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# Exempt or Non-Exempt? The Ten Most Common Employee Classification Pitfalls Faced by Nonprofits

January 8, 2013

12:00 PM – 2:00 PM EST

Venable LLP

575 7th Street, NW

Washington, DC 20004

**Moderator:**

Jeffrey S. Tenenbaum, Esq.

**Panelists:**

Daniel B. Chammas, Esq.

Nicholas M. Reiter, Esq.

# Presentation

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# Exempt or Non-Exempt? The Ten Most Common Employee Classification Pitfalls Faced by Nonprofits

Tuesday, January 8, 2013
12:30 p.m. – 2:00 p.m. EST

Venable LLP
Nonprofit Organizations Practice
Washington, DC

Moderator:
Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:
Daniel B. Chammas, Esq., Venable LLP
Nicholas M. Reiter, Esq., Venable LLP



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## Upcoming Venable Nonprofit Legal Events

February 12, 2013 - Top Ten Federal Grant and Contract Pitfalls for Nonprofits

March 13, 2013 - Preparing an Online Social Media Policy: The Top Ten Legal Considerations for Your Nonprofit

# Overview

- **How to find and fix common misclassification errors**
- **Topics covered today:**
  - Common exemptions from the FLSA
  - Independent contractors
  - Commissioned salespersons
  - Seasonal employees
  - Computer professionals
  - The myth about salaried employees
  - The importance of written job descriptions




# Overtime Basics

- **General Overtime Rules under the FLSA**
  - 40-hour workweek / 1½ times the regular rate of pay
- **Common Exemptions from the FLSA:**
  - Executive Exemption
  - Administrative Exemption
  - Professional Exemption
  - Computer Professional Exemption
  - Seasonal Employee Exemption
  - Highly Compensated Employee Exemption
- **Two Tests to Determine if Exemption Applies:**
  1. Duties Test
  2. Salary Test

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## Exemption Application

- **Duties Test:**
  - Asks about the "primary duty"
  - Factors considered include:
    1. Relative importance of exempt duties
    2. Amount of time performing exempt duties (but not necessarily majority of time)
    3. Relative freedom from supervision
    4. Wages paid to other employees for non-exempt work




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## Exemption Application (cont.)

- **Salary Test:**
  - Requirements
    - Paid $455 per week ($23,660 per year)
    - Paid on a salary basis
    - Pay not subject to reductions because of quantity or quality of work
    - Ready, willing, and able to work

## Executive Exemption

- **Duty Test**
  - Primary duty is the management of the enterprise or a department within the enterprise
  - Regularly directs the work of two or more other employees
  - Has authority to hire or fire employees, or alternatively, management will heed his/her recommendations to hire or fire employees




## Executive Exemption (cont.)

- **Whether the Primary Duty Is Management**
  - Interviewing, selecting, and training employees
  - Adjusting rates of pay or work hours
  - Planning and directing work tasks
  - Maintaining documents used for performance evaluations
  - Conducting employee reviews
  - Addressing workplace complaints or grievances
  - Budgetary decisions and oversight
  - Monitoring or implementing legal compliance measures
  - Ensuring employee safety

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## Executive Exemption (cont.)

- **Supervision of Subordinate Employees**
  - Regularly directs the work of at least two employees
  - The subordinate employees are full-time, or, alternatively, the part-time employees work at least 80 combined hours per week





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## Executive Exemption (cont.)

- **Authority to Hire or Fire Employees**
  - The employee does not need unilateral authority
  - Relevant factors
    - Are such decisions or recommendations part of the employee's job responsibilities?
    - How often are such decisions or recommendations made by or requested of the employee?
    - How often does the employer rely upon the recommendation of the employee?
- **Salary Test**
  - $455 per week?
  - Salaried?

## Administrative Exemption

- **Duty Test**
  - The employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or its clients/customers
  - The employee's primary duty must also require the exercise of discretion and independent judgment with respect to matters of significance





## Administrative Exemption (cont.)

- **Whether Duties Directly Related to the Management or General Business Operations**
  - Duties related to running or servicing of the enterprise instead of manufacture, sales, or retail
    - E.g., finance, auditing, budgeting, purchasing, advertising, human resources, quality control, legal and regulatory compliance, employee benefits, labor relations, and health and safety
  - Duties must be of substantial importance to the management or operation of the employer's enterprise or the employer's clients/customers
    - E.g., employees consulting for the employer's clients/customers
  - Indispensability of the job is not dispositive

## Administrative Exemption (cont.)

- **Exercise of Discretion and Independent Judgment**
  - The employee chooses between two or more possible courses of conduct
  - The choice is free from immediate direction or supervision on matters of significance
  - The employee's decisions may still be reviewed at times
  - The decisions may be recommendations for action rather than direct action
  - Merely following procedures is not sufficient





## Administrative Exemption (cont.)

- **Matters of Significance**
  - Major assignments related to employer's operations
  - Must affect the operations in a substantial manner
  - Authority to implement, interpret, or create management policies or operating practices
  - Authority to deviate from established policies or procedures without prior approval
  - Employee may commit the employer in significant financial matters
  - Involvement in planning of long- or short-term business objectives
  - Conducts investigations or resolves matters for management
  - Represents the employer in complaints or disputes

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## Administrative Exemption (cont.)

- **Salary Test**
  - $455 per week?
  - Salaried?





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## Professional Exemption

- **Duty Test**
  - The primary duty is the performance of work which requires either:
    1. Knowledge of an advance type or field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
    2. Invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
- **Salary Test**
  - $455 per week?
  - Salaried?
- **Two types of professional exemptions**
  1. Learned Professional
  2. Creative Professional

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## Professional Exemption (cont.)

- **Learned Professional**
  - The work must require advanced knowledge
    - Intellectual in character
    - Requires consistent discretion and independent judgment
    - Not routine mental, manual, or mechanical work
  - Usually acquired through prolonged specialized study
    - Specialized degree or period of instruction
  - Common examples
    - Lawyers
    - Doctors
    - Pharmacists
    - Registered Nurses
    - Physician Assistants
    - Chefs
    - Athletic Trainers




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## Professional Exemption (cont.)

- **Creative Professional**
  - The employee's primary duty must require invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
    - Not routine mental, manual, or mechanical work
  - A recognized field of artistic creative endeavor
    - Original and creative in character
    - Not mere reproduction by an employee with ability and training
    - E.g., music, writing, acting, graphic design

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# Computer Professional Exemption

- **Duty Test**
  - The primary duty must consist of:
    - Application of systems analysis techniques and procedures, e.g., consulting with users to diagnose and fix IT problems;
    - Design, development, analysis, testing, or modification of computer systems or programs, e.g., creating prototypes or design specifications;
    - Design, testing, creation, or modification of computer programs related to machine operating systems; or
    - A combination of any of the above, so long as the duty requires the same skill level





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# Computer Professional Exemption (cont.)

- **Salary Test**
  - Unlike other exemptions, allows for hourly rate:
    - $455 or more per week <u>and</u> on salary basis; <u>or</u>
    - $27.63 or more per hour

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## Seasonal Employee Exemption

- **No Duty Test**
- **Employer-specific inquiry:**
  - Employer is an amusement or recreational establishment, organized camp, or religious or nonprofit educational center; and either
  - Employer does not operate for more than seven months in any calendar year; or
  - During the preceding year, the employer's average monthly receipts for any six months were not more than one-third of its average monthly receipts for the other six months of the same year.
    - "Any six months" means the employer can choose which six months of the year
      - May – October = $260K = $43,333 per month
      - November – April = $75K = $12,500 per month





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## Highly Compensated Employees Exemption

- **Requirements**
  - Annual compensation of at least $100,000;
  - Compensation includes at least $455 per week in salary;
  - The employee's primary duty includes performing office or non-manual work; and
  - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt, administrative, or professional employee.

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## Salary Test Deductions

- **Permissible Deductions from Salary**
  - Absences for personal reasons, i.e., not sickness or disability
  - Deductions for sickness or disability absences pursuant to a bona fide sick plan
  - Penalties for major safety rule violations*
  - Disciplinary suspensions for one or more full workdays
- ***State-by-State Payroll Deduction Rules**
  - In general, very strict civil penalties for deducting employees' pay
  - E.g., payroll deductions for damaged property are typically illegal





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## Salary Test Deductions (cont.)

