

SEASONAL HIRING: GETTING IT RIGHT

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SEASONAL WORKERS: QUESTIONS TO CONSIDER

- If these individuals will only be here for a few months, are they employees who have to be put on payroll?
- Do I have to pay them?
- My seasonal workers get a “stipend” - that’s okay, right? Or, they get noncash benefits – no problem, right?
- How much do I need to pay my seasonal workers?
- How little can I compensate them?
- Why do any of these questions matter?

WHOM ARE WE TALKING ABOUT?

- Interns
- Canvassers
- Campaigners
- Special project workers
- Short-termers



HOW MIGHT WE CLASSIFY SEASONAL WORKERS?

- Volunteers
- Trainees
- Independent contractors or
- Temporary employees



WHY DOES IT MATTER?

- If your seasonal workers are employees, the organization must:
 - Comply with DOL wage and hour requirements
 - Withhold federal, state, and local taxes
 - Pay unemployment insurance and workers compensation insurance
 - Pay the employer portion of payroll taxes
 - Provide certain benefits
 - Count the intern towards the coverage threshold requirements of certain laws
- If your seasonal workers are properly classified as nonemployees, then these obligations do not apply.

WHY DOES IT MATTER?

- If your organization misclassifies a seasonal worker, it potentially has serious liability to the worker and to the federal and state governments
- Possible consequences include owing back wages, benefits, interest, overtime pay, liquidated damages, penalties for failure to withhold and failure to pay benefits

WHY DOES IT MATTER? SOME EXAMPLES:

- Conde Nast paid \$5.8 million to settle a class action lawsuit by former interns who were paid stipends of approximately \$300 for the summer
- NBC Universal paid \$6.4 million to settle class action by interns. Key factor was that they performed work normally performed by paid employees
- Federal court in NY held that Interns who worked on Black Swan were actually employees covered by US and NY wage and hour laws
- Class action lawsuit by former Hamilton College athletic department intern for misclassification as exempt employee settled for undisclosed amount
- On appeal, Labor Department won lawsuit against not-for-profit boarding school for failing to pay students who worked in affiliated nursing home in compliance with Fair Labor Standards Act

CAN THE INDIVIDUAL BE CONSIDERED A VOLUNTEER?

- Unlike for-profit organizations, nonprofits may use volunteers who are not paid.
- To qualify, the individuals must volunteer their time, "freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes."
- Volunteers usually provide services on other than a full-time basis, perform activities that are different than those performed by paid employees, and are engaged in typical volunteer activities, rather than commercial activities.

IS THE INDIVIDUAL A TRAINEE?

- Like for-profit organizations, nonprofits can have Interns or other workers who are unpaid trainees.
- To qualify as an unpaid training program, the program must:
 - Provide training similar to that received in an educational environment
 - Be for the benefit of the participating worker
 - Not displace regular employees and require close supervision by existing staff
 - Not provide an immediate advantage to the organization from the intern's activities
 - Not guarantee a job to the worker at its conclusion
 - Not pay wages to the intern, as understood by the employer and trainee

IS YOUR SEASONAL WORKER A TRAINEE?

- Determination of whether workers are trainees will rest on the “economic reality” of the program.
- Important factors to consider include whether the individuals are used as a substitute for regular workers, whether there is an academic or training element to the program, whether the individual is engaged in routine operations.



CAN YOUR SEASONAL WORKERS BE INDEPENDENT CONTRACTORS?

- To qualify as independent contractors, the workers must have control over the means and method of how the work is to be performed; the organization can only direct the result, but not how it is accomplished.
- That individuals are working on a temporary or short term basis does not, on its own, justify treating them as independent contractors.
- That the individuals are working on a one-time project, under time-limited grant funding, or will never be regular employees do not justify treating them as independent contractors.
- It is unlikely that most interns, campaign staff, or other seasonal workers can properly be classified as independent contractors.

ARE YOUR SEASONAL WORKERS RECEIVING COMPENSATION?

- Compensation can include noncash benefits, such as food and lodging
- Compensation can include a “stipend”
- Compensation can include promised future payments or benefits
- Compensation can include benefits that normally are provided to employees



ARE YOUR SEASONAL WORKERS RECEIVING COMPENSATION?

- Volunteers and trainees may be able to receive the following without being considered to have received compensation:
 - Reimbursement of out-of-pocket expenses
 - Reasonable benefits
 - A nominal fee



WHAT IS REIMBURSEMENT FOR OUT-OF-POCKET EXPENSES?

- This category includes reimbursement for the approximate out-of-pocket expenses incurred incidental to volunteering
- Possible expenses: uniform or personal cleaning allowances, travel expenses during the day, costs of attending classes or obtaining training, occasional meals while volunteering
- Use of a flat amount that does not exceed approximate expenses that can be documented is acceptable

WHAT ARE REASONABLE BENEFITS?

- The public sector regulations on volunteers provide that reasonable benefits include benefits under group insurance plans (such as liability, health, life, disability, workers' compensation) if they are traditionally provided to volunteers.
- However, examine your group insurance plans. Is coverage limited to employees?
- Possible examples: workers compensation coverage; public transit benefits.

WHAT IS A “NOMINAL” FEE?

- The definition derives from regulations applicable to volunteer activity in the public sector.
- **CAUTION:** DOL currently does not provide guidance as to whether the rules also apply to volunteers for nonprofit organizations.
- Nominal fees will be evaluated based on the distance travelled by, availability of, and efforts of the individual.
- It cannot be tied to productivity or vary based on hours worked.
- DOL opinion letters have defined a nominal fee for purposes of public agencies as a fee that does not exceed 20 percent of what a paid employee would otherwise receive.
- Nominal fees must be reported, usually on a Form 1099.

WHAT DOES THE WRITTEN RECORD SHOW?

- Letters confirming offer of internship or other relationship should specify whether the intern will be paid, will be a volunteer, or will be a trainee.
- As appropriate, confirm that the individual is volunteering freely and that wages or other compensation will not be paid, or that training will be provided.
- Verbiage should be consistent with classification; do not refer to “payments” unless the individual is an employee.

ARE YOUR PAID INTERNS AND TEMPORARY WORKERS RECEIVING ENOUGH COMPENSATION?

- All non-exempt employees must be paid the minimum wage and receive overtime payments in compliance with state and federal law.
- In most instances, these employees are likely to be nonexempt.
- Under the new requirements of the D.C. Wage Theft Prevention Act, the precise time worked by nonexempt employees must be tracked.

WHAT ARE THE WAGE AND HOUR RULES FOR DC EMPLOYEES?

- The D.C. minimum wage is currently \$9.50 an hour; going to \$10.50 effective July 1, 2015.
- Newly hired persons 18 years of age or older may be paid the federal minimum wage, currently \$7.25/hour, for a period not to exceed 90 calendar days.
- Minors (under 18) may be paid the federal minimum wage, currently \$7.25/hour.
- Employees must be paid time and one-half for all hours worked in excess of 40 in a regular work-week.
- Employers must comply with applicable limits on type of work and hours for under-age employees.

OTHER ISSUES

- Temporary hires who are employees must complete an I-9.
- Must comply with new notice provisions of the D.C. Wage Theft Prevention Act for all seasonal employees.
- Preserve at-will employment for paid interns.
- Paid interns are covered under workers compensation statutes; consider whether it is helpful to elect to have unpaid interns covered by workers compensation insurance.
- To help forestall problems, consider training for existing staff about how short-term staff should be supervised and treated.
- Consider an orientation or brief handbook explaining key policies.
- Departing employees will be eligible for unemployment compensation if no further work is available.