



Law Society of Scotland Guidance on Internships

1. Introduction

This guidance sets out good practice and, where applicable, the legal obligations which apply to hiring an intern within the legal profession in Scotland. The aim of this guidance is to promote fair access to internships and remove misunderstandings regarding the payment and treatment of interns.

Within this guidance the term intern applies to summer student placements and other types of work placements within the Scottish legal profession. This covers law graduates or law students who are looking for professional work experience within a law firm or within an in-house legal team.

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2. Background and wider context

Many law students seeking a traineeship will undertake some form of work experience or summer student placement with law firms and/or in-house legal departments. Many of the medium to large Scottish practice units use their summer placement programme as part of their traineeship recruitment process. Therefore, the ability to secure an internship is, for many, an important if not vital step in the ultimate route to qualification with the firm of their choice. For others, an internship can provide valuable vocational experience, both enabling them to differentiate their skills from other candidates in the shortlisting and recruitment process, and to decide whether the practice of law is in fact their preferred way forward.

At the same time, the prevailing economic conditions, and the uncertainty regarding the number of traineeships being offered has resulted in law graduates facing intense competition for jobs, leading to an increased willingness to seek unpaid alternatives to traineeship positions.

In the last couple of years, as a result of media interest in unpaid internships and HMRC action, according to some reports, the number of unpaid internships being advertised is now reducing. Nevertheless there remains a degree of confusion regarding applicable legal rights and widespread variations in how interns are treated.

In addition, as a result of the Law Society work on Fair Access to the Profession, the Society is looking at every stage of the route to qualification to ensure that it is as fair as possible – this includes matters relating to traineeship recruitment. The recommendations of that report, signed off by the Law Society's Council in January 2014, included publishing this guidance; working with an organisation called 'Adopt an Intern' to promote high-quality internships; and publishing recruitment guidance for practice units.

3. Government intervention

Both the Scottish and the Westminster governments have chosen to intervene in this area, although both have stopped short of legislation.

The issue first gained national prominence in 2009 when the final report by the Panel on Fair Access to the Professions ("The Fair Access Report"), (a body of experts chaired by Allan Milburn) concluded that the internship process across the professions was not sufficiently transparent.

The Fair Access Report stated that positions were often gained according to parental connections rather than on merit, and graduates from poorer backgrounds were not able to afford spending several months as an unpaid intern. Concern was also raised that a significant proportion of internships did not provide sufficiently high quality work experience.

As a result, the Gateways to the Professions Collaborative Forum was formed. In July 2011 it published a [Common Best Practice Code for High Quality Internships](#) ("the Best Practice Code"). The Best Practice Code does not have legal force and is a statement of good practice, but explains that internships should be paid; and provides guidance on recruitment, treatment and supervision.

In 2011 the Scottish Government introduced an [Adopt an Intern](#) scheme which provides funding and support to employers to enable them to pay their interns. This has resulted in over 500 internships having been provided across many industries.

4. The Law Society of Scotland's position

Good quality paid internships are endorsed by the Law Society of Scotland as a useful tool for graduates and students to gain work experience and vocational skills. There are many ways to offer an internship but a good quality internship would have the following features:

- openly advertised positions;
- fair and transparent recruitment and selection processes;
- a comprehensive introduction to the organisation;
- a quality learning experience;
- compliance with the national minimum wage;
- regular feedback; and
- a review at the conclusion.

Further details regarding these points are set out below.

5. Who is an intern?

There is no standard legal definition of an intern. It is somewhat of a term of art but a very useful working definition is contained in the Best Practice Code, such that an internship arises "*where an individual works so as to gain relevant professional experience before embarking on a career. Well managed, high quality internships should be beneficial to both employer and intern.*"

Prospective applicants are normally university students or in some cases school pupils interested in gaining some practical insights on what a future career in law might look like. As explained in the introduction, summer student placements would also come within this definition.

6. Entitlement to the National Minimum Wage

Legally, if an intern fulfils the definition of a "worker" then they should be paid the national minimum wage (NMW).

