The Water Cooler

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You May Have to Say "No" to Students Offering Free Summer Help (Or Pay Them Minimum Wage)

School is out for summer, and eager students unable to find (or uninterested in finding) paid employment are offering their services to your organization for free. Whether they are looking to build their resumes or dedicate some volunteer hours to a worthy cause, they are willing to help your organization at no cost to you. What could be wrong with that? Well, unfortunately, you may be violating state and federal wage and hour laws.

The federal Fair Labor Standards Act and Ohio's minimum wage law require most Ohio employers to, among other things, pay minimum wage and overtime to any nonexempt "employee." As a general rule, these laws state that individuals who are "suffered or permitted" to work are "employees" and must be compensated for the services they perform for an employer. If someone meets the definition of an employee, that individual cannot simply elect to waive his/her right to minimum wage and/or overtime.

Although there are exceptions to the definition of "employee," those exceptions are more limited than many employers may think. For instance, "volunteers" are exempt from minimum wage and overtime. However, the volunteer exception is generally only available to *public* employers and certain religious, charitable or not-for-profit organizations (e.g., non-profit hospitals). And, even as to these employers, the exception has significant limitations. For example, an individual cannot volunteer to perform the same types of services for a public employer that he/she is employed to perform for that employer. Also, a volunteer for a private, non-profit employer must not displace paid employees. Other restrictions may apply as well.

There are also circumstances under which individuals who participate in internships or training programs may do so without compensation. Unlike with the volunteer exception, private, for-profit employers may take advantage of this student intern exception. However, this exception is also subject to significant limitations. According to a 2010 Department of Labor Fact Sheet, the following six criteria must be satisfied for an individual to be properly classified as an unpaid student intern:

(1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

(2) The internship experience is for the benefit of the intern;

(3) The intern does not displace regular employees, but works under close supervision of existing staff;

(4) The employer that provides the training derives no immediate advantage from the activities of the intern and, on occasion, its operations may actually be impeded;

(5) The intern is not necessarily entitled to a job at the conclusion of the internship; and

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(6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In many instances, the above criteria may not be easily satisfied.

So proceed with caution, and consult with legal counsel, as you respond to students offering their services to your organization for free this summer. You may have to either say "no, thank you" or insist on paying the individual at least minimum wage. And, if you decide to accept an individual's services on an unpaid basis, your legal counsel should be able to assist you in preparing documentation for the individual to sign acknowledging his/her consent to, and understanding of, the various implications of the non-employee classification.

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Is It Necessary to Pay FICA Taxes for Summer Employees?

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The Federal Insurance Contributions Act (FICA) provides for a tax on wages that consists of two parts: Old Age and Survivors Disability Insurance (Social Security) and Hospital Insurance (Medicare). The tax is paid by the employee and the employer. [For 2012, the Social Security tax rate for employees is 4.2% (10.4% for the employer and employee combined), but the employee rate increases to 6.2% in 2013 (12.4% for the employer and employee combined) and the limit on wages subject to Social Security tax is $110,100 for 2012. The rate for Medicare is 1.45% (2.9% for the employer and employee combined) and there is no limit on wages subject to Medicare tax.] Generally, wages earned from any service performed by employees within the United States are subject to FICA tax. However, wages earned from the performance of certain types of services are specifically excluded from FICA tax. Some exclusions are:

- Temporary agricultural labor performed by foreign agricultural workers lawfully admitted to the United States.
- Certain services performed for a school by students regularly attending classes at such school (This exception requires that the student's predominant relationship with the school be as a student and only secondarily or incidentally as an employee.).
- Certain domestic services performed by full-time students of a college for a local college club or local chapter of a fraternity or sorority.
- Nominal services performed by student nurses that are incidental to the student's training.
- Most state and local government employees who actively participate in a retirement program maintained for state and local government employees (They are still subject to the Medicare tax.).
- Services performed by duly ordained, commissioned, or licensed ministers in the exercise of their ministries.
- Payment of $1,800 or less in wages during 2012 to a household employee.
- Newspaper distributors under the age of 18.
- Services performed by children less than 18 years of age for their parents.

In general, wages earned by individuals hired for summer employment will be subject to FICA tax unless one of the above described exclusions is applicable. Because the exclusions from FICA are limited, most employers will be required to withhold and pay FICA taxes on wages for summer employees.

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Pointers for Employing Teen Workers

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You may be familiar with the saying "If you want teens to keep their feet on the ground, put some responsibility on their shoulders." Employing minors can be a great business decision, but employers must adhere to the restrictions imposed on the employment of teens by the federal Fair Labor Standards Act (FLSA) and Ohio law. Ohio and federal law generally define a "minor" as any individual under the age of 18.

Basic Requirements

Work Permit: Generally, every minor age 14-17 must have a work permit. During summer months when school is *not* in session, however, a 16- or 17-year-old minor is not required to obtain a work permit, but the employer must maintain proof of the minor's age and a signed statement from a parent/guardian consenting to the proposed employment.

