

Frequently Asked Questions: Labor & Employment for Nonprofit Organizations

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■ Labor & Employment

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The questions and answers below highlight labor and employment topics as they relate to nonprofit organizations.^[1]

Classifying Your Staff

What is the difference between a paid employee and an unpaid volunteer? Under what conditions can a nonprofit utilize unpaid services from volunteers?

Volunteer – An individual generally will not be considered an employee for FLSA purposes if the individual volunteers:

1. Freely for public service, religious or humanitarian objectives; and
2. Without contemplation or receipt of compensation.

Typically, volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees.^[2]

What about my interns? Are they paid employees or unpaid volunteers?

Determining whether interns qualify as paid employees requires use of the “primary beneficiary test.” This test examines the “economic reality” of the intern-employer relationship to determine which party is the “primary beneficiary” of the relationship, and should be used to determine whether an intern is an employee or a volunteer under the FLSA. The test considers the extent to which:

1. 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 internship provides training similar to that of an educational environment, including the clinical and other hands-on training provided by educational institutions;
3. The internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit;
4. The internship accommodates the intern’s academic commitments by corresponding to the academic calendar;
5. The internship is limited in duration 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; and

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.^[3]

My nonprofit organization needs to complete a few tasks that none of our employees have the skills to complete. If we hire a contractor, will the contractor be considered an employee?

Under the FLSA, an employee is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. There is no single rule or test to determine whether an individual is an employee. Rather, the individual's total activity or situation controls. The following factors are considered significant in making this determination:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the alleged contractor.
7. The alleged contractor's degree of independent business organization and operation.

Factors such as the location where the work is performed and the absence of a formal employment agreement are not considered to have a bearing on determinations as to whether there is an employment relationship.

Helpful Tips Regarding Your Organization's Interns

1. It is useful for you to clarify the intern's status as either an unpaid volunteer, or a paid employee in writing, whether in the offer letter, a letter confirming the internship, or through other written materials, such as an orientation manual or position description.
2. You should also clarify any policies that apply to your interns. For example, if your organization has a policy that volunteers may be reimbursed for expenses related to the services they provide the nonprofit, clarify whether this policy will also apply to interns.
3. In some states, "volunteers" are not covered by workers' compensation insurance, so if the intern is injured, volunteer status could prevent him/her from being compensated for injuries. However, if your nonprofit has a "volunteer accident insurance" policy, the intern's medical expenses could be covered by that policy. Let your interns know upfront whether there is insurance coverage.^[3]

Wages and Other Compensation

Do I have to pay my interns?

As with the analysis above concerning whether an intern qualifies as an employee, determining whether an intern should be paid likewise requires use of the "primary beneficiary test" described above. If the results of the "primary beneficiary test" reveal that an intern is actually an employee of a nonprofit

organization covered by the FLSA, he or she is entitled to both minimum wages and overtime pay under the FLSA. However, if the test confirms that the intern is not an employee, then he or she is not entitled to either minimum wages or overtime pay under the FLSA.

If my employee offers to work as a volunteer after their shift, do I still have to pay them?

Yes. Paid employees of nonprofit organizations cannot “volunteer” to provide without appropriate compensation the same type of services to their nonprofit organization that they are employed to provide.

What is the current minimum wage rate?

As of July 24, 2009, the federal minimum wage rate to which covered nonexempt employees are entitled is \$7.25 per hour.

Many states have minimum wage laws, some providing for greater employee protection. Employers must comply with these laws. Where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage.

My volunteers work for free and do a great job. Can I give them a stipend?

This can be risky for the organization, because nonprofits providing stipends risk inadvertently converting a “volunteer” into an “employee.” A volunteer will be considered an employee if the volunteer:

1. Is paid a stipend of more than \$500 a year;
2. Is paid more than 20% of what a typical employee would be paid for the same service; or
3. Is offered the same benefits your paid employees receive.^[4]

I need my volunteer to pick up a few items for the organization; can they use their personal funds to pick them up on their way into the office and the organization reimburse them?

