

How to Determine if an Individual is a Volunteer or an Employee

As HR professionals, we are all aware of minimum wage requirements for our employees, so how can an employer implement an unpaid volunteer program? This guide will describe the instances where volunteer programs are legal and explain how to determine if your volunteer program is compliant with federal law.

Almost everyone has head of volunteer programs. In order to determine whether an individual is a volunteer or an employee, an employer will need to understand:

1. The definition of an employee.
2. The definition of a volunteer.
3. State and federal laws.
4. How trainees, internships and apprenticeship programs work.

Step 1: Understand the Definition of an Employee

An employee is a worker who performs services for the employer, and the employer controls how and what the employee will do. The Fair Labor Standards Act – FLSA (<http://www.dol.gov/whd/flsa/index.htm>) defines the term “employ” to include “to suffer or permit to work” for an employer. Under FLSA regulations, an individual cannot volunteer services to a private, for-profit company. Employees must be paid at least minimum wage and receive overtime for any hours over 40 in the workweek, unless otherwise exempt under federal law.

Step 2: Understand the Definition of a Volunteer

A volunteer donates their time and energy without receiving financial or material gain. The most common volunteer activities (<http://www.bls.gov/opub/ted/2009/jan/2k4/art01.htm>) are fundraisers, tutoring and teaching. Guidelines exist for volunteers in the public sector (<http://www.dol.gov/elaws/esa/flsa/docs/publicvol.asp>) and nonprofit employers in which payment of minimum wage or overtime would not be necessary. The individual would need to (1) work toward public service, religions, or humanitarian objectives; (2) not expect or receive compensation for services and (3) not displace any genuine employees.

Step 3: Comply with State and Federal Laws

There are no general regulations that permit volunteering of services to an employer in the private sector. All hour worked must be paid. According to the FLSA, an employer must pay all employees not less than the minimum wage for all hours worked. FLSA regulations state that time spent in work for public or charitable purposes at the employer’s request, or under his direction or control, or while the employee is required to be on premises, is working time. The Wage and Hour Division of the U.S. Department of Labor states that employees cannot

volunteer to do the same type of work that they perform as a part of their normal work duties and the hours must be included in the calculating of hours worked. Time spent voluntarily engaged in activities that are completely different from the employee's normal work duties and outside of the employee's normal working hours would not be considered work time.

Step 4: Determine FLSA status of Trainees, Internships and Apprenticeship Program Participants

Whether trainees or students are employees of an employer under the FLSA depends on the circumstances surrounding their activities on the premises of the employer. The School-to-Work Program (<http://www.dol.gov/elaws/esa/flsa/scope/ee15astw.asp>) is an excellent example of trainees. State programs exist that allow students from local school to gain experience in their chosen vocation. Students obtain valuable knowledge from employers willing to provide these worthwhile opportunities that prepare the trainees for the reality of the work environment.

Many companies develop and implement intern programs which allow students the opportunity to get real-world experience in their selected field of study. In order for someone to be considered an "intern" or a "trainee" under FLSA regulations, specific criteria must be met as well. The training must be similar to programs offered in vocational school; the intern, and not the employer, must benefit from the training; the intern cannot replace regular employees; and lastly, the intern or trainee cannot be guaranteed employment following the internship program, and there must be an understanding between the intern and the employer that no wages will be received for the time spent in this learning role.

The FLSA does allow time spent by employees working under an organized apprenticeship program to possibly be excluded from working time. However, certain criteria (<http://www.dol.gov/dol/tipic/training/apprenticeship.htm>) must be met in order to fulfill this requirement.

Employers must develop and outline their trainee, internship and apprenticeship programs to ensure compliance with FLSA regulations.

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