



This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Guidance for Nonprofits Seeking to Use Unpaid Interns

Unpaid interns are often an asset to nonprofits, bringing with them a desire to learn and a passion for the cause of the organization. Although unpaid internships can benefit all involved and are generally permissible in the nonprofit arena, nonprofits should approach these relationships with some degree of caution, taking care to ensure that the primary benefits of the internship accrue to the intern, rather than to the organization. Care must be taken to ensure the required criteria for unpaid internships are met. If the criteria are not satisfied, interns could be employees of the organization who are covered by the minimum wage and overtime requirements of the federal Fair Labor Standards Act (“FLSA”).

Background

The FLSA does not have a clear definition of who is or isn’t an employee. The statute defines the term “employ” broadly as including to “suffer or permit to work.” Covered, non-exempt individuals who are “suffered or permitted to work” must be paid the federal minimum wage, plus time-and-a-half for all hours worked over 40 in a work week. The Department of Labor (“DOL”) or an employee may bring suit to enforce the FLSA, and an employer who has not paid its employees correctly can be subject to paying two to three years of back pay, liquidated damages, and attorneys’ fees and costs. Unpaid interns may be exempt from the FLSA’s minimum wage and overtime requirements if certain criteria are met.

Internship Criteria

Prior to 2018, the DOL had its own six-part test for determining whether or not an intern could be unpaid. Many courts, including the Eleventh Circuit Court of Appeals, which is the appellate court in Georgia, have rejected the DOL test.

In January of 2018, the DOL issued an updated Fact Sheet adopting the “primary beneficiary” test that has been used by the courts. The DOL, like the courts, will now look at whether the intern or the employer is the “primary beneficiary” of the

relationship, focusing on the economic reality of each situation. The DOL points to the seven factors identified by the courts as instructive in making this determination:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Courts have described the “primary beneficiary test” as a flexible test, and no single factor is determinative. Accordingly, whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case.

Structuring an Unpaid Internship Program

The following tips for structuring an unpaid internship program can help a nonprofit avoid the possibility that its interns would be viewed as employees.

- Document the structure and features of the internship program. Documentation should include an agreement signed by the nonprofit and the intern that: 1) the relationship is not one of employment, but rather an internship for the intern's benefit; 2) the intern does not expect employment or compensation; and 3) the relationship is intended to provide the intern with skills that can be used in multiple settings.
- Ideally, engage interns through a school program that gives them academic credit.

- Have interns perform work that gives them learning opportunities and helps them develop skills that are marketable in multiple settings (rather than uniquely applicable to your operations). For example: shadowing and observation, attendance at organizational events and other networking opportunities, participation in community outreach efforts, learning how to use common software programs to design promotional materials, etc.
- Provide interns with training and supervise them more closely than you would your regular employees.
- Do not use interns as substitutes for regular workers. Interns may shadow and observe regular employees to learn about the work that the employees perform, but should not perform the same work as regular employees.
- Do not have interns work in a commercial enterprise, such as a store.
- Have the interns work part-time or for a limited time period.
- Do not engage interns with the expectation that they will eventually be hired full-time.
- Do not compensate interns in any way (this includes gift cards). You can reimburse them, however, for expenses related to the internship, such as parking or public transportation required for them to work (document this with receipts).

Unpaid Interns vs. Volunteers

You may wish to consider whether your unpaid interns would be more appropriately classified as volunteers. The focus of volunteering is performing work for civic, charitable, or humanitarian reasons, whereas internships focus on providing the intern with educational and/or practical work experience in a field of interest.

As is the case with unpaid interns, volunteers generally fall outside the scope of the FLSA. Volunteers must work without promise or expectation of compensation. Courts tend to treat individuals as employees, rather than volunteers, if the organization manages their daily work, requires them to adhere to set schedules, and/or disciplines them for not following the organization's rules. For more information on volunteers, see "Legal Issues of Working With Volunteers," available at <https://www.pbpatl.org/resources/volunteer-issues/>.

Conclusion

Nonprofit organizations must keep these principles in mind when engaging unpaid interns:

- The use of unpaid interns by nonprofit organizations is generally permissible.

- Because the applicable law regarding nonprofit interns is unclear, you should structure your internship to adhere to as many of the above guidelines as possible.
- The primary focus of the internship should be educational.
- Interns should not be used to replace paid workers.

If you have any concerns about your organization's interns, please seek legal counsel.