EMPLOYMENT LAW GUIDELINES FOR UNPAID VOLUNTEER OR TRAINEE WORK

It is often asked when an employer can lawfully accept the work of a volunteer or a trainee without having an obligation to pay at least the applicable minimum wage. This memorandum provides a short overview of the answer to this question.

THE GENERAL RULE is that all persons who work to the benefit of an employer must be paid at least the minimum wage as set by the Fair Labor Standards Act (FLSA)[1] unless a specific exception or exemption applies. Two Common exceptions allowing for unpaid work involve volunteers and trainees, if the criterion for each exception is fully satisfied in all respects.

VOLUNTEERS can donate services without pay for nonprofit entities and, in most cases, to *public sector employers* (e.g., governmental agencies), but not for private, for-profit employers. Such service is typically expected to be part time and must be performed for community service, religious or humanitarian objectives without any expectation of pay.

TRAINEES or INTERNS can be unpaid when they perform work which is for their own benefit. Workers who receive work-based training are not considered employees for purposes of the FLSA. The specific facts and circumstances of the worker's activities must be analyzed to determine if the worker is either a bona fide "trainee" who is not subject to the FLSA and thus need not be paid, or instead is actually an "employee" who may be subject to the FLSA and entitled to at least the minimum wage.

SIX-FACTOR TEST: The US Department of Labor's Wage and Hour Division (WHD) has a six-factor test based on US Supreme Court decisions to evaluate whether a worker is a trainee or an employee for purposes of the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction;
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under close observation;
4. The trainees are not necessarily entitled to a job at the end of a training period;
5. The employer providing the training derives no immediate advantage from the activities of the trainee, and on occasion the employer's operations may actually be impeded; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

1 The FLSA regulates higher wages is all states for most employees and employers. Some states also have laws that apply higher or additional standards than the FLSA, but this varies. This short paper addresses only federal law on this issue.

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FLSA VIOLATIONS: If all of the factors listed above are met, then the worker is a "trainee." An employment relationship does not exist under the FLSA, and the FLSA's minimum wage and overtime provisions do not apply to the worker. Because the FLSA's definition of "employee" is broad, the excluded category of "trainee" is necessarily quite narrow. The burden is on the employer to prove that the worker satisfies all of the factors and to be sure that any intended volunteer or training relationship is administered in a way that complies with the guidelines. Moreover, the fact that an employer labels a worker as a "trainee" (and the worker's activities are "training") does not make the worker a trainee for purposes of the FLSA unless the six factors are actually met. If a volunteer or training relationship turns out to fail under the relevant WHD test, the volunteer or trainee will not be in violation of the law, but the employer can be liable for back pay, liquidated "double" damages and attorney fees and fines.

PROPER DOCUMENTATION: We recommend that before a work-based training or volunteer relationship begins, both the employer and the worker agree in writing to the key aspects of the arrangement so that there are no misunderstandings. Such a document would make clear that the activity is unpaid, that the worker is not an employee or contractor, that the schedule is part-time, and that the worker is not entitled to the job at the conclusion of the training or volunteer period, among other things. The mere fact that the employer might later actually hire the worker as an employee does not mean the prior arrangement was employment that should have been compensated. However, if an employer frequently hires trainees or volunteers, then the unpaid service may not be considered by the WHD to be a true "nonwork" arrangement.

There are other training programs and exceptions and exemptions that may apply to certain situations, but it is not possible to detail them all in the confines of this short overview. This is not intended as legal advice but as general information only. This is current as of 2010, but please keep in mind that employment law frequently changes. Because the determination mentioned above are necessarily made on a case-by-case basis after considering all of the relevant facts and applying applicable federal, state and local law, you should seek counsel of a qualified legal professional familiar with laws in your area before making any conclusions about the FLSA or other labor and employment law compliance.

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