- **Consequences of Impermissible Deductions**
  - "Actual Practice" of making improper deductions?
    - Number of improper deductions
    - Time period of improper deductions
    - Existence/absence of clearly communicated policy regarding improper deductions
  - If "actual practice"
    - Salary test is not satisfied for the time period in which the "actual practice" occurred for employees in the same job classification and working for the same managers responsible for the improper deductions
    - Affected employees will not be deemed to have earned $455 per week

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## Salary Test Deductions (cont.)

- **Safe Harbor Provision**
  - No consequences for improper deductions if:
    - Clearly communicated policy prohibiting improper deductions, including internal complaint procedure;
    - The employer reimburses employees for improper deductions; and
    - The employer makes a good faith commitment towards future compliance.
  - No safe harbor available if the employer willfully makes improper deductions after notice, e.g., receipt of an employee complaint.





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## Independent Contractors

- **Employees v. Independent Contractors:**
  - *No one factor is dispositive!*
    - Written Agreement
    - Control: Behavioral & Financial
    - Relative Investments
    - Opportunity for Profit/Loss
    - Required Skill & Initiative
    - Permanency of Relationship
    - Separate Entity Question
    - Tax Forms & Benefits

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# Independent Contractors (cont.)

- **Three-Prong Test**

1. **Financial Control**
   - Unreimbursed business expenses
   - Worker's investment in the facilities or tools used in services
   - Worker makes his or her services available to the relevant market
   - How the business pays the worker
   - The extent to which the worker can realize a profit or incur a loss
2. **Behavioral Control**
   - Right to direct and control what work is accomplished
   - How the work is done, through instructions, training, or other means
3. **Type of Relationship**
   - Written contracts describing the relationship
   - Employee benefits, e.g., insurance, pension, vacation, or sick pay
   - The permanency of the relationship
   - Are services performed by the worker a key aspect of the business?





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# Independent Contractors (cont.)

## IRS 20 FACTOR TEST

| | | |
|---|---|---|
| 1. Level of instruction | 2. Amount of training | 3. Degree of business integration |
| 4. Extent of personal services | 5. Control of assistants | 6. Continuity of relationship |
| 7. Flexibility of schedule | 8. Demands for full-time work | 9. Need for on-site services |
| 10. Sequence of work | 11. Requirements for reports | 12. Method of payment |
| 13. Payment of expenses | 14. Provision of tools and materials | 15. Investment in facilities |
| 16. Realization of profit or loss | 17. Work for multiple companies | 18. Availability to public |
| 19. Control over discharge | 20. Right of termination | |

## Ten Most Common Classification Pitfalls for Nonprofits

1. Always classifying salaried employees as exempt.
2. Always classifying supervisors as exempt.
3. Classifying exemptions based upon job descriptions or titles only.
4. Making deductions from exempt employees' paychecks.
5. Misperception that exempt employees may not be rewarded with weekly compensation beyond their salaries.
6. Classifying all employees who work with computers as computer professionals.
7. Always classifying commissioned employees as exempt.
8. Equating all jobs performed by all highly educated employees with exempt jobs.
9. The myths about independent contractors.
10. Paying exempt employees a full week's salary if work is performed for some, but not all, of the work week.





## PITFALL # 1

### Always classifying salaried employees as exempt.

- **Salaried employees are not necessarily exempt.**
- **The salary test is only half of the equation.**
- **A salaried employee may not meet the duty test.**
- **Unless the duty test is met, the salaried employee must receive overtime pay.**
  - Calculation:
    - Determine weekly salary
    - Divide by hours weekly salary was intended to cover
    - Employee receives this hourly rate for every hour up to 40 that week
    - Multiply by 1.5 for hours worked above 40 per week
    - Special rules for fluctuating workweek

## PITFALL # 2

### Always classifying supervisors as exempt.

- **Supervisors are not necessarily exempt.**
- **"Primary duty" is the key factor.**
  - E.g., the "shift supervisor" who is a lead cashier
  - Is the employee's primary duty the supervision of other employees?
  - What can the employee do to fire/hire other employees?
  - Is the employee more akin to a "lead foreman" who works alongside others or a manager who oversees a department?




## PITFALL # 3

### Classifying exemptions based upon job descriptions or titles only.

- **Job descriptions are important, but are only a single factor.**
- **The DOL or a court will still look to the actual job duties performed.**
- **Job descriptions help prove an employer's reasonable expectations.**
- **Critical for disciplinary issues.**

## PITFALL # 4

### Making deductions from exempt employees' paychecks.

- **Exempt employees must be paid a *guaranteed base salary.***
- **The base salary cannot fluctuate from week to week.**
- **Common improper deductions from exempt employees' paychecks include:**
  - Late arrivals or early departures
  - Poor quality of work
- **Future pay cuts are OK.**
- **Need for clearly communicated policy.**





## PITFALL # 5

### Misperception that exempt employees may not be rewarded weekly compensation beyond salaries.

- **Exempt employees must be paid a *guaranteed base salary.***
- **As long as the base salary is paid, exempt employees may receive additional weekly compensation.**
- **Permissible weekly bonuses or additional payments for:**
  - Sales figures
  - Productivity levels
  - Quality of work
  - Extended hours

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## PITFALL # 6

## Classifying all employees who work with computers as computer professionals.

- **Commonly misclassified employees:**
  - Data entry employees
  - Computer hardware repair, manufacture, or maintenance employees
- **Employees may perform highly technical tasks, but at another's complete direction.**
- **Computer professional exemption more likely to become stale over time for specific employees.**





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## PITFALL # 7

## Always classifying commissioned employees as exempt.

- **Outside salesperson**
  - Primary duty of making sales or obtaining orders or contracts for services or facilities use; and
  - Customarily engaged away from business establishment to perform exempt sales function
- **Commissioned salesperson**
  - Retail or service establishment; and
  - Rate of pay above 1½ times minimum wage
- **Common classification issues**
  - "Customarily" engaged away from the office?
  - "Retail or service establishment?"

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## PITFALL # 8

## Equating all jobs performed by highly educated employees with exempt jobs.

- **Why misleading?**
  - Some jobs require special degrees or prolonged course of study.
  - Some jobs also require use and application of highly complex and specialized knowledge.
- **The professional exemption still requires independent judgment and discretion.**
- **Red flag: if the employee merely follows prescribed procedures.**





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## PITFALL # 9

## The myths about independent contractors.

- **Independence to perform his/her job is not dispositive.**
- **Wide variety of factors.**
- **Key questions:**
  - May the independent contractor determine how to achieve the objective for which he/she was retained?
  - Does the independent contractor perform any of the same job functions as employees?
  - Does the independent contractor provide services that are otherwise unavailable to the employer?
  - Are the independent contractor’s services integral to the employer’s business enterprise?

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## PITFALL # 10

## Paying exempt employees a full week's salary if work is performed for some, but not all, of the work week.

- **Common misperception:**
  - If an exempt employee works three out of five days in a workweek, the employer must pay the exempt employee for all five days because he/she is exempt.
- **"Ready, willing, and able" to work**
  - If the missed work days are due to lack of work, no pay deductions may be made.
  - Furloughs available, however.
- **Absences for personal reasons**
  - The employer may deduct an exempt employee's pay for absences due to personal reasons, among other things.





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## Questions

Jeffrey S. Tenenbaum, Esq.
jstenenbaum@Venable.com
t 202.344.8138

Daniel B. Chammas, Esq.
dbchammas@Venable.com
t 310.229.0302

Nicholas M. Reiter, Esq.
nmreiter@Venable.com
t 212.370.6296

To view Venable's index of articles, PowerPoint presentations, recordings and upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications, www.Venable.com/nonprofits/recordings and www.Venable.com/nonprofits/events.

