



**LEGAL ALERT: EMPLOYMENT AND TAX LAW CONSIDERATIONS
RELATED TO COMPENSATING SUMMER YOUTH WORKERS**

May 2015

Nonprofit organizations that operate summer youth programs should be mindful of the employment and tax laws that govern the compensation of youth workers. Payments made to summer youth workers generally fall into one of the following categories: employee wages, trainee stipends, or volunteer reimbursements.

Employee Wages

Employment Law Considerations

Generally, an employee is an individual who performs services under another's direction and control in exchange for compensation, i.e., a wage.¹ Employers have many legal obligations to their employees.² These include adhering to federal and state laws governing the workplace, such as wage and hour laws, unemployment insurance laws, and anti-discrimination laws. Employers are also required under New York State law to provide short-term disability insurance and workers compensation insurance to all of their employees.

Tax Law Considerations

The taxing authorities will treat the compensation paid by employers to employees meeting the above definition as taxable wages, without regard to the part-time or temporary nature of the work or the label the parties involved apply to the relationship.³ Employers are generally required to withhold and pay federal taxes⁴ (income tax, social security tax, and Medicare tax) and state taxes⁵ (in New York, income tax and unemployment tax) on wages paid to employees. Tax-exempt employers must always withhold and pay income tax from employee wages, but they are exempt from withholding and paying social security and Medicare taxes for employees to whom they pay less than \$100 in a calendar year.⁶

Special Note Regarding Paid and Unpaid Interns

Despite its common usage, there is no exemption from federal or state wage and hour laws, or from employer tax obligations, for "interns." In other words, the age and experience of the individual intern, the duration of the individual's commitment to the nonprofit, or the fact that it is a summer position does not create a special status or provide an exception to any federal or state employment or tax law. How persons described as interns should be treated

¹ N.Y. Labor Law Sec. 740 (a).

² *Requirements for Employers*,

<http://www.nyfirst.ny.gov/ResourceCenter/Business/Employees/Requirements.html>.

³ *IRS Publication 15*, <http://www.irs.gov/pub/irs-pdf/p15.pdf>, at p. 11.

⁴ *Id.* at p. 20-23.

⁵ <http://www.tax.ny.gov/bus/wt/wtidx.htm>.

⁶ *IRS Publication 15-A*, <http://www.irs.gov/pub/irs-pdf/p15a.pdf>, at p. 10.

for employment and tax law purposes depends on the facts surrounding their relationship with the not-for-profit organization:

Paid Interns: If individuals described as interns are providing services under the direction and control of the nonprofit in exchange for compensation in the form of a wage or stipend, they should be treated as employees, entered into the payroll system, and paid at least minimum wage with appropriate taxes withheld and paid.

Unpaid Interns: Alternatively, if the individuals are unpaid interns (meaning that they are not receiving or expecting compensation but are performing tasks for an organization), they should be treated as volunteers. In this capacity, they can, at most, be reimbursed for minimal expenses, such as travel and lunch costs, associated with their participation as volunteers. Providing any further compensation to unpaid interns increases the likelihood that they will be found to be employees by a court or regulatory agency.

*****Takeaway: If you are paying summer youth workers who are providing services under your control or direction, you should treat them as employees for employment and tax law purposes and undertake to fulfill all the attendant employer obligations (including paying at least minimum wage, which is \$8.75/hour for non-tipped workers, and ranges from \$4.90/hour to \$5.65/hour for tipped workers in New York State). If you anticipate having unpaid interns, you should limit any payment to them to reimbursement of participation costs in order to reduce the risk that they will be classified as employees for employment and tax law purposes.*****

Trainee Stipends

Employment Law Considerations

Unlike the word “intern,” the term “trainee” *is* found in employment law. Both federal and state laws provide an exemption from wage and hour laws for “trainees,” who are individuals engaging in bona fide training for future employment. Since trainees are not providing services to the training organization and are therefore not employees, the workers compensation and disability insurance coverage requirements do not apply to them. Very specific criteria apply to the trainee classification, including that the training is similar to that provided in an educational environment and that the organization providing the training derives no immediate advantage from the activities of the trainees.⁷ For this reason, it is very difficult for nonprofits to appropriately classify temporary workers, including unpaid interns, as trainees. Therefore, organizations seeking to classify workers as trainees should first consult an attorney and proceed carefully.

Once an individual is properly classified as a trainee, the individual may be paid a sub-minimum wage stipend or be reimbursed for the cost of equipment and tools used in training, as well as transportation and meal costs incurred during the training. The subminimum wage

⁷ The six criteria that the Department of Labor uses to distinguish employees from trainees can be found at this website: <http://www.dol.gov/elaws/esa/flsa/scope/ee15.asp>.

stipend may also be used as an incentive to participate and successfully complete the training program.⁸ The reimbursement of expenses is not a wage and should never be referred to as a wage. Rather, trainees must understand that they are not being compensated for services they perform for the nonprofit but are being reimbursed for expenses they incur in the training program.

Tax Law Considerations

Generally, if workers are trainees described in the foregoing, then they are not employees for tax purposes because they are not providing services to the training organization. Consequently, training organizations are not required to withhold and pay taxes on their behalf, although the trainees may personally owe tax on the value of any stipend that exceeds reimbursements.⁹ Consult an attorney or accountant for further guidance.

*****Takeaway: If your summer youth workers satisfy the narrow trainee exception, they are not required to be treated as employees for employment law purposes, and you may pay them a stipend which is less than minimum wage without withholding.*****

Volunteer Reimbursements

Employment and Tax Law Considerations

Volunteers who are not paid any compensation in exchange for the services they perform are not entitled to the protections afforded to employees under the law. But they may receive monetary reimbursement for certain minimal expenses, such as the costs of transportation and meals while volunteering. Reimbursement is not a wage and does not require withholding.

While reimbursements for participation costs will generally not be considered compensation, distribution of cash and cash equivalents (e.g., gift cards or gift certificates) not related to reimbursements is taxable income to the recipient, will be treated as compensation by the taxing authorities, and could give rise to the treatment of volunteers as employees under federal and state employment law.¹⁰ However, nonprofit organizations may give volunteers non-monetary token gifts without engendering this risk.

*****Takeaway: You may generally reimburse your summer youth workers for the costs (e.g., meals and travel) associated with participating in your program if they provide services under your direction and control without the risk that they will be deemed employees for employment or tax law purposes. Any money paid to them in excess of reimbursement for participation costs increases the risk that they will be considered**

⁸ See New York Dept. of Labor Opinion RO-09-0189 (youth participating in an educational internship program that paid a basic stipend, with adjustments tied to attendance and participation were not employees where criteria for a bona fide trainee program were met) available at <https://labor.ny.gov/legal/counsel/pdf/Other/RO-09-0189.pdf>.

⁹ See generally 26 U.S.C. Sec. 61 (regarding the broad definition of gross income).

¹⁰ *Charities and Their Volunteers: Working Together to Help the Public*, http://www.irs.gov/pub/irs-utl/charities_and_their_volunteers_working_together_to_help_the_public.pdf, at p. 9.

employees by the relevant authorities. A non-monetary “thank you” gift such as a pin or certificate at the end of the program does not pose this risk. ***

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