



*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**

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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**

The DOL has set forth a six-factor test used to determine whether interns can be unpaid:

1. The internship must be similar to training provided in an educational environment, even though it may include the operation of the employer's facilities.
2. The internship must be for the benefit of the intern.
3. The intern must not displace regular employees and must work under the close supervision of the existing staff.
4. The employer must derive no immediate advantage from the intern's activities, and the employer's operations may be impeded by the intern's activities from time to time.
5. The intern is not guaranteed a job at the end of the internship.

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6. The intern must understand that he or she is not entitled to wages for the services performed.

The DOL has stated that an employer must meet “each of the six criteria” to properly classify an individual as an unpaid intern rather than an employee. Courts have taken a more flexible approach to the six factors, however, and tend to reject the DOL’s “all or nothing” view. Furthermore, it is unclear whether the DOL’s six-factor test applies in the nonprofit sector. Although the DOL has suggested that the six-factor test applies only to for-profit entities, it has not expressly articulated a separate test for nonprofit internships. Due to the ambiguity in this area of law, nonprofits should approach unpaid internships with caution and consider the same factors as for-profit employers.

### **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.

- 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.
- Have the interns sign an acknowledgment that they will not be paid for their work.
- Ideally, engage interns through a school program that gives them academic credit.
- 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).
- 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.

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## 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 [http://www.pbpatl.org/wp-content/uploads/2012/10/Volunteer\\_Management\\_Issues1.pdf](http://www.pbpatl.org/wp-content/uploads/2012/10/Volunteer_Management_Issues1.pdf).

## 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.

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