# Speaker Biographies

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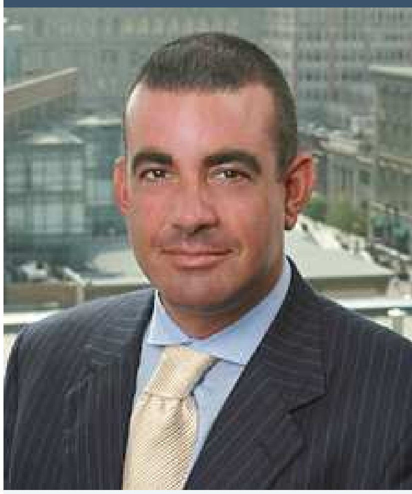

# Jeffrey S. Tenenbaum


Partner

Washington, DC Office

T 202.344.8138 F 202.344.8300

jstenenbaum@Venable.com


Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, credit and housing counseling agencies, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was the inaugural (2004) recipient of the *Washington Business Journal*'s Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the 2012 *Legal 500* rankings, and was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in *The Best Lawyers in America 2012* and *2013* for Non-Profit/Charities Law, and was named as one of Washington, DC's “Legal Elite” in 2011 by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

## REPRESENTATIVE CLIENTS

AARP
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Association for Marriage and Family Therapy
American College of Radiology
American Institute of Architects
Air Conditioning Contractors of America
American Society for Microbiology
American Society for Training and Development
American Society of Anesthesiologists
American Society of Association Executives
American Society of Civil Engineers
American Society of Clinical Oncology
American Staffing Association
Associated General Contractors of America
Association for Healthcare Philanthropy
Association of Corporate Counsel

## AREAS OF PRACTICE

Tax and Wealth Planning

Antitrust

Political Law

Business Transactions Tax

Tax Controversies

Tax Policy

Tax-Exempt Organizations

Wealth Planning

Regulatory

## INDUSTRIES

Nonprofit Organizations and Associations

Credit Counseling and Debt Services

Financial Services

Consumer Financial Protection Bureau Task Force

## GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

## BAR ADMISSIONS

District of Columbia

## EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

## MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

Association of Private Sector Colleges and Universities
Automotive Aftermarket Industry Association
Brookings Institution
The College Board
Council on Foundations
Cruise Lines International Association
Foundation for the Malcolm Baldrige National Quality Award
Goodwill Industries International
Homeownership Preservation Foundation
Independent Insurance Agents and Brokers of America
Institute of International Education
Jazz at Lincoln Center
The Joint Commission
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
Money Management International
National Association of Chain Drug Stores
National Athletic Trainers' Association
National Coalition for Cancer Survivorship
National Defense Industrial Association
National Fallen Firefighters Foundation
National Hot Rod Association
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
National Telecommunications Cooperative Association
The Nature Conservancy
NeighborWorks America
Peterson Institute for International Economics Professional
Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Texas Association of School Boards
Trust for Architectural Easements
United Nations High Commissioner for Refugees Volunteers
of America

## HONORS

Recognized as "Leading Lawyer" in the 2012 edition of *Legal 500*, Not-For-Profit

Listed in *The Best Lawyers in America 2012* and *2013* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.)

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

## ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

## PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, published by the American Society of Association Executives, and is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. He also is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. In addition, he is a frequent author for ASAE and many of the other principal nonprofit industry organizations and publications, having written more than 400 articles on nonprofit legal topics.

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer for ASAE and many of the major nonprofit industry organizations, conducting over 40 speaking presentations each year, including many with top Internal Revenue Service, Federal Trade Commission, U.S. Department of Justice, Federal Communications Commission, and other federal and government officials. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine, The Chronicle of Philanthropy, The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal issues on Voice of America Business Radio and Nonprofit Spark Radio.

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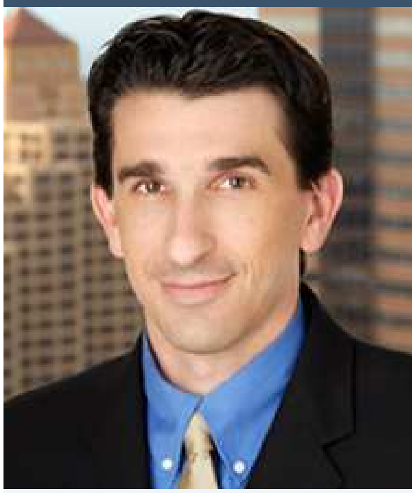

AREAS OF PRACTICE

Labor and Employment

West Coast Labor and Employment

Litigation

Class Action Defense

Commercial Litigation

Regulatory

California Law - Consumer Protection Statutes

INDUSTRIES

Consumer Products and Services

New Media, Media and Entertainment

BAR ADMISSIONS

California

COURT ADMISSIONS

U.S. District Court for the Central District of California

U.S. District Court for the Northern District of California

U.S. District Court for the Southern District of California

U.S. Court of Appeals for the Ninth Circuit

# Daniel B. Chammas

Partner

Los Angeles, CA Office

T 310.229.0302 F

dchammas@Venable.com

Dan Chammas is a skilled litigator with extensive experience defending companies against class actions, particularly wage and hour and consumer class actions. Mr. Chammas is a member of Venable's Labor and Employment Practice Group and has litigated and resolved every type of employment dispute, including claims for wrongful termination, sexual harassment, unpaid wages, racial discrimination and representing management against union grievances. Mr. Chammas focuses his practice on “high stakes” litigation, defeating class certification in "off-the–clock violations," missed breaks, discrimination, employee misclassification, and consumer class actions. He has personally managed and prevailed in more than ten multi-million dollar class actions.

In addition to his litigation work, Mr. Chammas has advised clients on a whole array of employment issues, including terminating employees, drafting employee handbooks, and complying with California and federal wage and hour laws, as well as leave and disability rules. He has also represented and counseled entertainment studios on their rights and obligations under various minimum basic agreements and talent deals.

## REPRESENTATIVE CLIENTS

Mr. Chammas represents Fortune 500 companies, premier providers of goods and services across the country, entertainment studios, and small businesses with varying levels of employees.

## SIGNIFICANT MATTERS

- Mr. Chammas has defended the premier global provider of wireless tracking and recovery systems for mobile assets in a wage and hour class action. He successfully argued before the U.S. Ninth Circuit Court of Appeals, which agreed with a lower court ruling and denied compensation to an employee who alleged his commute to work and other activities should have been paid time.
- He also successfully defended a client in an invasion of privacy consumer class action with allegations that the company placed and recorded hundreds of telephone calls to individuals per day without their consent. The class – which had originally sought tens of millions of dollars – could not be certified, Mr. Chammas pointed out, because the recordings were authorized by state tariffs.
- Mr. Chammas defeated class certification of a wage and hour class action alleging the misclassification of exempt supervisors, and then prevailed in a jury trial when 16 individual plaintiffs, who could not represent a class, still pursued their claims in court individually.

## EDUCATION

J.D., Stanford Law School, 1999

B.A., *summa cum laude*, University of California at Los Angeles, 1996

- He also represented and defended a leader in the portrait photography industry in an off the clock class action in federal court. The district court denied the motion to certify a class of over 3,000 employees.
- Mr. Chammas prevailed in a class action brought by the Department of Fair Employment and Housing, which alleged that requiring applicants for employment to submit to a "nerve pace test" violated the state's disability discrimination laws.

## HONORS

Selected for inclusion in *Southern California Super Lawyers* Rising Stars Edition 2010, 2009 and 2007

## PUBLICATIONS

- June 26, 2012, Attorney Fees Provision May Not Be As Powerful As You Think, *Daily Journal*
- January 2012, Enforcing Non-Compete Provisions in California, Labor & Employment News Alert
- December 2011, New California Employment Laws That Impact Employers, Labor & Employment News Alert
- December 2011, New California Law Penalizes Willful Misclassification of Independent Contractors, Labor & Employment News Alert
- May 18, 2011, Say Goodbye to Wage-and-Hour Class Actions, *Daily Journal*
- May 2011, The End of Wage-and-Hour Class Actions, Labor & Employment News Alert
- March 14, 2011, When It Comes to Arbitration Agreements, Less Is More, *Daily Journal*
- August 2010, California Court Empowers Employers To Collect Attorneys' Fees From Unsuccessful Claimants For Unpaid Wages or Missed Breaks, Labor & Employment News Alert
- March 24, 2010, Bracing for Brinker - What Employers Should Do While They Await California Supreme Court Ruling On Meal Breaks, *Society for Human Resource Management newsletter*
- March 2010, Employers and the Prevention of Workplace Violence, *Workforce Management Online*
- December 11, 2009, Hindsight Is Always 20/20: Preventing Workplace Violence
- October 29, 2009, Workweek Can Finally Be Shortened for Exempt Employees in Calif.