If a volunteer is reimbursed for expenses incurred while volunteering, the reimbursement may be classified as taxable income unless you require that:

1. Any expenses being reimbursed are incurred for the business purpose of the nonprofit organization, and
2. The volunteer must return any amounts received in excess of the actual expenses incurred within a reasonable period (no more than 60 days after the expense was incurred).^[5]

Hours Worked

What is the Fair Labor Standards Act (FLSA)?

The FLSA is a federal law that establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector, as well as in federal, state, and local governments. Under the FLSA, covered individuals must receive at least the minimum wage and may

not be employed for more than 40 hours in a week without receiving at least one and one-half times their regular rates of pay for overtime hours.^[1]

To whom does the FLSA apply?

The FLSA may apply under two theories: “Enterprise Coverage” or “Individual Coverage”.

Enterprise Coverage

The FLSA generally applies to (“covers”) employees of businesses or organizations that have:

1. At least two employees;
2. Annual gross volume of sales or business done of at least \$500,000; and
3. Hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies.

Income from contributions, membership fees, dues (except any part which represents the value of a benefit, other than of token value, received by the payer), and donations (cash and non-cash), used in the furtherance of charitable activities, are not considered when determining whether an organization meets the dollar threshold required for coverage under the FLSA.

Individual Coverage

Even if the employer is not considered a covered enterprise, the organization may still have to abide by the FLSA. Employees of employers that are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production.

Examples of activities that may result in individual employee coverage include making/receiving interstate telephone calls, shipping materials to another state, and transporting persons or property to another state.^[2]

What is a covered enterprise under the FLSA?

A covered enterprise under the FLSA is determined by analyzing the related activities performed, either through unified operation or common control, by any person or persons for a common business purpose.^[6]

Are nonprofit organizations considered enterprises?

Charitable, religious, educational, or similar activities of nonprofit organizations, where such activities are not in substantial competition with other businesses, are not considered covered enterprises under the FLSA. If the nonprofit competes substantially with other businesses, the FLSA applies.

Example: Where a nonprofit engages in ordinary commercial activities resulting in sales made or business done, such as operating a gift shop or providing veterinary services for a fee, the nonprofit would be considered a covered enterprise subject to the FLSA.

Important: Even if a nonprofit is not subject to FLSA, it may still be subject to state and local laws. As of February 24, 2015, the Texas minimum wage rate is \$7.25.

Does the FLSA apply to nonprofit organizations?

It depends. The FLSA applies to some, but not all nonprofit organizations. Whether the FLSA applies to a nonprofit organization is determined by the organization's gross annual sales or business done (if the organization's gross annual sales/business done is \$500,000 or more, the FLSA applies) and whether or not the activities of the nonprofit are in substantial competition with other businesses (if the activities of the nonprofit organization are in substantial competition with other business, the nonprofit is subject to the FLSA).

Overtime Pay

What is the overtime rate?

If an employee works more than 40 hours in a calendar workweek, he or she is entitled to overtime pay at a rate of not less than one-and-one-half times his or her regular rate of pay.

How long is a "workweek"?

A workweek is a seven-day period established by the employer and must remain consistent, that is, the start and end of the seven-day period cannot fluctuate from week to week.

Do the FLSA rules regarding exempt and nonexempt employees apply to nonprofit organizations?

If the nonprofit qualifies as a covered employer under the FLSA, then the FLSA rules regarding exempt and non-exempt employees apply as well.

What is the difference between exempt and nonexempt employees?

Nonexempt Employees – Nonexempt employees are those to whom covered employers must pay minimum wage and overtime, calculated as one and one-half times their "regular rate" of pay, for each hour over 40 worked in a calendar workweek.

Exempt Employees – Exempt employees are paid on a salary basis and are not entitled to overtime. Common exemptions include executive, administrative, professional, outside sales and some computer employees. Under the FLSA, an exempt employee is only entitled to receive the full amount of the base salary in any work period during which the employee performs any work (less permissible deductions).^[7]

How do I know if an employee is exempt or nonexempt?

