



# CAPIC

CALIFORNIA PSYCHOLOGY  
INTERNSHIP COUNCIL

CAPIC  
100 Ellinwood Way  
Suite N275h  
Pleasant Hill, CA 94523

925.969.4550  
[capicadmin@capic.net](mailto:capicadmin@capic.net)  
[www.capic.net](http://www.capic.net)

## CAPIC Information for Program Members: Interns, Stipends and Labor Laws

IMPORTANT: The clarifications below are provided as general information to our members. CAPIC is not able to provide human relations or legal counsel to its members. If needed, such counsel should be obtained independently.

NOTE: CAPIC is aware of the 08/23/2016 decision by the National Labor Relations Board, holding that graduate students working as teaching or research assistants at private universities are employees with the right to collective bargaining. This ruling is not expected to negate the existing, separate guidelines for student interns, particularly the 6-part balancing test articulated in the Wahling court case and detailed in the Department of Labor's (DOL) interpreted guidelines, which are explained later in this document.

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CAPIC program members are responsible for following labor laws. The adequacy of CAPIC stipends relates to CAPIC's training guidelines, not to labor laws, which should be considered separately. This memo is a reminder to CAPIC programs of this responsibility, as well as some relevant information for helping them remain in compliance.

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CAPIC has a policy statement which discourages but does not prohibit unfunded doctoral internships:

"CAPIC discourages unfunded doctoral internships but does not specifically prohibit them when the absence of a stipend is clearly stated at the time the position is offered and accepted (both verbally and in writing). If unfunded positions are offered, training resources should be sufficient to afford the same training as fully funded positions."

As revised 08/27/2010

CAPIC also has stipend requirements for its postdoc program members:

Criteria 13. The program has the necessary financial resources to achieve its training goals and objectives. Postdoctoral stipends shall be reasonable, fair, and stated clearly in advance.

Concurrently, there are laws and regulations governing the treatment of trainees, including some exceptions to labor laws (e.g. minimum wage requirements). CAPIC programs must abide by these laws and any exceptions to them.

- If a CAPIC program is already paying stipends of at least minimum wage and treating the intern as an employee, it is likely not using an exception to these aspects of labor law.
- If a CAPIC program is using an exception within the labor law (e.g. the "Intern" exception) and is not providing stipends of at least minimum wages, the program is responsible for properly doing so. The rest of this document addresses this situation.

## CAPIC Info Regarding Interns and Stipends

*Document last updated 08/29/2016 by René Puliatti, Esq.*

CAPIC program members are responsible for following all applicable laws, including labor laws, and CAPIC cannot provide legal counsel or human relations advice to its member programs. If needed, such counsel should be obtained independently. CAPIC provides the following info to its members as a courtesy.

The default position is that a student at a CAPIC internship program is an intern and not an employee. Different arrangements may be made with the agency, the student and her/his doctoral academic program. Such an "affiliation" or similar agreement may be required between a doctoral academic program and an internship to clarify responsibilities of both sides.

- Such an agreement is encouraged by CAPIC, and typically address issues not covered by the official Board of Psychology (BoP) forms, such as terms for compensation (if any), insurance coverage (if any), workers' compensation coverage (if any) and other issues between the internship, the school and the student.

How an intern is paid or categorized should not be determinative of whether an employment relationship exists. Programs are also responsible for managing this aspect of the internship.

- Paying interns/trainees as independent consultants or temporary employees and related actions (e.g. filing W-2's or 1099 tax forms for them), should not by itself establish an employment relationship.
- In general, stipends should be calculated on a monthly basis, not hourly. The stipend amount provided in a program's online CAPIC profile must be given as an annual amount, in order to allow comparisons among internships by students.
- In general, sites should avoid using the language of "employee" when referring to interns, but there are some aspects where it is unavoidable (e.g. stipend payments, payroll or tax filings, etc.) and should be acceptable.
- Again, how an intern is internally defined by the internship program is a matter for the internship program to decide and manage.

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- Again, it is the internship's responsibility for complying with all relevant laws for having a student treated as an intern and not an employee, as appropriate. If a CAPIC program is already paying stipends of at least minimum wage and treating the intern as an employee, it is likely not using an exception to these aspects of labor law.

At present, there are numerous areas of law governing employment of interns and trainees: the Fair Labor Standards Act (FLSA); (2) U.S. Supreme Court case law; (3) the Dep't of Labor's (DOL) Wage and Hour Division (WHD) interpretive guidelines; and (4) the National Labor Relations Board (NLRB).