## SPEAKING ENGAGEMENTS

- January 8, 2013, Exempt or Non-Exempt? The Ten Most Common Employee Classification Pitfalls Faced by Nonprofits
- November 27, 2012, "Exempt in California: How to Find and Fix Misclassification Mistakes," BLR Webinar
- November 15, 2012, "Exempt vs. Nonexempt: How to Find and Fix Misclassification Mistakes," BLR Webinar
- December 16, 2010, "Damage Modeling in Wage and Hour Class Actions" for the Eighth Annual Wage and Hour Litigation Conference - Bridgeport Continuing Education
- December 21, 2009, "The Outside Sales Exemption: Four-Part Virtual Boot Camp Series" hosted by Business & Legal Reports
- December 17, 2009, "The Executive Exemption: Four-Part Virtual Boot Camp Series" hosted by Business & Legal Reports
- December 16, 2009, "The Professional Exemption: Four-Part Virtual Boot Camp Series" hosted by Business & Legal Reports

VENABLE® LLP

our people

# Nicholas M. Reiter

Associate

New York, NY Office

T 212.370.6296 F 212.307.5598

nmreiter@Venable.com

Nicholas Reiter focuses his practice on labor and employment matters and commercial litigation. He regularly advises and litigates on behalf of clients in the restaurant, hospitality, construction, healthcare, and financial services industries.

His areas of concentration include:

- Representing employers in employment litigation matters in state and federal courts such as claims of discrimination, harassment, retaliation, constructive discharge, and wage and hour violations
- Advising and counseling employers regarding their workplace practices and procedures, including employee handbooks, termination and hiring decisions, and disability accommodations
- Conducting company-wide audits of employee classifications to ensure compliance with federal and state wage and hour laws
- Evaluating non-compete clauses and other restrictive covenants
- Representing employers in connection with audits and investigations initiated by governmental agencies, including the U.S. Department of Labor, the U.S. Department of Homeland Security, and the New York State Department of Labor
- Negotiating collective bargaining agreements and representing employers in other labor union disputes
- Defending healthcare systems and other employers against federal False Claims Act allegations
- Litigating commercial actions such as breach of contract claims, misappropriation of trade secrets, and unfair competition matters

## ACTIVITIES

Prior to joining Venable, Mr. Reiter was a law clerk for United States District Judge David N. Hurd of the Northern District of New York.

While attending law school, Mr. Reiter was Editor-in-Chief of the Journal of Law and Policy.

## PUBLICATIONS

- September 20, 2012, Payroll Pitfalls: How Nonprofit Employers Can Avoid Big Problems
- June 2012, Seventh Circuit Answers Question of First Impression: Cat's Paw Theory Exposes Co-Workers to Individual Liability for Retaliation Claims under Section 1981, Labor & Employment News Alert

## AREAS OF PRACTICE

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U.S. District Court for the Eastern District of New York

U.S. District Court for the Northern District of New York

U.S. District Court for the Southern District of New York

U.S. District Court for the Western District of New York

## EDUCATION

J.D., *cum laude*, Brooklyn Law School, 2008

B.A., College of William and Mary, 2004

## JUDICIAL CLERKSHIPS

Honorable David N. Hurd, U.S. District Court for the Northern District of New York

- February 21, 2012, How Nonprofits Can Avoid the Legal Pitfalls of Telecommuting Employees
- September 12, 2011, Telecommuting Employees: How Nonprofits Can Avoid the Legal Pitfalls
- July 25, 2011, A Nonprofit's Guide to Properly Characterizing Workers as Employees, Interns and Volunteers
- June 2011, New York Department of Labor Clarifies that Employers Have Until Next Regularly Scheduled Pay Day to Pay Out Employees' Credit Card Tips, Labor & Employment News Alert

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- January 8, 2013, Exempt or Non-Exempt? The Ten Most Common Employee Classification Pitfalls Faced by Nonprofits
- September 20, 2012, "Payroll Pitfalls: How Nonprofit Employers Can Avoid Big Problems" for the Better Business Bureau of Metropolitan New York
- April 17, 2012, Venable Breakfast Briefing: Updates for Restaurant Industry Employers
- September 14, 2011, Telecommuting Employees: How Nonprofits Can Avoid the Legal Pitfalls

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April 2012

# Top Ten Compensable Time Issues for Non-Exempt Employees

Related Topic Area(s): Employment Law

Wage and hour lawsuits outpace all other types of employment litigation, and federal and state labor departments continue vigorous enforcement in this area. Under the Fair Labor Standards Act ("FLSA"), employees are categorized as either exempt or non-exempt. Exempt employees are paid a salary for all hours worked and do not receive overtime pay. Exempt employees must meet certain criteria under the FLSA to qualify as exempt based on the primary duties of the employee's job and they must be paid on a salary basis. Non-exempt employees are generally paid on an hourly basis. They must be paid for all hours worked in a workweek and receive overtime pay if they work over forty hours in a workweek. So, in order to calculate the amount of money a non-exempt employee should receive, an employer must determine the number of hours of work or "compensable time." Compensable time or working time is defined as any time the employer permits or allows an employee to perform the activity. This includes all time worked while at the office, work performed at home, and even work that is performed before the regular workday begins.

It is critical for employers to ensure that their non-exempt employees are properly compensated for all hours worked, including all overtime hours worked. The top ten list below highlights some of the common pitfalls for employers, and addresses areas of confusion under the FLSA's complex rules on compensable time for non-exempt employees.

**1. Waiting Time**

If a non-exempt employee is not performing work during a regular workday, but is waiting for an assignment, such time must be considered compensable time because the employee is not free to leave. For example, an administrative assistant who is reading a romance novel while waiting for an assignment must still be compensated for that time since the employee is being required to wait. If, on the other hand, the employee is told that he or she can leave and come back in two hours, that time is not compensable waiting time because the employee is free to use the time for his or her own purposes.

**2. Seminars, Lectures, and Training Programs**

Many non-exempt employees attend lectures, seminars, and training programs outside the office. Attendance at lectures, meetings, training programs, and similar activities is not considered compensable time only if *all* of the following criteria are met:

- Attendance is outside the employee's regular working hours,
- Attendance is voluntary,
- The course, lecture, or meeting is not directly related to the employee's job, AND
- The employee does not perform any productive work during such attendance.

Training is considered related to the employee's job if it is designed to help the employee handle his or her job more effectively and it is related to the job. If it is training for another job or a new or additional skill, then it is not job-related even if the course incidentally improves skills in doing the regular work. For example, an IT employee who takes classes toward an accounting degree may incidentally improve his or her organizational skills but that training is not job-related.

When employees attend independent trainings, courses, and college after hours, and it is not required by the employer, such time is not compensable time. Even if the employer pays or reimburses the employee for part of the tuition through an employee benefit plan, the time spent at the course is not compensable time. Similarly, if an employer offers a lecture or training session for the benefit of employees, voluntary attendance outside of work hours is not hours worked, even it if it is job-related or paid for by the employer. For example, an employer may offer all employees an opportunity to hear an author to speak about a new book about improving management skills. If it is during work hours, the time at the session is compensable time. If the speaker event is outside of regular hours, and is completely voluntary, it is not compensable time.

**3. "Off-the-Clock Time"**

A non-exempt employee must be compensated for all hours worked in a workweek. This includes work performed that may be outside the employee's regular workday. For example, a non-exempt employee may report to the office 30 minutes early each day due to a commuter bus schedule. If the employee begins working prior to the start of the regular workday, that time must be counted as compensable time, even if the employee does not record the time on the time sheet. The same requirement applies to the non-exempt employee who brings work home or responds to emails from home before or after the regular workday.

Non-exempt employees should be instructed not to perform work beyond their regular work schedule unless they receive prior approval from their supervisor. If an employee fails to obtain approval but performs work, he or she must still be compensated for that time, but the employer may address the situation as a disciplinary matter. Employers should carefully consider work schedules for non-exempt employees, and establish policies and train supervisors regarding off-the-clock work to avoid potential violations of overtime requirements.

**4. Attendance at Receptions, Dinners, and Other Social Events**

Many employers sponsor or host receptions, dinners, happy hours, and other social events. If a non-exempt employee is required to attend a reception, dinner, happy hour, or other social event, that time is treated as compensable time, even if the employee is not performing work that he or she usually performs in the office. Again, it is important to clearly communicate to non-exempt employees what is required and what is not required. In addition, supervisors should be trained not to pressure non-exempt employees to attend an event that is not mandatory.

**5. Volunteer Activities**

Employers may offer "volunteering" or "team building" opportunities. If such activity is mandatory for non-exempt employees, it must be counted as compensable time even if the activities are held on the weekend outside normal working hours. Or, if the employer requires all non-exempt employees to "volunteer" two hours at a book drive, that is compensable time.

