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# The Crackdown on Unpaid Internships: Do Nonprofits Have to Worry?

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Summer's coming, and what's hot is more than just the weather.

Last year, the subject of unpaid internships boiled over in news stories of beleaguered "interns" fighting media and entertainment giants like Conde Nast Publications and Fox Searchlight Pictures. The workers won in the trial courts and in the court of public opinion. The corporate heavy-hitters had to back away from relying on these unpaid – or very low-pay – seasonal hirings that were really free grunt work wrapped up in the pretty packages of "internships." Many companies have stopped these so-called internship programs entirely.

***The Best Argument against Unpaid Internships? Most Are Illegal***

This development was a long time coming. Since 1938, when the federal Fair Labor Standards Act (FLSA) was passed, American workers have had protections against unfairly low pay. These labor laws, and similar ones passed by the states, guarantee payment of minimum wages and overtime, and other worker rights and benefits.

How did internships slip through this net of protections? Well, in 1947, the U.S. Supreme Court in *Walling v. Portland Terminal Co*. "established a narrow, common-sense exemption [from these labor laws] for those enrolled in a genuine training program."

Unpaid internships sprang up like weeds.

In recent years, though, the U.S. Department of Labor (DOL) has put employers to a strict, six-pronged test to determine if so-called internships are legal. States – allowed to enact even harsher restrictions – have been active and aggressive. California, for instance, adds another 5 elements on top of the DOL's 6 criteria. A company has to show it passes each and every one of these 11 hurdles. A true internship has to further the intern's education and training – not provide free or cheap labor

for the employer.

***What Does this Mean for Nonprofits?***

In a nutshell, the DOL's Fact Sheet 71 (2010) – which lists the six criteria – indicates that there may be exceptions for internships in the government and nonprofit sectors. The reason is that volunteers are an established mainstay for these groups. "Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible . . ."

So does this mean that if a nonprofit labels an "intern" a "volunteer," it's clear sailing ahead?

Like many things in life and the law – not necessarily.

That same Fact Sheet 71 footnote includes a caution: There is a ". . . need for additional guidance on internships in the public and nonprofit sectors."

To date, there's been no such clarification, although the existing regulations under the Fair Labor Standards Act include a definition of "volunteer." A person is a "volunteer" and not an employee, if he or she "performs hours of service . . . for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation" and offers the services ". . . freely and without pressure or coercion, direct or implied . . . "

Not very useful because it's so general. Also, the volunteer can be paid expenses, reasonable benefits, or a nominal fee. But how much, and where is the line drawn? What if a person doesn't get paid but gets college credit? It depends.

The statement of intent within these regulations is interesting, but doesn't really answer questions about specific situations:

> (b) 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.

The Department of Labor has a publication from the 1980's – No. 1297 – that gives some examples

Members of civic organizations may help out in a sheltered workshop; womens' organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly; . . . individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with . . . handicapped children or disadvantaged youth, . . . providing childcare assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations needed to carry out their charitable, educational or religious program. The fact that services are performed under such circumstances is not sufficient to create

an employee-employer relationship.

More helpful, but not really definitive – and it doesn't answer key questions about paid expenses or nominal stipends.

Certain factors may help move the scale over to the "volunteer" category instead of a "worker" classification. For example:

> Is the person motivated by the mission of the nonprofit?
>
> Do the services performed look like typical volunteer work instead of the activities performed by paid employees?
>
> Is the person there less than full-time? Does the person arrange a schedule that's convenient for him or her?
>
> How much control does the organization exert? (This one's a bit iffy because a nonprofit wouldn't want its volunteers doing or saying whatever they please.)

**What Should a Nonprofit Do?**

Proceed with caution, and get professional advice about your specific situation.

Finally, create a written agreement signed by both parties – the organization and the volunteer. Clearly specify the status and classification of the person as a volunteer, that there will be no ordinary compensation – or expectation of compensation – and that the duties and responsibilities are regular volunteer work.