While the FLSA only speaks to medical interns, courts have broadly interpreted that section to also apply to mental health interns and trainees. The Supreme Court, while it has not conclusively ruled on the employee status of interns/trainees, it has developed a six-part balancing test. The WHD in turn has used this balancing test to guide employers in determining the employee status of an unpaid intern or trainee. The recent (08/23/16) decision by the NLRB (Case No 02-RC-143012), holding that graduate students working as teaching or research assistants at private universities are employees with the right to collective bargaining, is not expected to negate separate, existing guidelines for psychology student interns at this time, although there has been a trend by the courts and agencies to consider more categories of trainees as employees.

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*Document last updated 08/29/2016 by René Puliatti, Esq.*

Below is a summary of the relevant guidelines.

1. Federal regulations use a 6-part balancing test to determine whether an “employment relationship” exists. If such a relationship exists, the student should be covered under labor laws (e.g. paid minimum wage). If not, the exceptions to regular labor laws should apply for student interns.

As a balancing test, no one criteria is meant to be determinative. The six factors are:

1. 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.
  2. The internship experience is for the benefit of the intern.
  3. The intern does not displace regular employees, but works under close supervision of existing staff.
  4. 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.
  5. The intern is not necessarily entitled to a job at the conclusion of the internship.
  6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.
2. California courts recognize a similar exemption following the same guidelines, and looks at the totality of the circumstances. The more these criteria are met, the more likely the court will consider the trainee not an employee and therefore exempt from minimum wage laws. The converse is also true.
  3. How an intern is paid or categorized should not be determinative of whether an employment relationship exists.
    - Paying interns/trainees as independent consultants or temporary employees and related actions (e.g. filing W-2's or 1099 tax forms for them), should not by itself establish an employment relationship.
    - In general, stipends should be calculated on a monthly basis, not hourly.
      - i. The stipend amount provided in a program's online CAPIC profile must be given as an annual amount, in order to allow comparisons among internships by students.
    - In general, sites should avoid using the language of “employee” when referring to interns, but there are some aspects where it is unavoidable (e.g. stipend payments, tax filings, etc.) and should be acceptable.

NOTE: One ongoing problem is that different governmental agencies (e.g. IRS vs Dept of Labor), use different standards for determining whether an intern should be considered an employee. While an IRS representative may state that an intern “looks like an employee,” that does not necessarily mean that the intern is an employee for labor law purposes or that the “intern” exception does not apply.

### In Summary:

- CAPIC doctoral internship and postdoctoral training programs are responsible for knowing and for complying with all laws, including labor laws, regulations and the 6-part balancing test noted above for interns.
- CAPIC prefers funded doctoral internships and requires funded postdoc fellowships. Those sites which do not provide stipends should pay particular attention to the 6-part balancing test. If a site is not using any exemption to labor laws (e.g. you are paying a stipend at least equal to minimum wage and treating

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the intern as an employee), this particular issue is likely not relevant to you.

- CAPIC stipend requirements relate to CAPIC's training guidelines, not to labor laws, which should be considered separately.

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### References:

Federal laws and regulations:

- Department of Labor (DOL) Fair Labor Standards Act (FLSA) 8 CCR 11040 §2) which relies on the Supreme Court's "Portland Terminal" case ([Walling v. Portland Terminal Co., 330 U.S. 148 \(1947\)](#)) and its 6-part balancing test.
- See also US DOL, Wage and Hour Division (WHD) Fact Sheet #71: [Doctoral Internship Programs Under The Fair Labor Standards Act](#)
  - This fact sheet was written for for-profit private sector entities and notes that "WHD is reviewing the need for additional guidance on doctoral internships in the public and non-profit sectors."
  - This fact sheet (#71) was applied in a 2013 non-profit case involving an intern at UCSF: <http://www.ibtimes.com/internship-debate-spills-public-sector-university-california-san-francisco-ordered-pay-back-wages>
- 8/23/16 National Labor Relations Board (NLRB) decision, Case No 02-RC-143012.
  - <http://apps.nlr.gov/link/document.aspx/09031d45821c20d4>

California laws and regulations:

- Department of Labor Standards Enforcement (DLSE):  
<http://www.dir.ca.gov/dlse/>
- CA DLSE Opinion on Intern Status, dated April 7, 2010:  
<https://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf>
- DLSE Manual, Page 46-4 (page 182 of PDF of referenced manual):  
[http://www.dir.ca.gov/dlse/DLSEManual/dlse\\_enfcmanual.pdf](http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf)

A review of many of these legal issues was also conducted by Cornell University in 2012:

- [http://www.cornellhrreview.org/preventing-employer-misclassification-of-student-interns-and-trainees/#\\_ednref](http://www.cornellhrreview.org/preventing-employer-misclassification-of-student-interns-and-trainees/#_ednref)