If, however, a non-exempt employee volunteers to work at the employer's annual dinner outside regular work hours and is not performing work regularly performed by the employee, that can be considered volunteering and does not need to be compensated. For example, a research assistant volunteers to be a greeter at an event on Saturday night, and is not required to volunteer, that is not compensable time. If the volunteering occurs during regular working hours, it is considered compensable time.

**6. Travel as a Passenger during Non-Shift Hours Where No Work Is Performed**

As a general rule, an employee who travels from home before his or her regular workday and returns home at the end of the workday is engaged in ordinary home-to-work travel which is a normal incident of employment and is not compensable.

Oftentimes, employees are asked to travel longer distances to attend conferences or other out-of-town events. However, if all of the following conditions are met, even this longer form of travel to a different city is not considered compensable time: the employee is a passenger on an airplane, train, boat, or automobile; the travel is during non-shift hours; AND no work is performed during the travel.

For example, an employee who takes a four-hour plane trip to a week-long conference during non-shift hours but performs no work on the plane need not be compensated for this travel time.

**7. Travel as a Passenger during Shift Hours**

On the other hand, if an employee travels to an out-of-town conference during shift hours, that employee must be compensated for the commuting time to the conference which exceeds that employee's regular commute, whether or not he or she performed any work during the commute.

For example, an employee whose regular commuting time is 30 minutes, and who takes a three- hour train ride for a one-day trip to another city during regular shift hours and performs no work on the train, must be compensated for the two-and-a-half hours which are not part of regular commute.

**8. Work Performed while Commuting**

One frequent area of confusion stems from situations where an employee performs work during his or her commute.  As a general rule, any work which an employee is required to perform while commuting must be counted as hours worked and compensated accordingly.  For example, time spent by an employee writing a report is work time, even if it happens to occur while the employee is riding on a bus (or other mode of transportation) to or from work.

It is important for employers to clearly communicate to non-exempt employees when work is and is not required to be performed.  Moreover, supervisors should be trained not to give non-exempt employees work to do once the employee's shift ends which must be completed by the beginning of his or her shift the next morning.

**9. Interns**

Whether an employer must compensate interns for time worked is an often misunderstood topic. Unpaid internships in the public sector and for nonprofit organizations, where the intern volunteers without expectation of compensation, are generally permissible.  Importantly, an intern who receives academic credit from his or her educational institution for completion of an internship with an employer will easily qualify as an intern/trainee.

On the other hand, examples of when an intern will not be considered an intern/trainee include: (1) where the intern is used to substitute for regular workers or to supplement the employer's workforce; (2) where, but for the intern, the employer would have hired additional employees or asked its existing staff to work additional hours; and (3) where the intern is engaged in the employer's routine operations and/or the employer is dependent on the intern's work.

**10. Time Waiting for/Receiving Medical Attention**

Time spent waiting for and receiving medical attention on the premises or at the direction of an employer during an employee's normal working hours on days when he or she is working constitutes hours worked and must be compensated.

For example, if a teacher's assistant feels dizzy during regular shift hours and her supervisor instructs her to lay down for 15 minutes in the employee lounge, this time must be compensated.

**Conclusion**

Of course, this top ten list only highlights some of the most common issues.  Employers must first make sure employees are properly classified as exempt or non-exempt.  Remember that not everyone who is paid a salary is exempt.  For non-exempt employees, employers should carefully track hours worked.  It is the employer's responsibility to keep records of hours worked and wages paid to employees.  If the records do not exist, there is a presumption that the employee's assertions are correct.  Also, train supervisors to be familiar with overtime requirements for non-exempt employees and to closely monitor hours worked by non-exempt employees.  Employers are encouraged to establish clear policies about non-exempt employees working from home or working while traveling, coming in early and staying late, and working beyond their regular schedule to avoid some of the common pitfalls.

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Grace H. Lee is an associate with the Labor and Employment Group of Venable LLP.
She can be reached at 202-344-8043 or **ghlee@venable.com**.

Robert A. Friedman is an associate with the Labor and Employment Group of Venable LLP.
He can be reached at 202-344-4332 or **rafriedman@venable.com**.

VENABLE LLP

AUTHORS

Jeffrey S. Tenenbaum
David R. Warner
Nicholas M. Reiter

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February 21, 2012

# How Nonprofits Can Avoid the Legal Pitfalls of Telecommuting Employees

Related Topic Area(s): Employment Law

As technology for the home office improves, more nonprofits and employees are taking advantage of the benefits of telecommuting. Laptops are lighter, faster, and more portable. Smartphones, iPads, and other e-readers continue to sell in record numbers. Cloud computing enhances colleagues' ability to share information efficiently. Video conferences are becoming the norm, not the exception. These technological advances, when combined with the growing concerns over gasoline prices and work-life balance, make telecommuting a very attractive option for many nonprofits and their employees.

Of course, federal and state labor laws still apply to the telecommuting employee. Whether a nonprofit should, or in some cases must, permit telecommuting depends upon an analysis of the unique issues that telecommuting raises under federal and state law. Set forth below is an overview of some of the logistical and legal issues nonprofits should consider when creating or reforming their telecommuting programs.

**Which Positions Are Best Suited for Telecommuting?**

No matter the technological developments, telecommuting will likely never be appropriate for every employee. For example, it is very unlikely that a nonprofit's receptionist could perform his or her duties while telecommuting. Similarly, employees performing client intake services may need to physically perform their duties at the job site. In contrast, positions which primarily entail the electronic transfer of documents or other information are typically better suited for telecommuting, subject to proper safeguards for confidentiality and client privacy. Other common characteristics of roles fit for telecommuting include a low need for direct supervision or guidance, limited face-to-face interaction, and easily measured performance benchmarks such as quantity of output instead of actual time spent at the job site.

**Wage and Hour Requirements**

The Fair Labor Standards Act ("FLSA") and its state law counterparts raise issues for how nonprofits monitor the work schedules of their telecommuting employees. Assuming an employee is not exempt from the overtime wage law, he or she must be paid time-and-a-half for all hours worked beyond 40 hours in a workweek. Additionally, employers are required to maintain accurate records of the hours their employees work.

Given the inherent difficulty of monitoring the work hours of a telecommuting employee, some employers offer telecommuting to exempt employees only. However, an across-the-board prohibition against telecommuting for non-exempt employees may give rise to a disparate impact claim depending upon the demographics of a nonprofit's workforce. As an alternative, many nonprofits create something akin to a virtual sign-in sheet, requiring their telecommuting employees to log-in and log-out of a web-based program at the beginning and end of their work day. Other nonprofits simply require that their telecommuting employees receive authorization from their manager prior to working beyond 8 hours in a workday or 40 hours in a workweek. However, in the event a telecommuting employee works overtime without proper authorization, the employer may not simply refuse to pay the employee overtime wages. Instead, the employer must still pay the employee overtime wages and treat the violation of the telecommuting policy as a disciplinary issue.

**Occupational Safety and Health Issues**

The Occupational Safety and Health Act ("OSHA") creates recordkeeping and workplace safety requirements for most employers, including many nonprofits. In contrast to the traditional work environment, the employer is typically absent when an injury to a telecommuting employee occurs. In addition, it is necessarily more difficult for an employer to monitor the safety of a telecommuting employee's workspace.

The employer's obligation to provide a safe work environment is balanced against the telecommuting employee's right to privacy in his or her home. Accordingly, an employer is not obligated to inspect a telecommuting employee's home office. However, a nonprofit's telecommuting policy should nonetheless help promote a safe home office environment. The policy should state that the telecommuting employee is responsible for ensuring that his or her workspace complies with the same safety requirements for the employer's site. The policy also should acknowledge that the telecommuting employee either has been provided equipment from the employer or has assumed responsibility for the safety of his or her own equipment.

**Workers' Compensation Laws**

Although the specific statutes vary among different states, workers' compensation laws generally require that an employer compensate its employees for injuries sustained in the course and scope of employment. Nonprofits may find it more difficult to ascertain whether an injury occurs in the course and scope of employment for telecommuting employees. Unlike with injuries at the employer's site, there are usually no witnesses when a telecommuting employee is injured at his or her home. In order to curb against the risk of fraudulent injury reports, the telecommuting policy should require that work-related injuries be recorded within a certain number of hours of the occurrence and that the employee make his or her home work-space available for inspection following the injury.

