**Legalities of Nonprofit Internships**

By Ellen Aldridge • May 10, 2010 •

Our nonprofit is getting inquiries from college students asking if we offer summer internships. I would love to have students assist us this summer, but we have no funds to pay them at regular employee wages. Do we have to pay interns? And if so, what is considered a legal stipend? Signed, Worried About Interns

**Dear Worried:**
I've been barraged recently with people asking: Interns, to pay or not to pay, and how to do either one legally. First I'll look at the issue of whether an intern can be classified as an intern (or is really an under-paid worker) and then look at the specific nonprofit issues of interns vs. volunteers. To allow employees to be exempt from the payment of minimum wages, it is not enough just to call them "interns."

**When interns do not need to be paid minimum wage**

The [Fair Labor Standards Act](http://en.wikipedia.org/wiki/Fair_Labor_Standards_Act) (FLSA) requires that an internship must satisfy all the following criteria to be exempt from 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 their close observation.

4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion the employer's operations may actually be impeded.

5. The trainees are not necessarily entitled to a job at the conclusion of the training period; and

6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

If even one of these criteria is missing, you will need to follow the minimum wage and work standards set by your state.

But as you can see from reading these criteria, it will be difficult for many nonprofits to have any workers that could satisfy all six criteria, especially criterion #4.

For example, if a worker does something other than incidental clerical work, or does work that is billed against grant funds, criteria #4 is not satisfied. In other words, the very reason that many nonprofits want interns -- because they can do useful work for the organization -- is the very reason they cannot be properly classified as interns.

However, if the internship really *is* in the nature of job-training for the worker, and these criteria are satisfied, a worker could be classified as an intern and thereby exempt from the FLSA and California law.

[For a detailed case study applying these criteria to a nonprofit job-training program check out the full opinion letter from the California Division of Labor Standards Enforcement (DLSE) [here](http://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf). Note that even though the employer in this opinion letter is a nonprofit, the DLSE did not discuss whether or not these "interns" could be volunteers since they are working in commercial enterprises for their job training.]

**But what about *volunteer* interns?**

For nonprofits, however, the question is broader than just whether a worker fits the legal definition of intern per the DOL or a state Labor Commission. There is another classification of worker that nonprofits use heavily: volunteer. Both interns and volunteers are exempt from minimum wage laws and as a result, can be paid "stipends," or even nothing. So in addition to understanding whether the worker meets the legal definition of intern, we also need to know whether he or she meets the legal definition of volunteer.

Both the FLSA and state wage and hour laws define what constitutes a volunteer. Unfortunately, the definitions are not identical and are a bit vague, but they do provide some guidance.

**The Department of Labor defines volunteerism**

The federal Department of Labor (DOL) Wage and Hour Division has recognized that a person may volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA. Such a person volunteers freely for such organizations without compensation or expectation of compensation.

Such activities are described by the DOL as "ordinary volunteerism." In determining whether an activity is "ordinary volunteerism," the DOL considers a variety of factors, including:

* Nature of the entity receiving the services (nonprofit, for instance)
* Compensation of any sort (such as money, room & board, perks, etc.)
* Expectations of benefits in the future
* Whether the activity is less than a full-time occupation
* Whether regular employees are displaced
* Whether the services are offered freely without pressure or coercion, and
* Whether the services are of the kind typically associated with volunteer work.

[Reference: DOL Opinion Letters FLSA 2001-18 and FLSA 2006-4]

If an individual volunteers in a part of a nonprofit which is commercial and that serves the public, such as stores or restaurants, the DOL does not recognize them as volunteers for FLSA purposes.

For example the US Supreme Court held in the case Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303 (1985) that a religious nonprofit foundation whose workers received room and board but had absolutely no expectation or desire for wages since they were working in the foundation's ministry, were found to be employees since their work involved operation of commercial enterprises including trucking and operating a hotel.

Check your state law definition of "volunteer" with your state's Department of Labor to make sure there are not other factors that apply in your state. I strongly recommend that all nonprofits using volunteers have these workers sign agreements at the beginning of the volunteer relationship to clearly establish that there is no expectation of compensation and that the work they are performing is ordinary volunteerism and not a commercial enterprise.

**What exactly is a stipend?**

Remember: a primary factor in establishing a worker as a volunteer is that there is "no expectation of compensation." The DOL regulations do however allow nonprofits to pay for volunteer expenses, reasonable benefits,  and a nominal fee, or any combination thereof, without losing their status as volunteers. 29 C.F.R. 553.106. The "nominal fee" which is typically referred to as a "stipend" cannot exceed 20% of what you would have to pay a worker to perform the service and the amount cannot be tied to productivity or hours worked. [Reference: FLSA Opinion Letter 2005-51]

If a stipend exceeds $600 in a calendar year, it must be reported as 1099 income. The idea behind a stipend is that it covers the out-of pocket costs of volunteering but is not a wage. We haven't seen surveys on nonprofit stipends, but anecdotally most interns are volunteers or paid something like $1,000 for a summer. Government volunteer programs such as AmeriCorps often pay in the neighborhood of $11,000 per year for full-time work.

OK, so let's look again at these students requesting internships with your organization. If the work these individuals would be doing is ordinary volunteerism and there is no expectation of compensation, they may properly be classified as volunteers (rather than as interns). Alternatively, if the nature of the position is predominantly job-training rather than benefit to your organization or the public, then the position can be classified as an internship -- thereby allowing for a stipend to be paid that is below minimum wage.

In closing, while many nonprofits will find it easy and natural to have positions classified as unpaid volunteers -- such as "volunteer interns," it is likely to be quite difficult to classify positions legally as interns, and on that basis, to pay the position less than minimum wage.

*For further reading*, the New York Times articles linked below are excellent; note that they discuss interns primarily in industries such as entertainment and journalism, but are still relevant to nonprofits:

* Article discussing interns under federal law: the Fair Labor Standards Act (FLSA) which establishes minimum wage and overtime requirements: <http://www.nytimes.com/2010/04/03/business/03intern.html>
* Article discussing a recent California Labor Commissioner Legal Council Opinion Letter on unpaid internships ht[tp://www.nytimes.com/2010/04/10/business/10interns.html](http://www.nytimes.com/2010/04/10/business/10interns.html)

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