Generally, whether an employee is exempt or nonexempt depends on:

1. How much they are paid;
2. How they are paid; and
3. The kind of work they do.

To be exempt an employee must be:

1. Paid at least \$35,568 per year (\$684 per week);
2. Paid on a salary basis; and
3. Performing exempt job duties.

Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee’s work. Subject to few exceptions, an exempt employee must receive the full salary for any week in which he or she performs any work, regardless of the number of days or hours worked.

Since job duties are relevant to determining whether an employee is exempt or nonexempt, does the employee’s job title determine his or her status?

No. Job titles do not determine an employee’s status as exempt. To qualify for exemption, employees generally must meet certain tests regarding their specific job duties and salary.

Are the FLSA rules regarding exempt employees the same for all positions in my nonprofit organization?

Persons employed as bona fide executive, administrative, professional, outside sales and certain computer employees qualify for the FLSA overtime and minimum wage exemption. Each exemption has a separate duties test.^[8]

Salary Test – To qualify for the FLSA exemption, employees (other than those in outside sales, teachers, and employees practicing law or medicine) generally must be paid at least \$35,568 per year (\$684 per week).

The salary test does not apply to outside sales employees. Computer employees may be paid at least \$684 per week on a salary basis or on an hourly basis at a rate not less than \$27.63 per hour.^[8]

Duties Tests

Executive employees:

1. The employee’s primary duty is the management of an enterprise or a customarily recognized department or subdivision;
2. The employee must customarily and regularly direct the work of two or more full time employees; and
3. The employee must have the authority to hire or fire employees or the employee’s recommendations as to hiring, firing, promotion, change of status, are given particular weight.^[9]

Administrative employees:

1. The employee’s primary duty is the performance of office or non-manual work;
2. The employee’s office or non-manual work must be directly related to the management or general business operations of the employer or the employer’s customers; and
3. The employee’s primary duty must include the exercise of discretion and independent judgment in matters of significance.^[10]

Professional (learned and creative professionals) employees:

1. The employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized instruction; or
2. Performance of work requiring invention, imagination, originality, or talent in recognized artistic or creative field.^[11]

Computer employees:

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Computer employees must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the following duties:

The employee's primary duty must consist of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
2. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on, and related to user or system design specifications;
3. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.^[11]

Outside sales employees:

1. The employee's primary duty is making sales or obtaining orders or contracts for services or for the use of facilities paid by the client or customer and
2. The employee must be customarily and regularly working away from the employer's place of business.^[12]

What is a primary duty?

"Primary duty" means the principal, main, major or most important duty that the employee performs. The determination of an employee's primary duty must be based on all the facts in a particular case with the major emphasis on the character of the employee's job as a whole.^[9]

Employee Benefits

Are nonprofits required to provide paid vacation or paid sick leave?

Vacation Leave and Holiday Pay – The FLSA does not require payment for time not worked, such as vacations, sick leave or federal or other holidays. Unless a state specific law requires paid vacation or holiday leave, these benefits are matters of agreement between an employer and an employee or the employee's representative.^[13]

Sick Leave – Currently, only the Families First Coronavirus Response Act mandates federal paid sick leave, but this Act will expire on December 31, 2020. However, for companies subject to the [Family and Medical Leave Act \(FMLA\)](#), unpaid sick leave is required. FMLA provides for up to 12 weeks of unpaid leave for certain medical situations for either the employee or a member of the employee’s immediate family. In many instances paid leave may be substituted for unpaid FMLA leave.

What is the FMLA?

The [Family and Medical Leave Act \(FMLA\)](#) provides certain employees with up to 12 weeks of unpaid, job-protected leave per year, and requires that their group health benefits be maintained during the leave. The FMLA helps employees balance their work and family responsibilities by allowing them to take reasonable unpaid leave for certain family and medical reasons. It also seeks to accommodate the legitimate interests of employers and promote equal employment opportunity for men and women.

Does the FMLA apply to nonprofit organizations?

The FMLA applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees.

What does the FMLA require of my nonprofit organization?