**Implications of the Americans with Disabilities Act**

The Americans with Disabilities Act ("ADA") prohibits workplace discrimination based upon an employee's disability. Assuming that an employee meets the ADA's definition of disabled, nonprofits with 15 or more employees must reasonably accommodate the employee so long as such accommodation does not result in an undue hardship for the employer. In the telecommuting context, the most critical question is whether the disabled employee can perform the essential functions of his or her job from home. Common considerations include whether: (1) the employee regularly meets with clients or customers; (2) the employee supervises other employees and/or regularly meets in person with a team of co-workers; and (3) the employee's productivity or quality of work will suffer if he or she is permitted to telecommute.

In light of these concerns, nonprofits should ensure that they have written job descriptions which clearly set forth the essential job functions of each position. As part of the interactive process, a nonprofit should refer to an employee's job description when explaining whether it permits the employee to telecommute as a reasonable accommodation. An employer is not necessarily required to permit telecommuting merely because it is the employee's preferred reasonable accommodation. In one recent case, an employee requested that she be permitted to telecommute because her disability required that she lay down periodically during the workday. Although the employer denied her request, the employer did not violate the ADA because it provided the employee with a cot in her office as an alternative reasonable accommodation for her disability.

**Anti-Discrimination**

Federal and state laws prohibit discrimination based upon an employee's membership in a protected class, including an employee's race, gender, national origin, religion, disability, age, and marital status, among others. In particular, telecommuting raises concerns of potential disparate impact claims. Unlike intentional forms of discrimination, disparate impact claims typically arise from a company-wide policy which adversely, albeit unintentionally, affects a disproportionate number of employees who are members of the same protected class.

For example, a nonprofit may require its telecommuting employees to dedicate an entire room in their homes as their work-space. At first glance, this policy may seem harmless. However, what if only the most affluent employees can afford to cordon an entire room in their homes for telecommuting purposes? Depending upon the socioeconomics of a nonprofit's work-force, this hypothetical telecommuting policy may disproportionately exclude members of various protected classes. In order to safeguard against a disparate impact claim, nonprofits should either allow all employees in a given position to telecommute, or alternatively, determine a number or percentage of such employees who are permitted to telecommute on a first-come, first-served basis. Nonprofits also should document all telecommuting requests and decisions so that the non-discriminatory administration of its telecommuting policy is memorialized. Finally, nonprofits must ensure that all compensation schedules and benefit programs are uniform, regardless of whether an employee telecommutes.

### Medical Leave Needs

Under the Family Medical Leave Act ("FMLA"), qualified employees are permitted up to 12 weeks of leave time during any 12-month period in order to receive care for a serious health condition; to care for a spouse, child, or parent; or following the birth or adoption of a new child. An employer is subject to the FMLA's requirements so long as it employs 50 or more employees at a worksite or within 75 miles of such worksite. For telecommuting employees, their "worksite" is not their home. Rather, for purposes of the FMLA, their worksite is the office to which they report.

The most common problem arises when employers use telecommuting to pressure employees not to take medical leave. Although tempting, employers cannot require or otherwise coerce employees to telecommute in lieu of taking medical leave as permitted under the FMLA. However, employers can still offer (but not require) a reduced leave schedule with telecommuting as an option.

### Privacy Issues

Telecommuting policies must balance an employee's right to privacy against the employer's need to monitor the employee's performance. Generally, a person has a valid privacy right in any matter which he or she can "reasonably expect" to remain private. Accordingly, any telecommuting policy must set forth the employee's unequivocal acknowledgment that various facets of his or her home work-site may be monitored unexpectedly, including his or her use of the employer's computer, telephone lines, or other equipment.

### Protection of Confidential and Proprietary Information

Another concern telecommuting raises is the risk of unauthorized disclosure of confidential and proprietary information. Unlike work performed at the employer's work-site, there is often no way of knowing who outside the employer's organization is privy to sensitive information at the employee's home. Therefore, it is strongly recommended that any telecommuting policy include a non-disclosure agreement applicable to all information and materials used or prepared in connection with the telecommuting program. Nonprofits also should consider whether to implement stronger password and other security measures than those used at their work-sites. Furthermore, home office equipment such as computers and other devices containing work product and sensitive employer information should be dedicated for work-related activities only.

### Income Taxes

Telecommuting raises tax issues where an employee telecommutes from a different state than where his or her employer is located. Although tax laws vary widely amongst the different states, income is traditionally taxable wherever it is earned. However, at least one state has departed from this norm. In 2005, New York State's highest court held that, under the state's tax law, all of an employee's wages were subject to tax in New York despite the employee having telecommuted from his home in Tennessee during 75% of the time he worked for his employer located in New York. The decision suggests that wages are "earned" wherever the employer is located unless the interstate work was performed out of necessity rather than convenience to the employee. Unfortunately, there is no blanket answer for all states, and employers must evaluate their home state's tax laws to ensure compliance.

### Tort Liability

In most cases, employers bear responsibility for injuries and damage to property as a result of their employees' negligence, especially if such injury or damage occurs on the employer's property. Telecommuting asks whether the same is true for harm to a third party at an employee's home. Take, for example, the courier who slips on the snowy steps outside an employee's front door while delivering a package of work-related documents. In some cases, the employer will bear responsibility for his injuries.

In order to protect against such claims, nonprofits should make sure that their liability insurance policies cover the telecommuting employee's home when used in the course and scope of employment; be sure to consult all potentially applicable policies (e.g., commercial general liability insurance, property insurance, directors and officers liability insurance). In addition, nonprofits may require as a condition of telecommuting that employees secure liability coverage for such injuries as part of their own homeowner's or renter's insurance.

### Zoning Laws

Depending upon the employee's responsibilities, applicable zoning laws and regulations may prohibit the employee from performing his essential job functions in his or her home. Many cities' zoning laws and regulations limit or restrict the operation of home businesses.  In some cases, such laws and regulations will require that the employee secure a permit or license before engaging in specific work activities within his or her home.  If so, nonprofits should consider whether they or their employees will bear responsibility for securing the necessary permits or licenses.

**Recommended Components of any Telecommuting Policy**

In addition to the considerations outlined above, it is strongly recommended that any employer's telecommuting policy also include the following:

- A clear definition of "telecommuting" for purposes of the telecommuting policy and any related agreements between the employer and employee (*i.e.*, does telecommuting include work at home only, or does it also include other off-site locations?)
- Easy-to-understand eligibility requirements (*e.g.*, minimum length of employment and the employer's considerations for whether an employee's position is fit for telecommuting)
- The steps of the telecommuting approval procedure
- That participation in the telecommuting program is a privilege and not a right, subject to revocation at any time for any lawful reason
- That the abuse of telecommuting can result in disciplinary action, including termination of employment
- The employer's right to monitor and inspect the home work environment
- A non-disclosure and confidentiality agreement
- The employer's right to change the terms of its telecommuting policy
- That the telecommuting employee is expected to meet the same performance standards as on-site employees

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Given the growing prevalence of telecommuting and the advances in related technology, nonprofits should look for changes in the labor and employment laws that affect telecommuting employees.  As explained above, many state laws vary from both different jurisdictions and their federal counterparts.  As always, it is recommended that nonprofits consult with legal counsel to ensure compliance with their specific jurisdictional requirements.

*For more information, please contact Jeff Tenenbaum at* ***jstenenbaum@Venable.com****, David Warner at* ***drwarner@Venable.com****, or Nick Reiter at* ***nmreiter@Venable.com****.*

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**Please contact one of the authors or any of the attorneys in our Labor and Employment Practice Group if you have any questions regarding this alert.**

**Richard J. Frey**
rjfrey@Venable.com
310.229.9630

**Daniel B. Chammas**
dbchammas@Venable.com
310.229.0302

**Ryan M. Andrews**
rmandrews@Venable.com
310.229.0344

# New California Law Penalizes Willful Misclassification of Independent Contractors

Effective January 1, 2012, a new California law creates large penalties for employers who "willfully" misclassify their workers as independent contractors. The new law comes amid a growing crackdown by the federal government and various states on employers who treat regular employees as independent contractors, thereby avoiding taxes and side-stepping various employment laws.

## Overview

The bill, SB 459 (Corbett), was signed into law by Governor Jerry Brown on October 9, 2011, and adds Sections 226.8 and 2753 to the California Labor Code. The new law does not change the test for determining whether a worker qualifies as an independent contractor, but it greatly increases the financial risk for employers who misclassify workers. Under Section 226.8, it is unlawful for any person or employer to engage in the "willful misclassification" of an individual as an independent contractor. "Willful misclassification" is defined as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." Labor Code § 226.8(i)(4). In addition to the act of misclassification, each time a misclassified worker is charged a fee or has his/her pay reduced as a result of the misclassification, there is a new violation of Section 226.8.

