

Wage and Hour Update for CAAs Working with Interns and Volunteers

By Allison Ma'luf, Esq. & Christopher Logue, Esq.
August 2018

The U.S. Department of Labor (DOL) issued updated guidance earlier this year that clarifies the analysis public and nonprofit employers must undergo to determine whether work performed by an intern or volunteer triggers federal wage and hour compliance obligations. Even though the DOL guidance, [Fact Sheet #71](#) "Internship Programs Under the Fair Labor Standards Act," specifically addresses for-profit employers, it has been the main source of general information for all employers regarding whether an employer must treat interns or volunteers as employees under the Federal Fair Labor Standards Act (FLSA) and pay them minimum wage and overtime. The DOL's update to this guidance not only establish a more flexible test, it also includes a footnote that alleviates much of the burden of the test for nonprofit and public employers.

The Fact Sheet adopted the "primary beneficiary test," an approach that federal courts have used to analyze whether an employment relationship is created when an employer works with interns and volunteers. Under this test, the court considers seven criteria to determine who is benefiting more from the arrangement (see [Fact Sheet #71](#) for a list of the seven criteria). If the employer is reaping more benefits, it must treat the intern or volunteer as a non-exempt employee under the FLSA (i.e., pay minimum wage and overtime). The courts have explained that no one factor is determinative and the outcome from weighing the criteria will depend on the facts and circumstances of each case.

However, in a footnote, the DOL specifically differentiates for-profit employers from nonprofit and public employers with regard to the application of the test. The DOL explains that, with respect to public and nonprofit employers, the criterion addressing compensation expectations of interns or volunteers will likely outweigh the other factors. The footnote states that:

The FLSA exempts certain people who volunteer to perform services for a state or local government agency or who volunteer for humanitarian purposes for non-profit food banks. [The DOL's Wage and Hour Division] also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations. ***Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.***



Reimbursement of reasonable expenses is not likely to be considered compensation for purposes of the FLSA analysis.

Nevertheless, because each state has its own wage and hour laws, which may or may not be identical or similar to the federal laws, CAAs should work with local employment law counsel to ensure compliance with state law. Generally, the wage and hour law that results in a more favorable outcome for an employee will control.

Thus, the main takeaways for CAAs with regard to DOL's updated guidance are:

- Adopt the approach of not compensating interns or volunteers, including not paying stipends or rewarding with gift cards;
- Review and update, if necessary, volunteer and intern policies to reflect that the only payment interns or volunteers may receive is for reasonable expenses incurred at the direction of the CAA pursuant to the CAA's expense reimbursement policies;
- Clearly communicate the CAA's no-compensation policy for interns and volunteers;
- Err on the side of caution and consider the other "primary beneficiary test" criteria when reviewing internship and volunteer programs, even if no compensation is provided; and
- Check with an employment law attorney licensed in your state to ensure compliance with your state's laws.

Lastly, it's important to remember that if an intern or volunteer is considered an employee, an employer will be responsible for payroll taxes and may be required, pursuant to its policies, to provide other benefits.

To learn more about this topic, view the CAPLAW webinar, "[To Pay or Not To Pay: That is the Question Regarding your Interns and Volunteers](#)," facilitated by employment attorneys James M. Paul and Leslie E. Wallis of the law firm Ogletree Deakins.

This eNews brief is part of the Community Services Block Grant (CSBG) Legal Training and Technical Assistance (T/TA) Center. It was created by Community Action Program Legal Services, Inc. (CAPLAW) in the performance of the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Community Services Cooperative Agreement – Grant Award Number 90ET0467-01-00. Any opinion, findings, conclusions, or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Health and Human Services, Administration for Children and Families.

The contents of this publication are intended to convey general information only and do not constitute legal advice. Any communication through this publication or through CAPLAW's website does not constitute or create an attorney-client relationship. If you need legal advice, please contact CAPLAW or another attorney directly.