Categories of interns who are entitled to the NMW:-

(a) the worker

Under section 230(3) of the Employment Rights Act 1996, a worker is someone "who has entered into or works under

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;"

The key elements of this definition are an obligation to provide personal service and the creation of mutual obligations between the parties. As such it covers a broad range of working relationships, from casual workers and in many cases consultants who are hired for specific engagements.

The Westminster government has published [NMW Guidance](#) for employers covering work experience, internships and placements, and specifically includes advice on when an individual is entitled to be paid the NMW. This user-friendly guidance contains a number of case studies to explain who is and is not a worker.

If an intern is expected to come into work on specific days, perform tasks directed towards the benefit of the business and comply with instructions then there is every likelihood that they are a worker.

The worker's contract can be written, oral or implied. Even if the individual signs a written agreement accepting that they are a volunteer and therefore not entitled to be paid, the agreement alone would not be sufficient to override the reality of the situation, if they were in fact a worker. This is one area of the law where courts may disregard the express terms of a contract if it does not reflect the reality of the situation. As such, employers cannot hide behind a label to avoid payment of the NMW.

Examples from case law:-

In **Vetta v London Dreams Motion Pictures Ltd (ET/2703377/08)** the claimant was hired as an assistant to the art director on an "expenses-only" basis. The expenses were paid by the respondent. The employment tribunal agreed that the Claimant was a worker and therefore entitled to receive salary calculated at NMW rates plus payment for any accrued holiday she had not taken.

In **Hudson v TPG Web Publishing (2011)** an unpaid intern won her tribunal claim against the respondent after she spent weeks working for the My Village website carrying out a variety of tasks.

Despite working every day at specific times, eventually being given the responsibility to recruit other interns and being put in charge of a team of writers, the respondent did not pay her because they viewed her as an unpaid intern. The tribunal disagreed, ruling that she was, in fact, a worker, and ordered payment of wages calculated at NMW rates and accrued holiday pay.

Categories of interns who are not entitled to the NMW:-

(b) individuals who workshadow

Individuals who workshadow are not likely to fall within the NMW legislation since these individuals only observe and are not performing work. However the updated NMW [Guidance](#) issued by the Westminster government, draws a distinction where there is a promise of work at the end of the internship. The Guidance states that "An intern is classed as a worker and is due the National Minimum Wage if they're promised a contract of future work."

(c) students on work experience placements

Although there is an exception in the NMW Regulations such that student work experience placements of less than one year are exempt from the NMW, the exemption only applies if the work experience is part of the student's course. It does not therefore cover the situation where a third or fourth year law student works in a law firm over the summer in the hope of getting a traineeship.

(d) pupils of compulsory school age or under

School work experience schemes, where the pupils are under compulsory school age (i.e. generally 16 years old) are exempt from the NMW. That does not mean that pupils aged above 16 would be entitled to be paid the NMW, as they would most likely fall within the general workshadowing definition. Law firms who do offer work experience to pupils above the school leaver age, will not benefit from the automatic exemption, meaning that they must take care to ensure that the pupil is simply workshadowing, and not working, in which case they may be entitled to the youth rate of the NMW. Employers should also be aware that additional obligations apply in terms of Health & Safety legislation where they employ young workers or offer work experience. The HSE has produced [Guidance](#) on employing young workers which also covers work experience

(e) volunteers

Genuine volunteers have no right to be paid the NMW, and sometimes the legal position relating to their status can be confused with interns. There is a raft of case law where individuals have sought to challenge the lack of legal rights which apply to volunteers, and who have sought to argue that they are in fact workers, to obtain legal rights particularly around protection from discrimination.

Yet the courts have maintained this distinction between workers and genuine volunteers where there are no binding legal obligations. Accordingly, genuine volunteers are not workers and have no protection from anti-discrimination legislation or eligibility to receive holidays.

The essential point about the status of a volunteer is this lack of binding relations. Volunteers can walk away at any time from a workplace with no questions asked. They are under no obligation to perform work or come to work every day. To state and emphasise the obvious, the relationship is entirely voluntary.

(f) voluntary workers

The NMW Regulations contain a specific exemption for "voluntary workers" if they work for a charity, voluntary organisation, associated fund raising body or statutory body. Clearly this exemption is not going to apply to law firms, although could apply to a law student volunteering to work for a charity.