## How Employers Will Be Affected

Penalties range from $5,000 to $15,000 per violation for isolated violations. Where there is a pattern or practice of violations, the penalty range increases—$10,000 to $25,000 per violation. Under new Section 2753, paid advisors (excluding attorneys and employees of the company) who "knowingly advise" employers to misclassify workers are jointly and severally liable for any penalties imposed on the employer as a result of the misclassification.

In addition to the new costly monetary penalties, employers who violate the new law are required to post a "prominent" notice on their public website stating, among other things, that they have "committed a serious violation of the law" by willfully misclassifying employees, and directing any other employees who feel they have been misclassified to contact the Labor and Workforce Development Agency.

## How Employers Can Minimize Risk

As with other California labor statutes, this one identifies the Labor Commissioner as the enforcement agency, but permits employees to enforce their rights through the courts. Employers must therefore be mindful of the risk of classifying groups of workers as independent contractors, especially given the prevalence of wage/hour class actions in California. At a minimum, employers who regularly use independent contractors should consider obtaining arbitration agreements with class action waivers to minimize their exposure in this area.

Independent contractor classification is a nuanced legal question, and the new penalties underscore the importance of receiving sound advice in this area. Additionally, in light of the new advisor liability provision, consultants and accountants who might otherwise offer their advice on how to classify workers should put this question to an employment attorney.

For a general overview of the rules for determining whether a worker is an employee or an independent contractor, click **here**.

If you require additional information or for any questions regarding this new law, you are invited to contact the authors or their colleagues in **Venable's Labor and Employment Practice Group**.

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**AUTHORS**

Ronald W. Taylor

Thomas H. Strong

Jeffrey S. Tenenbaum


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Articles

November 10, 2011

# Volunteering for Trouble or Trouble with Volunteers?: A Guide to the Liability Risks for Nonprofits and their Volunteers

Related Topic Area(s): Employment Law, Miscellaneous

Volunteers often constitute an essential portion of the "workforce" of nonprofit organizations. Volunteers can play an essential role in providing important charitable services and constitute a vital link to an organization's constituency and the public—enhancing or harming a nonprofit's image and functioning. The use of volunteers, however, entails risk—both from and to volunteers. For example, volunteers can be placed in positions where their own personal safety may be endangered or where they may present a threat (physical, economic or otherwise) to employees, visitors, patients, members, or others making use of the nonprofit's services or facilities. At the same time, volunteers may be deterred from volunteering due to concerns that they may be injured or sued for their actions, proving the adage that no good deed goes unpunished.

As is apparent, the ability to obtain and maintain a volunteer force that functions smoothly with employees and the constituency of an organization is critical. As such, a nonprofit must use care in selecting and supervising volunteers, while at the same time taking steps to ensure that current and potential volunteers do not feel the risks associated with volunteering are too great. This article will provide an overview of some of the legal issues presented by the use of volunteers.

**A concern for the nonprofit: Is the nonprofit volunteer really an employee?**

Nonprofits, like all employers, are subject to an ever-expanding array of employment statutes. Anti-discrimination statutes exist at the federal, state, and local levels, barring discrimination based upon a wide range of protected characteristics from race and religion to gender identity and expression. However, as a general rule, courts have held that such statutes apply only to individuals in an employment relationship and do not apply to volunteers.

The question becomes, then, whether a volunteer may actually be an employee. This question is more complicated than it may seem, but there is not much in the label "volunteer" itself. It is fairly clear that the individual's perception that volunteering is prestigious or professionally advantageous to him or her does not create an employment relationship, but the line between employee and volunteer becomes less clear when something of value is provided to the volunteer. Where there is evidence of compensation, courts often will look at the "economic realities" of the relationship, including the degree of control over the activities of the volunteer. Reimbursing a volunteer for volunteer-related expenses generally should not convert a volunteer into an employee. However, when the financial benefits provided to a volunteer extend beyond the simple reimbursement of expenses, there is an increasing risk that the individual could be considered an employee. For example, some nonprofits make volunteers who are exposed to personal risk eligible for a range of benefits such a disability pension, survivors' benefits for dependents, and other benefits. Some courts have found that such benefits could reflect the existence of an employment relationship. Thus, the urge to provide volunteers with stipends or other financial benefits, while admirable, could expose the nonprofit to significant additional risk in the form of employment litigation.

In the area of federal and state anti-discrimination laws, there is a significant benefit to an individual being considered a volunteer because the nonprofit usually will not be liable under these laws. In contrast, under workers' compensation laws, there can be a significant downside to an individual not being considered an employee because the nonprofit does not get the benefit of the limited liability afforded to the nonprofit for injuries sustained by the volunteer. This is not to say an injured volunteer would have an automatic or meritorious claim against the nonprofit for which s/he is volunteering—the volunteer would have to prove all the elements of his or her claim, subject to all defenses, including, in some states, a limitation on liability and/or partial charitable immunity. The possibility of a suit for negligence suggests that nonprofits should take steps to assure that their volunteers are not subjected to dangerous conditions, including through a lack of appropriate training.

This risk of potential claims (whether employment or injury-based) is enhanced by the fact that many nonprofits do not adequately train or take typical employment-related steps with volunteers—such as providing sexual harassment training or providing a policy on reporting sexual harassment.

Because volunteers in most situations will not be considered employees, the risk of liability for an employment law claim by a volunteer is low. However, the potential for personal injury and other claims still exists, and the reputational harm to an organization from lawsuits is potentially very high. The risk can be mitigated to a large extent by recognizing that volunteers are potentially exposed to the same risks as employees and that the steps taken to protect employees should be taken to protect volunteers, consistent with their exposure to risks.

By way of example, creating a volunteer handbook and/or volunteer orientation which address the types of risks a volunteer could be exposed to will go a long way toward limiting the likelihood a claim will be filed and the organization's reputation damaged. In the employment area, this should include appropriate policies, such as an anti-harassment policy with a reporting mechanism which provides a way for volunteers to report a potential problem before it becomes a much larger problem for the organization—just as with employees. Similarly, if a volunteer will be exposed to hazards on the "job," whether from providing medical services or assisting in construction activity, the same protections and training provided to employees should be provided to volunteers. An orientation program should be provided to volunteers that covers the essential elements of the volunteer activity and provides the volunteer with information on how to report any problem the volunteer may encounter while performing volunteer work.

**Do the nonprofit and its volunteer need to worry about getting sued for volunteer activities?**

Many states limit the maximum potential liability of certain nonprofit organizations and most nonprofit organizations have comprehensive liability insurance policies. Those protections, however, may provide minimal comfort to a volunteer concerned with being sued personally for actions taken while volunteering. Such concern could be a barrier to recruiting volunteers, particularly in areas of high potential litigation, including providing volunteer medical services, assisting a vulnerable population, and even driving for the organization.

In order to prevent the fear of becoming enmeshed in litigation from discouraging volunteerism, the federal government and many states have enacted legislation designed to protect volunteers from certain types of liability, such as from honest mistakes or ordinary negligence. For example, Congress passed the federal Volunteer Protection Act in 1997. The Act provides that a "volunteer"[1] of a nonprofit organization generally will not be liable from harm caused if (1) the volunteer was acting within the scope of the volunteer's responsibilities; (2) the volunteer was properly licensed, certified, or authorized by the state in which the harm occurred (where such authorization is required); (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the volunteer; and (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the owner or operator is required to possess an operator's license or maintain insurance. The limitations on liability do not apply to terrorist or violent criminal acts, hate crimes, sexual offenses, misconduct in violation of civil rights laws, or offenses committed while the volunteer was under the influence of alcohol or "any drug."

While the federal statute provides significant protection to volunteers, the protection does have gaps. For example, a volunteer who injures someone while driving for the organization is not protected. Significantly, the federal Act does not prohibit states from providing additional protections from liability relating to volunteers.

Accordingly, it is important for nonprofits to understand the limits each state places on volunteer liability in order to ensure that volunteers are adequately protected and the organization has appropriate insurance coverage. The limitations on volunteer liability vary significantly from state to state. For example, the Maryland Volunteer Service Act provides that a "volunteer is not liable in damages beyond the limits of any personal insurance the volunteer may have in any suit that arises from the volunteer's act or omission in connection with any services provided or duties performed by the volunteer on behalf of the association or organization, unless an act or omission of the volunteer constitutes gross negligence, reckless, willful, or wanton misconduct, or intentionally tortious conduct." Thus, unlike the federal statute, the Maryland statute does not exempt driving from its protections. A volunteer is liable only to the limits of his or her automobile insurance unless his or her conduct falls within one of the other exemptions. Significantly, the Maryland statute for volunteers does not even require that volunteers actually maintain liability insurance in order to be eligible for the liability limitation. In short, if a volunteer does not maintain liability insurance, the volunteer cannot be held liable unless the volunteer's action constituted gross negligence, reckless, willful or wanton misconduct, or intentionally tortious conduct.