The FMLA requires employers to provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons:

1. The birth and care of the newborn child of an employee;
2. Adoption of foster care of a child;
3. The care of an immediate family member (spouse, child, or parent) with a serious health condition;
or
4. When the employee is unable to work because of a serious health condition.

Are employees of nonprofit organizations eligible for leave under the FMLA?

Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months, have worked for at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles of each other. Whether an employee has worked the minimum 1,250 hours of service is determined according to FLSA principles for determining compensable hours or work.^[14]

Time taken off work due to pregnancy complications can be counted against the 12 weeks of family and medical leave.

What about medical benefits—Is my nonprofit organization required to offer medical insurance to employees?

The FLSA has no stipulations requiring health or other insurance benefits. However, the [FMLA](#) does have provisions concerning health insurance when an employee is on qualifying family and medical leave. Additionally, [The Employee Benefits Security Administration \(EBSA\)](#) can offer general guidance related to insurance benefits.^[15]

^[1] U.S. Dep’t of Labor, [Wages and the Fair Labor Standards Act](#) (last visited July 14, 2020).

^[2] U.S. Dep’t of Labor, Fact Sheet #14A: NonProfit Organizations and the Fair Labor Standards Act (FLSA) (last visited July 14, 2020).

^[3] Nat’l Council of Nonprofits, [Interns: Employee or Volunteer](#) (last visited July 14, 2020).

^[4] Federal Volunteer Protection Act of 1997, 42 U.S.C. § 14505(6) (Supp. IV 1998) (defining “volunteer” as individual who performs services and does not receive compensation other than reasonable reimbursement or anything of value in lieu of compensation in excess of \$500.00 per year); see also Wage and Hour Opinion Letters FLSA2006-28 (August 7, 2006) and FLSA2005-51 (November 10, 2005).

^[5] Nat’l Council of Nonprofits, [Interns: Employee or Volunteer](#) (last visited July 14, 2020); see also Perkins Law, [Be Careful Not to Convert Your Nonprofit Volunteers into Employees](#) (last visited July 14, 2020).

^[6] U.S. Dep’t of Labor, [Fact Sheet #5: Real Estate and Rental Agencies Under the Fair Labor Standards Act \(FLSA\)](#) (last visited July 14, 2020).

^[7] Chamberlain, Kaufman and Jones, [Coverage Under the FLSA](#) (last visited July 14, 2020).

^[8] U.S. Dep’t of Labor, [Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act \(FLSA\)](#) (last visited July 14, 2020).

^[9] U.S. Dep’t of Labor, [Fact Sheet #17B: Exemption for Executive Employees Under the Fair Labor Standards Act \(FLSA\)](#) (last visited July 14, 2020).

^[10] U.S. Dep’t of Labor, [Fact Sheet #17C: Exemption for Administrative Employees Under the Fair Labor Standards Act \(FLSA\)](#) (last visited July 14, 2020).

^[11] U.S. Dep’t of Labor, [Fact Sheet #17E: Exemption for Computer-Related Occupations Under the Fair Labor Standards Act \(FLSA\)](#) (last visited July 14, 2020).

^[12] U.S. Dep’t of Labor, [Fact Sheet #17F: Exemption for Outside Sales Employees Under the Fair Labor Standards Act \(FLSA\)](#) (last visited July 14, 2020).

^[13] U.S. Dep’t of Labor, [Vacation Leave](#) (last visited July 14, 2020); see also U.S. Dep’t of Labor, [Holiday Pay](#) (last visited July 14, 2020).

^[14] U.S. Dep’t of Labor, [Sick Leave](#) (last visited July 14, 2020).

^[15] U.S. Dep’t of Labor, [Fair Labor Standards Act Advisor](#) (last visited July 14, 2020).

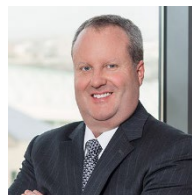
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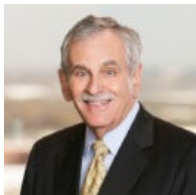
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