Outwith these sectors, an individual can still volunteer to work for a commercial organisation, but they would not fall under the specific NMW exemption. If they were wrongly labeled as a volunteer they could still be entitled to be paid the NMW. If a law firm expects an intern to come into work every day in accordance with an agreement and perform tasks under supervision then they are not volunteers, as there is a binding legal relationship.

Interns are entitled to be paid the NMW which is (at 11th July 2014) £6.19 per hour (if aged 21 and over) if they are properly viewed as working for an employer. In addition, as a worker under the Working Time Regulations they are entitled to rest breaks and the accrual of statutory holiday pay for the period of their placement.

7. Rates of NMW as of 11th July 2014 (the rates are generally amended in October each year)

Year	21 and over	18-21	Under 18	Apprentice*
1 October 2013	6.31	5.03	3.72	2.68
1 October 2014	6.50	5.13	3.79	2.73

***This rate is for apprentices under 19 or those in their first year [of the intern placement].*

Can an employer pay their intern the NMW apprentice rate?

A short term internship undertaken by a law student or graduate is unlikely to satisfy the definition of "apprentice" for the purposes of the National Minimum Wage legislation.

There are two elements to the definition of apprentice:

- The individual should be under 19 years old, or if over 19 they should be in the first 12 months of their apprenticeship, and
- The individual should be employed under a contract of apprenticeship

It is highly unlikely that an internship agreement would satisfy the requirements of a contract of apprenticeship. Most internships are for a relatively short duration, and are unlikely to satisfy the legal test for a common law contract of apprenticeship which states that training is the primary purpose of the role.

8. Enforcement of the NMW

Failure to pay the NMW to an intern can result in more than an award of back pay. In extreme cases there are criminal penalties, if for example, there has been a wilful neglect to pay the NMW. The HMRC is responsible for enforcing compliance with the NMW, although individuals can also bring complaints, either by a deduction from wages claim or a breach of contract claim. The majority of cases will be dealt with through such civil actions.

In recent years the HMRC has adopted a tougher and more prominent stance on non-payment of the NMW particularly in relation to interns. It has targeted specific sectors that are known to hire interns, such as the media and journalism. In addition it wrote to a number of employers who were openly advertising for unpaid internships to advise them of their obligations in relation to the NMW.

A revised naming and shaming policy was adopted in October 2013 making it easier for the HMRC to publicise the names of employers who fail to pay NMW. Also, since March 2014 the scope to issue penalties has also been increased. An employer who fails to pay NMW rates faces not only arrears of pay but a penalty assessed at 100% of the total underpayment. (Previously it was 50% of the underpayment.)

(a) Claims from a worker

Claims for unlawful deductions from wages must be made to an employment tribunal within 3 months of the date of the deduction (or the last in a series of deductions). A breach of contract claim in the employment tribunal can only be raised where the employment relationship has ended, and again a claim should be made within 3 months of the date of termination. However, the time limits are different in the sheriff court and a claim for breach of contract may be brought in the sheriff court within 5 years of the breach of contract. If the individual is a worker for the purposes of the NMW then they cannot agree to be paid less than the NMW. Section 49 of the National Minimum Wage Act 1998 states that any agreement to pay less than the NMW is void.

(b) Enforcement by the HMRC

An HMRC investigation can be triggered through a specific complaint from a worker or by virtue of a sector wide investigation if there are concerns that employers are not paying the NMW. If an underpayment notice is issued then an employer must pay this within 28 days plus a penalty to the Secretary of State which is calculated at 100% of the underpayment.

Any employer which is issued with a notice of underpayment will now be referred to DBIS to consider "naming and shaming". An employer then has 14 days to respond to this preliminary notification before DBIS decide whether to issue a press release with their name.

9. Rights under the Working Time Regulations 1998

If the intern is a worker then they are entitled to paid holidays and rest breaks.

Holidays

The Working Time Regulations 1998 (WTR) provide that a full time worker is entitled to 5.6 weeks (or 28 days) of holiday per annum. To prevent new workers taking a large proportion of their holiday entitlement immediately, employers can stipulate that the holiday entitlement in the first year accrues at 1/12 of their annual entitlement.

