

## **NYSDOL Fair Labor Standards Act**

11 criteria that determines if an employer/employee relationship exists, all criteria must be met

1. Training, even though it includes actual operation of the employer's facilities, is similar to training provided in an educational program.
2. The training is for the benefit of the intern (student).
3. The intern does not displace regular employees and works under close supervision.
4. The activities of trainees or students do not provide an immediate advantage to the employer. On occasion, operations may actually be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period and are free to take jobs elsewhere in the same field.
6. The trainees or students are notified, in writing, that they will not receive any wages and are not considered employees for minimum wage purposes.
7. Any Clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity.
8. The trainees or students do not receive employee benefits.
9. The training is general, and qualified trainees or students to work in any similar business. It is not designed specifically for a job with the employer that offers the program.
10. The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose. The screening only uses criteria relevant for admission to an independent educational program.
11. Advertisements, postings, or solicitations for the program clearly discuss education or training, rather than employment, although employers may indicate that qualified graduates may be considered.

## **USDOL Wage and Hour Division Section 64c08: Students with Disabilities**

The USDOL and USDOE have developed guidance for students with disabilities participating in work based learning experiences. They have determined that students with disabilities who participate in unpaid work experiences are covered under the school's liability insurance and are not subject to the employer's Worker's Compensation Insurance.

7 Criteria that determines if an employer/employee relationship exists, all criteria must be met

1. Participants are individuals with physical and/or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable and who, because of their disability, will need intensive ongoing support to perform in the work setting.
2. Participation is for vocational exploration, assessment or training in a community-based work site under the general supervision of rehabilitation organization personnel, or in the case of a student with a disability, public school personnel.
  - Each student with a disability shall have an Individualized Education Program (IEP) which lists the needed transition services established for the exploration, assessment, training, or cooperative vocational education components.
  - Each participant in a community-based rehabilitation organization program must have an Individual Plan for Employment (IPE) which includes a statement of needed transition services established for exploration, assessment, or training

components. In the past these plans were called Individual Written Rehabilitation Plans (IWRP)

3. Community-based placements must be clearly defined components of individual rehabilitation programs developed and designed for the benefit of each individual.
4. Documentation will be provided to Wage and Hour (WH) upon request that reflects that the individual is enrolled in the community-based placement program, that this enrollment is voluntary and that there is no expectation of remuneration. However, the information contained in the IEP or IPE does not have to be disclosed to WH. The individual with a disability and, when appropriate, the parent or guardian of each individual must be fully informed of the IEP or IPE and of the community-based placement component of the plan.
5. The activities of the individuals with disabilities (participants) at the community-based placement site do not result in an immediate advantage to the business. Factors that would indicate the business is advantaged by the activities of the individual include:
  - Displacement of regular employees
  - Vacant positions have been filled with participants rather than regular employees
  - Regular employees have been relieved of assigned duties
  - Participants are performing services that, although not ordinarily performed by employees, clearly are of benefit to the business
  - Participants are under continued and direct supervision of employees of the business rather than representatives of the rehabilitation facility or school
  - Placements are made to accommodate the labor needs of the business rather than according to the requirements of the individual's IEP or IPE
  - The IEP or IPE does not specifically limit the time spent by the participant at any one site, or in any clearly distinguishable job classification.
6. While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours spent in each activity, as a general rule, an employment relationship is presumed not to exist when each of the three components does not exceed the following limitations. These limitations apply during any one school year:
  - Vocational explorations – 5 hours per job experienced
  - Vocational assessment – 90 hours per job experienced
  - Vocational training – 120 hours per job experienced
7. Individuals are not entitled to employment at the business at the conclusion of the IEP or IPE. However, if an individual becomes an employee, he or she cannot be considered a trainee at that particular community-based placement unless in a different, clearly distinguishable occupation.