

Fair Labor Standards Act: Narrow Exceptions For Volunteers And Interns

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How do you react to dedicated employees who love their work so much that they offer to perform extra work "off the clock"? Or, if you run a nonprofit organization, what do you say when your accounting clerk volunteers to work without pay collecting entry fees at a weekend fund-raiser? And what about your friend's daughter, an eager new graduate who is so happy just to get a toehold into your industry that she offers to intern for free? Are these dreams come true or horror stories in the making?

While economically enticing, these offers are generally too good to be true. Even though "free" labor seems a perfect solution for your company in tight budget times, if you accept free labor, with limited exceptions, you run a serious risk of violating both federal and state wage and hour laws which generally require you to pay employees for all hours worked. Employers who ignore these rules can find themselves liable for back pay or even a penalty of double damages, turning this seemingly perfect solution into a costly mistake.

Employers' General Obligation to Pay All Workers

Under the terms of the federal Fair Labor Standards Act ("FLSA"), an employer is required to compensate each employee for all hours worked. State wage and hour laws require the same. The FLSA's broad definition of "employ" includes to "suffer or permit to work." The FLSA requires employers to pay covered individuals who are "suffered or permitted to work," with very few exceptions, for the services they perform for the employer. The FLSA and state laws also dictate the minimum amount of pay per hour and require, unless the employee meets a statutory exemption, overtime pay of 1½ hours for every hour worked over 40 in a workweek.

The Cost of Non-Payment

The risk of violating wage and hour laws is significant. Under the FLSA, an unpaid or improperly paid employee may be awarded back pay, including overtime pay, and the employer may also be fined for each unpaid or underpaid employee. Additionally, in North Carolina, the law provides that if an employer intentionally fails to pay an employee and the employee prevails in a wage and hour claim, the court is required to assess an award of double back pay. Even an agreement between the employer and employee that the employee will not be paid will generally not be a defense to an FLSA or similar state claim because, with very few exceptions, the law requiring an employee to be paid will invalidate any such agreement. The employer will then face the risk of paying the employee both back wages and penalties.

What about Volunteers?

But what if someone offers to volunteer for your company or organization? Doesn't the volunteer's intent

count to allow you not to pay wages or a salary to the volunteer? The answer will depend on your type of business and whether or not the volunteer opportunity meets certain criteria.

Private For-Profit Employers

For private for-profit employers, the FLSA's requirements are clear that there is no such thing as an employee providing "volunteer" time. The U.S. Department of Labor ("USDOL"), the agency that enforces the FLSA, has plainly stated that "employees may not volunteer services to for-profit private sector employers." Additionally, even the courts have agreed that the label "volunteer" doesn't matter; simply calling someone a "volunteer" will not shield an employer from its FLSA obligation to pay the required wages if that individual performs work that benefits the for-profit organization.

Public Employers

The rules are different in the case of public employers. The USDOL's FLSA regulations define a volunteer for a public agency as someone who "performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered." The regulations unambiguously state that Congress, in enacting the FLSA, did not intend to discourage volunteer activities for civic, charitable, or humanitarian purposes, but did wish "to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to 'volunteer' their services."

Thus, individuals may volunteer to work for a public agency without pay if they offer their services freely. But public employers should make certain that any employee who is offering volunteer, unpaid work has not been pressured or directly or indirectly coerced by any representative of the agency to work without pay.

Additionally, the FLSA prohibits public sector employees from volunteering, without compensation, to work additional time performing the same type of services or work for which they are employed. For example, a police officer can properly be considered a volunteer, and need not be paid, for reading to school children at the municipal library. The same officer must be paid, however, and cannot be considered a volunteer, when directing traffic for a city-sponsored road race in the same municipality where the police officer is employed.

Nonprofit Employers

Similar to a public sector volunteer, an individual who is not employed in any capacity by a nonprofit organization and donates hours of service to the organization for civic or humanitarian reasons is a volunteer and not an employee under the FLSA so long as there is no promise or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof.

However, caution is necessary. In interpreting the FLSA nonprofit volunteer regulations, the USDOL has taken the position that employees of a nonprofit organization may not volunteer to provide services for the organization that are "the same as, similar, or related to" their regular job duties. Also, nonprofit organizations cannot request or direct employees to perform volunteer work during the employee's normal working hours, even if the requested duties are not the same as or similar to the employee's regular job duties. As an example, a nonprofit hospice can allow an employee who usually works as a secretary to volunteer to park cars at a weekend fund-raiser, but the same employee would need to be paid for recording the minutes at a volunteer committee meeting held during the employee's work hours.

Interns in the Private Sector—The Strict Six-Factor "Trainee Exception"

Can you assist young, entry-level persons, often called "interns," to learn about your business even if you can't afford to pay them? Also, as a private employer, can you "audition" potential employees by allowing them to intern with your company without any money exchanging hands?

From a practical and economic standpoint, an unpaid internship appears to be a win-win for you, your company, and the intern. The intern gains valuable insight into your business and gets practical experience, and you may gain a potentially trained, future employee while getting some much needed assistance without cost. But, like the caution against allowing private company employees to work for free mentioned above, the FLSA's requirements make unpaid internships ill-advised except under very controlled conditions.