Most contracts will set out the terms of the notification procedure for taking holidays. If the employer follows the provisions within the WTR then the default provisions are very simple and provide that the worker gives the employer twice the length of the period of holiday that they are requesting. Therefore 2 days' notice would be required for a 1 day holiday. Similar provisions apply for the refusal of a leave request from an employer.

(A detailed examination of the scope of payment and accrual of holidays is beyond the remit of this guidance.) Government guidance on the accrual and the calculation of holiday pay can be found [here](#).

Payment on termination

The intern is entitled to take their working time holidays during the period of their internship. If through pressure of work they are unable to take the holidays then employers must make a payment in lieu at

the end of the internship. It is a requirement of the Working Time Regulations that unpaid holidays which have accrued during the period of the internship must be paid upon termination.

If an employer fails to pay outstanding holiday pay on termination then the intern could present a claim to an employment tribunal within three months of the date that payment was due under the WTR or as an unlawful deductions from wages claim within 3 months of the last in a series of deductions.

Rest breaks

A worker is entitled to an uninterrupted 20 minute unpaid rest break where they work 6 hours or more. Different rules apply to those who are classified as young workers who are under 18. If a young worker is required to work more than 4 and a half hours then they are entitled to a 30 minute break.

10. Fair Access - Recruitment

To ensure fair access, internships should be openly advertised (for instance via the website www.LawScotJobs.co.uk) with information explaining what tasks the intern would be doing alongside the skills and experience necessary for the role.

Although this would not need to be as detailed as a job description or person specification it should be modelled on this. The advertisement should state the duration of the internship and the level of payment (a firm/ organisation could choose to pay in excess of the NMW).

Shortlisting of candidates and interviews should take place on a non-discriminatory basis, bearing in mind that, as they are workers, they are protected from discrimination under the Equality Act 2010 and are entitled to reasonable adjustments at interview. For further guidance on complying with the Equality Act during the recruitment process please see the comprehensive [EHRC Guidance](#) which provides legal guidance and best practice on conducting a non-discriminatory recruitment process.

Offer letters should be sent to the successful candidate with an Internship Agreement setting out the terms of their contract, monthly salary and the entitlement to any holidays which would accrue during this period. It is also good practice to provide a confidentiality clause within the Agreement to protect client information and discuss the importance of confidentiality with the intern, both during and the internship and after it has ended.

Ideally, the Internship Agreement should refer to a draft work plan with learning objectives which can then be discussed with their supervisor at the start of their internship. Law firms should be transparent about the availability of a position at the end of the internship.

11. Comprehensive Introduction to the Organisation

An intern should be provided with the same induction into the law firm (or in-house legal team) as newly recruited employees in terms of understanding IT systems, facilities, health and safety, HR and equality issues.

The firm should nominate a supervisor who will meet with the intern at the beginning of the internship and provide support and guidance throughout the internship.

The intern should meet their work supervisor as soon as possible after starting to discuss their work-plan and agree expectations and learning objectives. This should be a two-sided discussion with the supervisor listening to what the intern is hoping to achieve in terms of skills and work experience. The supervisor should also be clear about what tasks they will expect the intern to do to with a view to minimising time spent in administrative tasks which are not learning opportunities, although it is reasonable to expect that routine tasks are unavoidable. Interns will also need to be able to demonstrate that they can deal with administrative tasks and have an eye for detail and processes.

The work-plan should then be agreed and documented.

12. Quality Learning Experience

The aim of an internship is to give the intern vocational skills and experience. In most cases, the intern will have little or no previous experience of working in a law firm. Therefore, additional support and mentoring should be given to help them during their internship.

Their supervisor should offer an open-door policy to assist interns with queries and schedule one to one meetings to ensure they have regular feedback.

13. End of Internship Review

At the end of the internship, the supervisor should conduct a formal performance review. The review should also provide the intern with the opportunity to give the law firm feedback on how they have handled the internship to learn lessons for the future.

Following the meeting the law firm should provide a letter outlining the tasks the intern has completed and skills that they have gained, to assist them with future employment.

The overall aim is to increase the quality of the experience for both the intern and the law firm.

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