apply your state’s wage-hour requirements to the intern as you would to any other employee. Assuming your interns are nonexempt, they must be paid at least the minimum wage (federal or state, whichever is higher), receive overtime when they work more than 40 hours in a workweek in most states or eight hours in a day in some states, and be subject to your state’s meal and rest break rules.

If you are uncertain how much to pay interns, you can consult with your local high school or college placement center, where counselors may be able to give you some direction on what other employers in your area are paying. Pay levels for internships are typically determined by a student’s year in school and field of work. The 2015 NACE survey found that companies expect to pay bachelor’s degree-level interns an average of $17.20 per hour, up from the 2014 average of $16.35 per hour. Pay for high school teens is typically minimum wage.
What About Offering Health Benefits?

Some employers choose to offer benefits coverage to interns, and applicable large employers may be required to offer group health insurance benefits to avoid potential penalties under the employer shared responsibility provision of the Affordable Care Act (ACA). The ACA’s employer shared responsibility provision (often referred to as “play or pay” or the “employer mandate”) generally applies only to employers that averaged at least 50 full-time and full-time equivalent employees in the prior calendar year. Small employers are exempt.

Under the ACA rules, interns would be defined as “seasonal employees” when hired into positions for which the customary annual employment is six months or less. The ACA employer mandate may be triggered for seasonal employees (interns) depending upon the length of the internships and the number of hours the interns are expected to work (at least 30 hours per week/130 hours per month or more), your company size, and the measurement method(s) you use to count employees for purposes of the mandate. These rules are complex because they are designed to protect an employee’s eligibility for health coverage while also offering the employer different methods for avoiding potential penalties. Be sure to work with your broker and legal counsel to review the application of the rules based on the specifics of your benefit plans and employee work schedules.

Offering benefits to interns enhances your employment brand and reputation in college placement offices and with the labor marketplace overall. The downside may be extra administrative work to communicate the benefits options, handle enrollment and manage COBRA, although this usually is minimal. In our experience, interns often are students or young adults who have coverage through their parents or other sources, and many choose not to enroll.

Finally, before extending health benefits to interns or temporary employees, review the eligibility provisions in your benefit plan documents. You may need to work with your carrier and broker to amend the plan to extend eligibility to interns.
Practical Tips for Hiring Interns

Before hiring an intern:

- Develop an intern policy and define the job carefully so that both parties are clear about job duties and expectations. This reduces misunderstandings that can lead to lawsuits. The policy should define the basic internship program, such as compensation structure (or spell out that interns will not be paid), benefits (if applicable), eligibility requirements and the intern’s at-will status. Make sure the policy does not establish what could be viewed as a legally binding contract. Never infer the promise of employment for a specified period.
- Define supervisory roles and supervisor/intern evaluations. Reliable supervision is the key to preventing problems, including injuries, discriminatory actions and performance failings. Make sure all supervisors know who is overseeing the work of each intern.
- If possible, obtain formal documentation from the intern’s college or high school explaining the educational relevance of the internship if it will earn the student credits.
- Ask whether the school provides liability insurance to cover damage caused by a student. Many schools carry the coverage. In addition, if your company has employment practices liability insurance, check whether it extends to interns.

Once your intern is on board:

- Onboard your intern by covering the company’s vision, mission and values, orienting him or her to your company’s products and services and providing a roadmap of how to get things done within the company. Cover the important company policies that all employees, regardless of status, must follow.
- Confirm pay and benefits (if applicable) and explain pay dates.
- Make sure you comply with child labor laws that may affect the age groups of your interns.
- Limit teen interns’ hours. If your internship program reaches out to high schools, the FLSA’s or state’s child labor provisions may curb students’ hours and duties.
  - In most cases, children age 13 and under are off limits to employers, except for certain odd jobs, like newspaper delivery or babysitting.
  - Youths ages 14 and 15 can work outside of school hours in certain nonhazardous jobs, but their hours are limited to three on a school day, 18 in a school week, eight on a non-school day and 40 in a non-school week. Further, they can work only between 7 a.m. and 7 p.m.; the nighttime limit extends to 9 p.m. in summer.
  - The FLSA says 16- and 17-year-olds can work unlimited hours, but not in certain hazardous jobs.
  - Once workers reach age 18, they are free to work any job for unlimited hours.
For more details on child labor laws, visit the Department of Labor Youth Labor site. Check your state labor laws, which may require stricter child labor standards, and check for other requirements, such as whether your state requires work permits or proof-of-age certificates for minors.

Please remember to:

- Manage interns as closely as employees, if not more so. Your company can be held responsible for the actions of any workers, including unpaid interns, while they are performing work for you. Courts will view interns like employees, as “agents” of your company.
- To ensure interns are paid correctly, they must maintain time records. To avoid the possibility of FLSA violations, companies who find themselves in the position of “employer” should ensure their interns accurately capture and are paid for all of their hours of work.
- Check benefits eligibility requirements to comply with the ACA and your benefit plan rules (if applicable).
- Apply your company’s workplace policies to interns, for both consistency and good positive employee relations reasons. Interns who are considered “employees” have the same legal protections as your regular employees, and even unpaid interns may be able to pursue claims under Title IX, which bans sex discrimination in “any education program,” or pursue common-law job-bias claims, such as infliction of emotional distress.

Hiring summer students is a great way to help our youth learn what it takes to be successful in business while helping us get special projects completed. We recommend that you plan ahead and structure your program so that your summer internship program is a great experience for everyone.