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A Nonprofit's Guide to Properly Characterizing Workers as Employees, Interns and Volunteers

AUTHORS

Jeffrey S. Tenenbaum
Kristine A. Sova
Nicholas M. Reiter

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For many nonprofits, the savings that comes from not paying wages, benefits and taxes provide a great incentive to classify workers as interns or volunteers. But for the nonprofits that inappropriately classify workers as interns or volunteers, those misclassifications can lead to serious – oftentimes financially crippling – penalties. Among other things, penalties typically include back wages, interest on those wages, liquidated damages (meant to punish employers for non-compliance), attorneys' fees, and unpaid taxes and unemployment insurance contributions, not to mention criminal charges for nonprofit executives and those making personnel decisions. With federal and state agencies paying close attention to these issues, now more than ever is the time for nonprofits to ensure that they have properly classified their workers as interns or volunteers.

Workers as "Interns"

Many nonprofit organizations offer unpaid internships to students seeking entry into the workforce or the nonprofit sector. Under federal wage and hour law, there is no blanket provision exempting all interns or nonprofits from the law's grasp, yet unpaid interns abound. This begs the question: Should unpaid interns really be paid? The answer in some instances is, yes.

When determining whether federal wage and hour law requires an intern to be paid, an organization must first determine whether the federal Fair Labor Standards Act (the "FLSA") applies. An intern will fall within the purview of the FLSA if he or she engages in interstate commerce, the production of goods for interstate commerce, or in any function closely related and directly essential to the production of goods for interstate commerce. The FLSA broadly defines interstate commerce to include trade, transportation, transmission, or communication between either different states or any state and any place outside such state. Accordingly, the FLSA often applies to interns who, at first glance, have no relation to traditional commercial activities. Typical examples include interns who regularly handle interstate mail and telephone calls, send or receive goods across state lines, or travel in between states during the course of their services. Additionally, the FLSA identifies several "covered enterprises" which necessarily fall under the scope of the statute, including the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education, among others.

Given the breadth of the FLSA and the abundance of unpaid interns, a frequent assumption is that there must be an exception for interns under the FLSA. Despite its commonality in the professional vernacular, however, the FLSA does not even use the term "intern." In order for federal wage protections to attach, the intern must be an employee, as defined by the FLSA. While the statutory language does not delineate between employees and interns or trainees, a U.S. Supreme Court opinion issued in 1947 and the U.S. Department of Labor's subsequent six-part test provide helpful guidance regarding the FLSA's application to interns.

In *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the individuals at issue participated in a training program that was a prerequisite to employment. The U.S. Supreme Court held that employment "trainees" were not employees for purposes of the FLSA during their training period. The Court considered the "economic reality" of their training, as well as the circumstances surrounding the training, and concluded that the training program neither contemplated compensation for the trainees nor provided the employer an immediate or direct advantage.

Following *Walling*, the U.S. Department of Labor ("DOL") issued a six-part test to help determine whether an individual is a trainee, as opposed to an employee requiring compensation. According to the DOL, if *all* of the following criteria apply, the trainees are not employees within the meaning of the FLSA and need not be paid:

. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
. The training is for the benefit of the trainees;
. The trainees do not displace regular employees, but they do work under regular employees' close supervision;
. The employer that provides the training derives no immediate advantage from the activities of the trainees and, on occasion, the employer's operations may actually be impeded;
. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
. The employer and the trainees understand that the trainees are not entitled to wages for the time spent training. (Note that as an exception to this criterion, tuition assistance and nominal stipends for students are not considered wages.)

While this test is consistent with judicial interpretations, most courts do not hold that all six criteria must be met. Instead, they follow *Walling* and analyze the economic reality of the training, focusing primarily on whether there was an expectation or contemplation of compensation and whether the employer received an immediate advantage from work completed. Common examples of when an intern will *not* be considered a trainee include:

- The employer uses the intern as a substitute for regular workers or as a supplement to its current workforce;
- But-for the intern, the employer would have hired additional employees or asked its existing staff to work additional hours; or
- The intern is engaged in the employer's routine operations and/or the employer is dependent upon the intern's work.

However, an intern *will* be considered a trainee when the internship is part of an academic experience (*e.g.*, when an intern receives academic credit from his educational institution for completion of the internship).

Workers as "Volunteers"

Nonprofit organizations also need not compensate their "volunteers." Although the FLSA only defines "volunteers" with respect to state or local government agencies, the U.S. Department of Labor's Wage and Hour Division ("DOL-WHD") nevertheless looks to the FLSA's definition for guidance when considering whether an individual qualifies as a volunteer at a nonprofit organization. Under the FLSA, an individual is a volunteer so long as (1) he or she receives no compensation apart from expenses and/or a nominal fee to perform services for which he or she volunteered, and (2) such services are not the same type of services for which the individual is employed. In particular, the DOL-WHD will consider whether the individual had a clear understanding prior to providing services that he or she would not be compensated for his or her services and that such services were offered without pressure or coercion from the nonprofit organization. Only nonprofit organizations may take advantage of this "volunteer" exception. For-profit employers must comply with all federal wage laws, regardless of whether their workers are willing to perform services on a volunteer basis.

DOL-WHD investigators likely will determine that workers fall outside the definition of volunteer if the workers work a full-time schedule and perform substantially the same activities as paid employees. The limited guidance currently available suggests that the definition of volunteer contemplates individuals performing humanitarian services on a part-time basis. In this context, examples of "volunteers" include individuals who help distribute food at a homeless shelter on the weekends, participate in a big-brother/sister program, or drive a vehicle to help provide transportation for a nonprofit organization's field trip.

The more common scenario encountered by nonprofits involves employees who volunteer to perform services on behalf of their nonprofit employers. Fortunately, nonprofit organizations may allow their employees to serve as volunteers so long as the voluntary activities occur outside regular working hours and are not similar to the employees' regular duties. The same considerations regarding the expectation of compensation and whether the services were offered without pressure or coercion from the nonprofit organization apply in this context.

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In light of several recent indications from DOL, nonprofit organizations can expect and should stay tuned for further guidance from DOL related to whether their unpaid interns are exempt from minimum wage laws. Nonprofit organizations should be mindful that state wage and hour laws often vary from their federal counterpart and may call for a different conclusion. To ensure jurisdictional compliance, it is recommended that nonprofits consult with legal counsel.

*For more information, please contact Jeff Tenenbaum at **jstenenbaum@Venable.com**, Kristine Sova at **kasova@Venable.com**, or Nick Reiter at **nmreiter@Venable.com**.*