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Legal Issues for Working with Interns

This time of year, nonprofit organizations often begin to consider taking on summer interns. The law does not recognize the term “interns,” and instead considers them to be employees, volunteers, or trainees. If an individual is an employee of an organization, certain federal and state laws regarding employees apply. Most notably, the federal Fair Labor Standards Act (FLSA) requires the organization to pay the employee minimum wage and overtime. The U.S. Department of Labor recently issued Fact Sheet #71 to clarify when internship programs must comply with the FLSA. This fact sheet is available at www.dol.gov/whd/regs/compliance/whdfs71.htm.

Whether an individual is an employee depends on the realities of the situation, not on the label the organization gives him or her. Thus, it is important to know when an individual instead qualifies as a volunteer or a trainee and can avoid the requirements of the FLSA, as summarized below. Nonetheless, nonprofit organizations are advised to use the legally recognized terms rather than “intern” in order to maintain clarity.

Interns as Volunteers

Individuals participating in “internship programs” may qualify as volunteers. Volunteers are people who freely donate their services to nonprofit organizations without any expectation of compensation. While volunteers may be reimbursed for related expenses—such as for travel or supplies—payments beyond that could be considered a wage, turning the individuals into employees. Nonprofit organizations should be particularly careful about paying “stipends” that exceed reimbursement of expenses. If you wish to pay your volunteers, you should instead reclassify them as employees and pay them at least minimum wage.

It is also useful to have a written agreement signed by the volunteer expressly stating that he or she is a volunteer and does not expect compensation in exchange for services.

Interns as Trainees

An individual instead may qualify as a trainee, if the program is an educational experience for the benefit of the individual. This is a very narrow category. The U.S. Department of Labor considers an individual a trainee if *all* six of the following criteria are met:

1. The training is similar to the training in a vocational school.
2. The training is for the benefit of the trainee.
3. The trainees do not displace regular employees, but work under close supervision.
4. The organization does not receive an immediate advantage from the trainees.

5. The trainees are not necessarily entitled to a job at the end of the training program.
6. The organization and the trainees understand that the trainees are not entitled to wages for the training.

An individual more likely will be a trainee if the benefits to him or her outweigh any benefits to the organization. Benefits to trainees could include fulfilling a requirement for graduation, earning high school or college credits, or obtaining skills that are useful in the market outside of the particular organization. Supervisors should provide trainees with feedback, supervision exceeding that of regular employees, and final evaluations. Assignments given to trainees should not involve work that the organization would generally pay someone to do. Acceptable assignments include observations and job shadowing.

As with volunteers, trainees may be reimbursed for expenses, but additional payments may push the individual into the employee category. Problems arise when organizations pay individuals some amount above expenses but below minimum wage.

It is helpful to have a written agreement signed by the trainee outlining the benefits from and expectations of the training program. Also, if applicable, a representative from any school allocating credits to the trainee should sign a written agreement stating so.

Although the use of the term “intern” is ingrained in the nonprofit culture, it is important to understand whether an individual is actually an employee, volunteer, or trainee and to treat him or her as such.

This alert is meant to provide general information only, not legal advice. Please contact Judith Moldover at (212) 219-1800 ext. 250 if you have any questions about this alert.

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