

June 2, 2020

Running an Internship Program During the COVID-19 Crisis

As nonprofits continue to serve communities in need during the COVID-19 crisis while they try to adapt to new versions of what business as usual may look like for the foreseeable future, organizations may be thinking about how to create opportunities as part of efforts to persevere during these challenging times. Summer internship programs at nonprofits can create opportunities for high school and college students to work for an organization for a limited time to learn about how an organization runs as well as about the nonprofit sector in general. The organization can benefit by getting temporary help in exchange for providing an educational experience for students. This Legal Alert addresses the following issues nonprofits should keep in mind when creating an internship program:

1. Proper classification of “interns”
2. Providing interns stipends (instead of wages)
3. Special rules for interns that are minors
4. Applicability of anti-discrimination and anti-harassment laws
5. Workers’ compensation coverage requirements
6. General tips and recommendations for creating an internship program

1. Proper Worker Classification for “Interns”

Neither federal nor state law recognizes the term “intern,” so a nonprofit organization must be mindful of relevant employment laws when deciding whether it will be creating a paid or unpaid internship program. If a nonprofit organization intends to pay its interns, the intern will be considered an “employee,” and the organization must adhere to minimum wage and overtime requirements under the federal Fair Labor Standards Act (FLSA) and New York State’s Minimum Wage Act.¹ Even when a nonprofit organization intends to provide unpaid internships, the law may recognize such unpaid interns as “employees,” requiring adherence to minimum wage and overtime requirements. Whether an intern is an employee depends on the realities of the situation, not on the label the nonprofit organization gives him or her.

The U.S. Department of Labor (USDOL) provides guidance on when interns will be considered “employees,” entitling them to minimum wages and overtime pay under the FLSA.² Courts use what they call the “primary beneficiary test” to determine whether an intern is actually an employee under the FLSA by analyzing the following seven factors:

1. The extent to which the intern and employer clearly understand that there is no expectation of compensation.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment.

¹ Visit the New York State Department of Labor website [here](#) for current minimum wage rates.

² U.S. Department of Labor’s Fact Sheet #71 (updated as of January 2018) providing this guidance can be found [here](#).

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant education benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The primary beneficiary test is a flexible test where no single factor is determinative. It is a test that examines the unique circumstances of each case to determine whether the intern or the employer is the primary beneficiary of an internship program. If the employer is determined to be the primary beneficiary, the intern will be recognized as an employee.

New York State law imposes similar but stricter standards to determine when an intern is an employee. Similar to the FLSA, an intern is only exempt from minimum wage and overtime requirements under New York law if the intern is not in an employment relationship. The New York State Department of Labor (NYDOL) uses a test with 11 criteria, many of which overlap with the primary beneficiary test, that must *all* be met for a determination that no employment relationship exists.³

Organizations should consider how the impact of COVID-19 will affect their ability to satisfy both the primary beneficiary test and the 11-criteria test under New York law. For example, organizations may need to be more vigilant to ensure that a remote internship program will still provide a meaningful learning opportunity for interns. Also, for any organization that has recently laid off or furloughed employees, the internship program should not be used to replace those positions.

Nonprofits may also work with unpaid interns by classifying them as "volunteers." USDOL provides that, "[u]npaid internships for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible." The FLSA exempts volunteers, i.e., those individuals who freely donate their time to religious, charitable, civic, humanitarian, or similar nonprofit organizations as a public service. However, volunteers generally set their own hours and can freely decline certain types of work, whereas interns are generally expected to report to their supervisors according to set hours and may not be able to decline assignments without risking a favorable recommendation upon the completion of their internship. New York State law has a similar exception for volunteer work with nonprofits.⁴

2. Providing Interns Stipends

Nonprofits that are contemplating creating an unpaid internship may wish to provide interns with small stipends. While nonmonetary gifts as a token of appreciation are generally unproblematic, nonprofits must be careful when providing monetary stipends. Nonprofits may issue small stipends to reimburse interns for travel or other program-related expenses. However, any amounts

³ NYDOL's 11-criteria test can be found [here](#).

⁴ NYDOL's Fact Sheet on Wage Requirements for Interns in Not-For-Profit Businesses can be found [here](#).

exceeding such reimbursements may be considered compensation that will turn the intern into an “employee,” triggering minimum wage, overtime, workers’ compensation, and other requirements under applicable federal and state laws.⁵

3. Special Rules for Interns Who Are Minors

Federal and state child labor laws, applicable to minors under the age of 18, ensure that when young people work, the work is safe and does not jeopardize their health, well-being, or educational opportunities. The minimum age for employment generally is 14 under both federal and New York State law.⁶ The laws prohibit employment of minors for certain occupations involving hazardous conditions or dangerous machinery, impose restrictions on work hours (including the number of hours worked in a day or week, and the times of day), and require general compliance with minimum wage laws. Work hour restrictions are stricter during the school year, but even during the summer, employers should limit minors to working no more than 40 hours per week. Additionally, in New York, all minors must obtain an employment certificate (more commonly known as working papers) before commencing any type of employment.⁷

While these rules technically do not apply to unpaid interns who are not “employees,” nonprofits should use these rules to guide their unpaid internship programs as well.

