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EMPLOYMENT LAW

# New California Worker Laws: How Do They Affect Nonprofits?

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Sheepherders in California are special.

They have their own minimum wage. On July 1, 2014, the rate jumped to $1,422.52. That's a *monthly* amount, presumably because sheepherding is not your typical, 9-to-5, clock-in/clock-out, kind of gig.

The minimum wage for most other California "employees" is calculated on an *hourly basis*. And it applies to workers of just about every employer in this state: for-profit, nonprofit, and public/government.

## *Minimum Wage Rates and Facts*

California's general minimum wage rate went up to $9.00 per hour on July 1st, 2014, and will increase again – to $10.00 per hour – on January 1, 2016.

Who is an "employee" under this labor law? Outside salespersons aren't – along with family members of the employer, apprentices regularly indentured under the State Division of Apprenticeship Standards, and "learners," regardless of age, who may be paid not less than 85% of the minimum wage rounded to the nearest nickel during their first 160 hours of employment in occupations in which they have no previous similar or related experience.

There's also an exception carved out for nonprofits like sheltered workshops or rehab facilities – under a special license – for mentally and physically disabled workers.

An employee may not agree – or be asked to agree – to work for less than the minimum wage. It's an obligation of the employer that can't be waived by any understanding or contract, including a collective bargaining agreement.

It's also not ok to try squirming out of the minimum wage obligation by characterizing an employee as an independent contractor. There are strict rules about which category applies to a particular person who provides services; there are serious consequences for any mischaracterization.

What about interns or volunteers, you ask?

We'll get to that a in a few paragraphs, because there's another new labor law that all employers including nonprofits must follow.

## *Mandatory Paid Sick Leave*

Governor Jerry Brown signed into law on September 10, 2014 the new Healthy Workplaces, Healthy Families Act of 2014.

It takes effect July 1, 2015. Any *employee* who works in California for 30 or more days within a year from the commencement of employment is entitled to paid sick days, to be accrued at a rate of no less than one hour for every 30 hours worked.

There are detailed rules about the purposes for which this leave may be used, when it is accrued, how the employer must post notices and keep records about this new mandatory benefit, and the procedures and penalties that apply for failing to abide by the law.

The law applies broadly to most private, nonprofit, and public employers: "'Employer" means any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities."

It applies to all "employees" except for a few highly specific categories of workers: employees covered by union agreements already providing for paid sick days or equivalent benefits; certain construction-industry workers; in-home supportive home-services providers; and certain air carrier workers.

If your employees don't fit into any of these narrow categories, the law applies to you and to them.

## *What about "Interns" and "Volunteers"?*

In the for-profit sector, the determination of who is an "employee" for purposes of labor and tax laws is a bit simpler than in the nonprofit sector. True independent contractors are excluded precisely because they are *not* employees. So that leaves "interns." Bona fide, true interns are also outside the definition of "employees" under these laws.

In the nonprofit sector, "employee" doesn't include true independent contractors and doesn't include true interns. Then there are volunteers: true "volunteers" are not employees, either.

A lot of unnecessary confusion is created when organizations casually use terms like "volunteer interns" or "intern volunteers." It's important to keep the titles straight.

An intern is not a volunteer (although he or she is not being paid) and a volunteer is not an intern, unless that worker's activities are truly and exclusively designed to train and educate that person. They are distinct categories – analyzed differently to determine whether general labor and other laws

applicable to "employees" apply.

In a nutshell, and to recap, here are the key points:

***Interns:***

Over the years, there's been a general *misunderstanding* by many employers – for-profit and nonprofit – about so-called internships.

A company or organization can't simply announce an "internship program," launch it, and expect it to fly without any interference or questions. Many summer or seasonable hirings, in particular, are just free grunt work wrapped up in pretty packages called "internships."' Taking out the trash, fetching coffee, or doing work that otherwise would have to be performed by a paid employee, is not an internship under current law and standards of the federal Department of Labor (Fair Labor Standards Act) and the California Division of Industrial Relations (California Labor Code).

A true, qualified internship is a program designed and carried out to further the education and training of the intern – not to meet any of the labor needs of the sponsoring company or organization.

The Department of Labor has issued a strict 6-point test, and California's labor administrators have issued an additional 5-point test that California internship programs must meet.

If *each and every one* of these 11 criteria are met, then a program is a true and legitimate internship. Interns in these programs are *not* "employees" under the federal and state labor laws, and so the sponsor may pay a little bit less than minimum wage, much less than minimum wage, or nothing at all.

Otherwise, whether or not these workers are called "interns," the sponsor must abide by all of the rules and regulations relating to "employees," including minimum wage and overtime laws, and now the mandatory sick pay law.

***Volunteers:***

Federal and state officials recognize the long, honored history of volunteerism in philanthropic organizations, and the valuable role that volunteers play in advancing the charitable mission.

Nonprofits and government entities may have "volunteers: individuals who perform "hours or service . . . for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered."

If It's a true volunteer situation, then laws like minimum wage, overtime, and paid sick leave do not apply. "Congress did not intend to discourage or impede volunteer activities undertaken for civil, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to 'volunteer' their services."

Both the federal Fair Labor Standards Act (FLSA) and California wage and hour laws define what constitutes a volunteer. The definitions are not identical and are a bit vague, but they do provide some guidance.

Under the federal test of what is "ordinary voluntarism," a variety of factors are considered, including whether the services are of the kind typically associated with volunteer service, whether the activity is less than full-time and ongoing (rather than seasonal or short-term), and whether regular employees are displaced.

Volunteers may be paid small amounts only, including reimbursement of reasonable expenses, other minor benefits, and minimal stipend amounts. (This is unlike the internship situation, where the intern may be paid more than small amounts, but still less than the full minimum wage.)

Two additional points. First, an employer cannot ask an employee to volunteer some extra hours doing the same work for which he or she is paid. Second, if an individual volunteers in a part of a nonprofit that is commercial and that serves the public, such as stores or restaurants, that person is no longer a "volunteer" and must be paid at least minimum wage.

## *Conclusion*

If, next summer, students come knocking at your organization's door looking for work, be careful and proceed with caution.

If the work these people perform is ordinary volunteerism, and they don't expect any compensation, you may be able to classify them as volunteers. If the purpose and nature of the work is education and job-training – rather than benefiting your organization or the public – then you may be able to legitimately classify them as interns.

If the situation doesn't fit within either of these categories – or it's a bit of both! – then no matter what you call it, the job is minimum-wage employment, and you have to dot all the Is and cross all the Ts of the labor laws, including payment of minimum wage and overtime, compliance with payment deadlines and record-keeping, and sick-pay accrual if the time frame is long enough.

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