Wage Agreement: Employers must have a written agreement with the minor as to the wages or compensation to be paid for each day, month or year or per piece for work performed.

Rest Period: Minors must be given a rest period of at least 30 minutes when working more than five consecutive hours.

Time Records: Employers must keep a written record, such as a time book, showing the minor's actual starting and stopping time of each period of work or rest. These records must be kept for two years.

Postings: The State of Ohio Minor Labor Laws poster must be posted in a conspicuous place frequented by minors together with a complete listing of all minors employed at the particular establishment.

Summer Hours

Restrictions on a minor's work hours when school is *not* in session during the summer months (June 1 to September 1) differ by age category:

Minors 14 and 15: May not perform work before 7:00 a.m. or after 9:00 p.m. and may not work more than eight hours per day or 40 hours per week. The only exception to the 40 hours-per-week limit is for employment incidental to bona fide programs of vocational cooperative training, work-study or other work-oriented programs with educational purposes.

Minors 16 and 17: Face *no* restrictions on the starting and ending time and *no* restrictions on the number of hours worked per day or per week.

Occupational Restrictions

Due to the dangerous nature of particular types of jobs, minors are restricted from performing certain types of work. Such restrictions include:

- **All Minors**: Prohibited from operating power-driven bakery machines or woodworking machines (including saws). Minors may not distribute or use fertilizers or insecticides and may not work in roofing operations. All minors are generally prohibited from driving a motor vehicle on public roads or highways in the course of their employment. An employer may permit a 17-year old employee to drive on public roads/highways in the course of work if the "incidental and occasional" driving exemption under the FLSA applies. But even this exemption is subject to the additional restrictions under the Teen Drive for Employment Act of 1988 (i.e., daylight hours only, clean driving record, and no urgent time-sensitive deliveries).
- **Minors 14 and 15:** Prohibited from additional hazardous occupations, including all manufacturing jobs, working in freezers or meat coolers, loading or unloading delivery trucks, and all warehouse and construction work except clerical jobs. Door-to-door sales activities are

prohibited unless very specific criteria are met. Under federal regulations, minors under the age of 16 may not cook on a grill that has an open flame and may not use cooking devices or clean equipment when the surface is hotter than 100º F.

- **Minors Under 14:** Federal law prohibits employment of minors under age 14, with very limited exceptions (i.e., newspaper delivery, actors and performers).

Teen-aged employees can be valuable contributors to an organization. Employers must be mindful of the restrictions imposed by the FLSA and Ohio law. Local laws should also be checked to learn of any additional restrictions imposed. Employers should adhere to the most restrictive law if a contradiction exists between the applicable federal, state and/or local law addressing the employment of minors.

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Are Summer Employees Eligible to Participate in Your Retirement Plan?

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The annual hiring of summer employees is a great opportunity for an employer to review the eligibility provisions to participate in his/her company's retirement plan. Depending on how an employer's retirement plan is drafted, summer employees may be eligible to participate in the retirement plan. If the retirement plan is drafted to include all employees and does not include an age or service limitation in its eligibility to participate provisions, then the summer employee probably is eligible to participate in the retirement plan. However, if the retirement plan contains age or service limitations in its eligibility provisions, then there is a good chance that the summer employee will not be eligible to participate in the retirement plan.

An employer should be cautious if his/her company's retirement plan contains a provision excluding part-time, seasonal or temporary employees, or any other classification that appears to be based on hours of service worked for the employer. The Internal Revenue Service (IRS) issued guidance in 2006 indicating that it would closely scrutinize such provisions as directly or indirectly violating the coverage requirements for qualified retirement plans. If a retirement plan excludes from participation part-time, seasonal or temporary employees, the retirement plan now needs to define the terms in such a way that they are not linked to hours of service worked by the employee.

For example, if an employer wants to exclude temporary employees, the plan document should define "temporary employees" as "members of the substitute workforce of the employer." Similar definitions should be carefully crafted if an employer wants to exclude part-time and seasonal employees so as to pass IRS scrutiny.

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Employers Can Face Steep Workers' Compensation Penalties for Injured Minors

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As summertime approaches, along with school vacations, a number of employers seek to hire minors to do a variety of jobs. Under Ohio's workers' compensation laws, a minor is included under the definition of an employee and is covered by workers' compensation statutes in his or her own name. Only in the instance of an injury that results in settlement is a guardian required to take and hold the settlement on behalf of the minor. In addition, employers should be aware that certain workplace injuries involving a minor (age 17 or younger) may result in higher costs for the employer than would be the case with a non-minor. Specifically, Ohio's workers' compensation statute subjects employers to penalties over and above normal workers' compensation premiums when the injury involves the employer's violation of a specific safety requirement established by the Ohio Industrial Commission (e.g., faulty equipment). Although the penalties vary, employers should expect that if a minor is involved, the Industrial Commission will hand down the maximum award available.

Employers seeking to hire a minor for summer work should ensure that all safety requirements are being satisfied and that the minor is thoroughly trained and supervised in using any workplace equipment.

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