4. Applicability of Anti-Discrimination and Anti-Harassment Laws

Both paid and unpaid interns are protected against discrimination based on age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, marital status, reproductive health choices, gender identity or expression, racially-associated hairstyles, religiously-required attire or facial hair, and domestic violence victim status under the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL).

Employers may not discriminate against interns as to selection, retention, or the terms and treatment of an internship. It is unlawful to use internship applications or make any inquiries during the hiring process that directly or indirectly express any limitations or specifications based on any protected basis. If an intern opposes discrimination or files a complaint of discrimination, the law protects the intern from retaliation. Sexual harassment is also strictly prohibited as a form of sex discrimination. Nonprofits must distribute their sexual harassment policy and the information presented in their annual harassment training to new interns.

Effective February 8, 2020, all employers in New York State, regardless of the number of employees, are covered under NYSHRL. However, while the NYCHRL applies to all employers with respect to

⁵ A nonprofit may be able to pay interns subminimum wage stipends by classifying them as “trainees” that are recognized as exempt from minimum wage and overtime requirements under both federal and state law. However, this is only permitted in extremely limited circumstances, so nonprofits should refrain from paying stipends that exceed expense reimbursements without consulting an attorney first.

⁶ There are some exceptions to this rule for certain types of work such as farm work, newspaper carrier work, babysitting, etc.

⁷ There are different types of working papers depending on the child’s age and whether he or she is currently attending school. Please visit NYDOL’s website [here](#) for additional information.

protection against sexual harassment, the city's law only applies to employers with at least four employees with respect to other types of discrimination.⁸

5. Workers' Compensation Coverage Requirements

Under New York's Workers' Compensation Law, virtually all employers in New York State must provide workers' compensation coverage for their employees. Individuals working for a nonprofit organization are considered employees under the law in the same manner as those working for a for-profit business. Therefore, nonprofits with paid interns (or interns that are otherwise classified as employees) must obtain workers' compensation insurance coverage for the interns.

Individuals that volunteer their services for nonprofits are generally not eligible for workers' compensation benefits. Accordingly, nonprofits with unpaid interns are generally not required to provide them with insurance coverage. However, nonprofits who wish to provide unpaid interns with stipends must be careful. Although reimbursements for travel or other program-related expenses are permitted, the law considers reimbursements that exceed amounts that offset expenses, as well as other perks that have monetary value, as compensation. Unpaid interns who receive larger stipends and/or perks that have monetary value will be considered paid employees that require workers' compensation coverage.

6. Tips and Recommendations for Creating an Internship Program

- **Have a written policy or plan outlining the internship program.**
It is helpful to have a plan in place before the internship begins, so nonprofits can set specific goals that will provide the interns with an educational experience. Nonprofits should consider what kinds of transferable skills interns can expect to learn that will be useful in other future job settings by participating in the program. Given the current environment, internship programs will likely be administered remotely which will require even more diligence during the planning process and may require updates to any existing policies.
- **Draft an offer letter or letter of agreement.**
This is especially important for nonprofits who are considering an unpaid internship program. Nonprofits should have documentation evidencing the interns' understanding that the position is unpaid, for a limited period, and completing the program does not entitle them to employment.
- **Designate an assigned mentor or supervisor for each intern.**
By having a designated mentor or supervisor, the intern will know who to report to if he or she has questions or if any problems arise during the internship. In addition, job shadowing and learning skills under close and constant supervision can enhance an intern's learning experience. The primary goal of an unpaid internship must be to provide interns with a true educational experience, so it is especially important to invest in these mentoring relationships for remote interns who will have fewer day-to-day interactions with the organization's staff.

⁸ For more information on how NYSHRL and NYCHRL affects nonprofits generally, including training requirements, see Lawyers Alliance's legal alert on Keeping Up with Changes to NYS and NYC Anti-Sexual Harassment and Discrimination Laws [here](#).

➤ **Have a record-keeping system to track the work performed by interns.**

It is a good idea to have a system in place to keep track of the work performed by interns. This will not only serve the purpose of documenting that interns are receiving proper trainings and supervision, but it can help to monitor progress towards goals and expectations that were set out at the beginning of the program.

An intern's ability to contribute to a nonprofit organization's core day-to-day operation may be limited in nature, and preparing for and supervising an internship program will require considerable effort especially during these challenging times. However, providing internship opportunities is a way for nonprofits to partake in mentoring eager students that are actively thinking about their future career paths. It is an opportunity for organizations to show high school and college students about the important work they do, and to inspire future leaders in the nonprofit sector.

* * *

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.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations and social enterprises that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, Lawyers Alliance for New York helps nonprofits to develop and provide housing, stimulate economic opportunity, improve urban health and education, promote community arts, and operate and advocate for vital programs that benefit low-income New Yorkers of all ages.