

# When it Comes to Volunteers and Unpaid Interns There is No Such Thing As a Free Lunch

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It is summertime and the schools are out. You get a call from an eager college student offering to intern at your company for free. It seems like a win-win situation, right? Your company wins by having someone finally get to those little details and back burner projects it might never otherwise pay someone to do. The intern wins by making business connections, getting real-life experience, filling up their resume and potentially leaving with a good reference (or even a paying job).

Unfortunately, it is not that simple. Unpaid help, regardless of whether the help is called “volunteers,” “interns,” “trainees,” “clerks” or any other name, raises various potential legal issues for all companies. Further, if your company is a for-profit, the practice of using unpaid help *itself* is likely illegal.

## Wage and Hour Laws

The biggest risk with any sort of unpaid volunteer, trainee or intern (hereinafter the “unpaid individual”) is the federal and state wage and hour laws. Virtually every employer is required to follow both federal and state wage and hour laws which require companies to pay employees minimum wage and overtime. The definition of “employee” under the law is very broad – anyone the company suffers or permits to work – and under no condition can the wage requirements be waived by a worker.

While there are various exceptions to the wage payment laws for unpaid help working for non-profit organizations, the exception for volunteers working for businesses is narrow. The federal Department of Labor (“DOL”) has indicated that businesses can only avoid paying wages to an individual performing activities for the business (referred to by the DOL as “interns” or “trainees”) who fits all of the following criteria:

1. The activities performed, even though they include actual operation of the facilities of the employer, are similar to training which would be given in an educational environment;
2. The activities are for the benefit of the unpaid individual;
3. The unpaid individual does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the unpaid individual;
5. The unpaid individual is not necessarily entitled to a job at the conclusion of his/her performance of activities with the employer; and
6. The employer and the unpaid individual understand that the individual volunteering is not entitled to wages.

Wage and Hour Fact Sheet #71. The fourth requirement is often the most troublesome – the prohibition against receiving an immediate benefit from the unpaid individual's presence.

The very strictest reading of this requirement would virtually eradicate unpaid work programs of any type. In reality, deriving *some* benefit from an unpaid individual will not necessarily mean the individual must be paid. Other DOL guidance indicates that a small amount of benefit does not destroy eligibility for the exception, and courts are likely to view the question practically.

Clearly unpaid summer interns who watch others perform their jobs, are given mock projects, go to training sessions and go to social outings do not have to be paid. This is true even if occasionally they are of use to the

company (i.e., they fill a spot at a company-sponsored event, help a worker carry his notebooks into a meeting, or take notes that a worker ends up using to refresh their recollection).

On the other end of the spectrum are volunteers who regularly file papers, answer phones, fetch lunches, and update websites. These sorts of volunteers should be paid. This is true even if on a regular basis they do things that do not benefit the company, like sit in on important meetings or shadow workers. This is still true if the company ends up spending more resources giving the volunteer a place to sit, office supplies, supervision and time with high-level employees than the amount of benefit the company derives from the volunteer's work. This is still true if the company would not normally consider hiring someone to do the work the volunteer is performing, the volunteer holds hours that would not normally be allowed of a normal employee or the volunteer would otherwise be completely unqualified to work for the company.

#### No Good Deed Goes Unpunished

Unfortunately, wage and hour woes are not the only trouble your company may endure using unpaid individuals. Many companies take on volunteers not for the potentially free labor, but rather as a favor or sort of civic activity. While these sort of apprenticeships are more likely to be ones that can be unpaid, they are also more likely to create a different kind of liability – the type that stems from a lawsuit by the volunteer or a lawsuit based upon the volunteer's actions.

Many employment laws may not apply to unpaid individuals. For example, the Family and Medical Leave Act generally applies to individuals on the company's payroll. However, companies should not assume that the world of volunteerism is the wild west.

First and foremost, some courts will look beyond the actual lack of compensation and determine whether the individual *should* have been paid (and thus are covered by the law), will determine whether the internship would be a clear pathway to employment or will simply apply one of the many employment relationship tests and ignore the lack of compensation. Second, even if typical employment laws do not apply, a different set of laws still protects non-employees from certain types of discrimination. For example, the Rhode Island Civil Rights of People with Disabilities prevents any entity doing business in the state from discriminating against anyone – including volunteers – on the basis of a disability. R.I. Gen. Laws 42-87-1, et. seq. While the Act does not require the employer to provide a reasonable accommodation to non-employees – an often costly endeavor – it does require employers make reasonable modifications to workplace rules, policies and practices to account for non-employees.

Third, there is potential liability stemming from an unpaid individual's workplace injury. The good news is that because non-employees are likely not going to be covered by your company's workers' compensation insurance, their work does not increase your workers' compensation premiums. The bad news is that a non-employee can still sue on a fault-based tort theory and recover greater damages than a workers' compensation claim.

Finally, the unpaid nature of the relationship does not diminish the potential for your company to be held liable for a volunteer's torts (including negligence), if the individual is acting under your direction or control when committing such torts. The potential for a derivative claim from a volunteer's actions is often greater than for a normal worker as the volunteer may be less trained, less experienced and often the company did not utilize their normal screening procedures when allowing the volunteer to work.

#### Using Unpaid Individuals Correctly

Despite the potential downsides, interns, volunteers, trainees and other unpaid individuals can be a great value to a company and are an integral part of our society if used correctly. Companies should use the following steps to decrease the potential for costly liability:

1. *Carefully consider the wage and hour issue.* There are several ways to deal with wage and hour

concerns within for-profit entities. The easiest is to pay all individuals minimum wage and treat them as employees. Alternatively, the employers can make the activities the volunteers perform more academic, and derive less benefit from the volunteer. Specifically, partnering with a local school in a program that gives the volunteer credit for the internship can greatly increase the amount of actual work the volunteer can do for your business without having the wage payment requirements kick in. Finally, instead of an in-office, hands on full summer internship, consider a one or two time experience for unpaid individuals. Wage and hour laws only apply when the individual would otherwise meet the test of who is an employee (versus someone with a relationship with the employer similar to an independent contractor). Giving an individual a project or two to do on their own time, at their own house, using their own material, with minimal supervision, likely will not pull the individual into the “employee” category. Such an experience can still give your company valuable work products and the individual a good experience, a resume item and a potential reference.

2. *Protect your company from third-party suits.* Your company needs to be sure it follows the same steps when allowing any person to volunteer at your company as it does for an employee. Have the individual fill out an application for internship/volunteer program. Interview the individual carefully. Call references, seek documentation for alleged academic accomplishments and do any other screening you normally would for a potential employee.
3. *Protect the Unpaid Individual.* While unpaid individuals might not have the same protection as employees, take the same precautions – including documentation procedures – to avoid discrimination lawsuits by volunteers, especially when choosing who to hire and ending relationships. Also be sure to provide these individuals with your harassment policy and let the volunteers know how to report problems.

Above all, companies need to be aware that there are real concerns when using unpaid help. When questions and problems arise involving unpaid help, companies should not hesitate to consult an experienced employment attorney.

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