Unpaid Interns and For-Profit Businesses: The Narrow "Trainee Exception"

Although the FLSA's definition of employment and pay requirements are very broad, the United States Supreme Court recognized as far back as 1947 that the work of an individual that "serves only his own interest" can, under very limited circumstances, be outside of the scope of the FLSA's definition of employment. This holding paved the way for unpaid internships as an exception to the pay requirements of the FLSA.

The USDOL, balancing the FLSA's broad directive with the Supreme Court's recognition of "self-interest" situations, created rules allowing a narrow exception for for-profit employers to legally provide training and learning opportunities to interns without providing monetary compensation. The USDOL set out a six-part test, technically called the "trainee exception," for use in determining whether or not an intern must be paid as an employee under the FLSA. If all of the following six factors are met, an intern is not an employee, and the FLSA's payment requirements will not apply:

- 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 intern;
- The intern does not displace regular employees, but works under their close observation;
- The employer that provides the training derives no immediate advantages from the activities of the intern and, on occasion, the employer's operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and,
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Recently, the issue of intern pay has garnered a great deal of attention, with a number of high-profile lawsuits filed by interns in the entertainment and publishing industries. Against this backdrop, the USDOL continues to take the position that the narrow "trainee exception" from the FLSA's broad definitions of "employment" is established only when all six factors are met. The USDOL, commenting in one of the intern cases currently before the courts, reiterated that the trainee exception is a very narrow exception to the FLSA's broad coverage and should not be expanded, "particularly in difficult economic times when employers are eliminating paid staff positions and the promise of free labor is both tempting and available."

Creating a Legal Unpaid Internship in For-Profit Businesses

Given these narrow criteria, and the heightened current scrutiny, how do you avoid the risk of expensive FLSA back pay claims and still have a program for unpaid interns?

First, take care in designing your internship program so that it complies with all six of the USDOL factors. Further, heed the USDOL directive that the experience should focus on:

[A]n educational component that extends throughout the entirety of the internship and imparts substantial educational content that is transferable beyond the confines of the particular workplace.

Your program should utilize formal training materials and incorporate into the training the practical application of material taught in a classroom. Your interns must be taught skills that are applicable across your industry and not specific only to your organization.

To meet the second factor of the USDOL's trainee exception, ensure that your training program provides your intern with more than the general skills and exposure that any new employee would receive in the first few months on the job. However, make sure your intern is not performing routine work of your business on a regular basis or is otherwise performing productive work in such a manner that your business is dependent upon your intern's work.

For example, if your intern trains with various departments, shadows other employees to understand their responsibilities in the production process, and learns various tasks, but is not wholly responsible for a critical production function, you will have created a training situation more likely to fulfill this requirement of the trainee exception.

The third critical requirement of a proper unpaid intern program in a for-profit business is preventing your intern from acting in ways that are similar to other members of your company's work force. Be certain that you are not having your intern perform tasks that a paid employee would otherwise perform. The key is to make sure that the activities of your intern have not alleviated your need to hire additional employees or require existing staff to work additional hours to perform the same activities. Keep the level of supervision higher for your intern than for your general work force, and do not have your intern take independent responsibility for significant tasks.

To meet the fourth USDOL factor, you should analyze your intern's planned work and make certain that it does not provide direct and immediate advantage to your company. If your intern's work allows you to expand programming or make additional profit, you are at risk of not satisfying the requirements for the trainee exception.

Finally, in order to comply with the fifth and sixth factors, make certain that your intern program is never used as a formal trial period for permanent employment. Design your program to have a fixed, and not an open-ended, duration, and make sure that you have your intern execute a written agreement that makes clear that your intern has no expectation of pay during the training experience or a guaranteed job after the program ends.

In sum, to create a legal unpaid internship:

- Provide targeted educational training to your intern;
- Have your program benefit your intern because of the educational nature of the internship, rather than supply your company with free entry-level labor;
- Provide close supervision;
- Do not displace regular employees; and,
- Do not include compensation or promise of a job.

Unpaid Interns in the Public or Nonprofit Sector

Nonprofit or public sector employers have greater latitude to have an unpaid intern than for-profit businesses because, in essence, an unpaid intern for a nonprofit or public sector organization is a volunteer. As noted

earlier, the FLSA recognizes the benefits of volunteering for nonprofit or public entities, and such unpaid interns or volunteers will ordinarily not be considered employees for FLSA purposes if they volunteer freely without contemplation or receipt of compensation.

However, if you are a nonprofit or public sector employer, in order to maintain the volunteer exception for an unpaid intern, you should be cautious not to have the unpaid intern displace paid workers or perform work that would otherwise be performed by employees. Be aware of other limits, and especially refrain from having your unpaid intern work in a commercial operation (such as a clothing store or a farm) operated by your nonprofit organization, as your intern would then likely be deemed an employee, not an intern or volunteer, and, therefore, subject to the FLSA. Additionally, if you pay your intern at all, your intern may then be considered an employee and be subject to the minimum wage and overtime requirements of the FLSA.

Conclusion

Keeping labor costs low through the use of volunteers or interns can benefit your organization, but can also present significant monetary liability. Understand the FLSA's general requirement of payment for work performed and protect your organization by knowing the narrow circumstances and requirements for unpaid volunteers and interns.

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