Other states, such as Alabama, provide broad protection for a volunteer acting in good faith within the scope of his or her volunteer duties with exceptions only for "willful or wanton misconduct." In some instances, a volunteer receives protection from certain lawsuits only if an organization takes affirmative steps. For example, in Michigan a volunteer will receive protection from certain lawsuits only if the nonprofit organization expressly assumes liability for those claims in its articles of incorporation. (Thus, for nonprofits incorporated in states such as Michigan, if such assumption of volunteer liability is desired, it is necessary to proactively amend the organization's articles of incorporation accordingly.) Finally, many states provide broad protections to certain categories of volunteers, including medical providers and volunteers performing duties for the state such as volunteer police officers and conservation officers.

As should be apparent, it is critical that each organization understand the law in the jurisdictions where it has volunteers to ensure that volunteers are receiving the maximum protection possible (at least to the maximum extent desired by the nonprofit), that volunteers' questions and concerns regarding lawsuits can be accurately answered, and that the organization has appropriate insurance coverage in light of the volunteer exemptions.

**What should the nonprofit do?**

Nonprofits should consider the following simple steps to help minimize the potential liability from and to volunteers:

- Establish criteria for volunteers to enable reasonable care in the selection of volunteers. Obtain complete information to enable identification of a "risky" volunteer. This consideration is especially important if the volunteer will work with vulnerable individuals such as children.
- Provide training and guidance to volunteers similar to an employee performing the same duties.
- Ensure that volunteers understand that they are volunteers, that they are not eligible for employee benefits, and that their status as a volunteer is not a step toward obtaining employment with the organization.
- Establish a volunteer handbook which provides volunteers with clear channels for reporting and resolving any problems (including harassment).
- Develop rules for supervising and monitoring volunteers.
- Develop criteria for discontinuing volunteers who demonstrate unfitness.
- Understand the scope of exemption from liability for volunteers and take the steps necessary to maximize that protection.
- Examine the organization's insurance policies to ensure that they provide sufficiently broad coverage for actions taken by volunteers.

[1] "Volunteer" is defined as a person who does not receive compensation or receive other benefits in excess of $500 per year. The liability of the organization for harm caused by a volunteer is not limited under the Act.

* * * * * *

For more information, please contact **Ronald Taylor** at 410.244.7654 or **rwtaylor@Venable.com**, **Thomas Strong** at 410.244.7541 or **thstrong@Venable.com**, or **Jeff Tenenbaum** at 202.344.8138 or **jstenenbaum@Venable.com**.

For more information about this and related industry topics, visit **www.Venable.com/nonprofits/publications**.

# Top Ten Compensable Time Quandaries for Nonprofits

| Number | Hypothetical | Is the Time Compensable? | |
|---|---|---|---|
| | | *Yes* | *No* |
| 1 | Administrative assistant is reading a romance novel at her desk while waiting for an assignment. | ✓ | |
| 2 | Research assistant attends continuing education seminar that will improve research skills during regular work hours. | ✓ | |
| 3 | Employee arrives to work thirty minutes early everyday due to her commuter bus schedule and starts working but does not record this time on her weekly timesheet. | ✓ | |
| 4 | Employee is invited to dinner with members of the association at the annual conference but is not required to attend and is free to make other dinner plans. | | ✓ (as long as no coercion) |
| 5 | Employee volunteers to participate in employer-organized company-wide trip to build houses for Habitat for Humanity. | ✓ (if under employer direction or control) | |

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# Top Ten Compensable Time Quandaries for Nonprofits

| <u>Number</u> | <u>Hypothetical</u> | <u>Is the Time</u> | <u>Compensable?</u> |
|---|---|---|---|
| | | ***Yes*** | ***No*** |
| 6 | Employee takes 4-hour plane trip to a week-long conference during non-shift hours but performs no work on the plane. | | ✓ |
| 7 | Employee whose regular commuting time is 30 minutes takes a three hour train for a one day trip to another city during regular shift hours and performs no work on the train. | ✓ (the 2.5 hours not part of regular commute is compensable) | |
| 8 | IT specialist volunteers to be a greeter at her nonprofit's annual fundraiser for two hours outside of regular working hours. | | ✓ (as long as no coercion) |
| 9 | A nonprofit which provides job training services to homeless men hires an intern to assist in conducting intake interviews of program participants. | ✓ (but, probably not if intern receives academic credit) | |
| 10 | Teacher's assistant feels dizzy during regular shift hours and supervisor instructs her to lay down for 15 minutes in the employee lounge. | ✓ | |

# Questions?

**Grace H. Lee, *Associate***
**575 7th Street, NW**
**Washington, DC 20004**
**202.344.8043**
**ghlee@Venable.com**

**Robert A. Friedman, *Associate***
**575 7th Street, NW**
**Washington, DC 20004**
**202.344.4332**
**rafriedman@Venable.com**

**Jeffrey S. Tenenbaum, *Partner***
**575 7th Street, NW**
**Washington, DC 20004**
**202.344.8138**
**jstenenbaum@Venable.com**

***This chart is not intended to provide legal advice or opinion and should not be relied upon as such. Legal advice can only be provided in response to a specific fact situation.***

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Articles

July 25, 2011

# A Nonprofit's Guide to Properly Characterizing Workers as Employees, Interns and Volunteers


**AUTHORS**

Jeffrey S. Tenenbaum

Nicholas M. Reiter




Related Topic Area(s): Employment Law

For many nonprofits, the savings that come from not paying wages, benefits and taxes provide a great incentive to classify workers as interns or volunteers. But for the nonprofits that inappropriately classify workers as interns or volunteers, those misclassifications can lead to lengthy governmental investigations or costly lawsuits, including class action litigation. The consequences are serious – oftentimes financially crippling – administrative penalties or damage awards, which typically include, among other things, payments for back wages, interest on those wages, liquidated damages (meant to punish employers for non-compliance), attorneys' fees, and unpaid taxes and unemployment insurance contributions, not to mention criminal charges for nonprofit executives and others making personnel decisions. With federal and state agencies, as well as plaintiffs' attorneys, paying close attention to these issues, now more than ever is the time for nonprofits to ensure that they have properly classified their workers as interns or volunteers.

**Workers as "Interns"**

Many nonprofit organizations offer unpaid internships to students seeking entry into the workforce or the nonprofit sector. Under federal wage and hour law, there is no blanket provision exempting all interns or nonprofits from the law's grasp, yet unpaid interns abound. In light of this, nonprofit organizations must ask themselves: Should unpaid interns really be paid? The answer in some instances is, yes.

When determining whether federal wage and hour law requires an intern to be paid, an organization must first determine whether the federal Fair Labor Standards Act (the "FLSA") applies. An intern will fall within the purview of the FLSA if he or she engages in interstate commerce, the production of goods for interstate commerce, or in any function closely related and directly essential to the production of goods for interstate commerce. The FLSA broadly defines interstate commerce to include trade, transportation, transmission, or communication between either different states or any state and any place outside such state. Accordingly, the FLSA often applies to interns who, at first glance, have no relation to traditional commercial activities. Typical examples include interns who regularly handle interstate mail and telephone calls, send or receive goods across state lines, or travel in between states during the course of their services. Additionally, the FLSA identifies several "covered enterprises" which necessarily fall under the scope of the statute, including the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education, among others.

Given the breadth of the FLSA and the abundance of unpaid interns, a frequent assumption is that there must be an exception for interns under the FLSA. Despite its commonality in the professional vernacular, however, the FLSA does not even use the term "intern." In order for federal wage protections to attach, the intern must be an employee, as defined by the FLSA. While the statutory language does not delineate between employees and interns or trainees, a U.S. Supreme Court opinion issued in 1947 and the U.S. Department of Labor's subsequent six-part test provide helpful guidance regarding the FLSA's application to interns.

In *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the individuals at issue participated in a training program that was a prerequisite to employment. The U.S. Supreme Court held that employment "trainees" were not employees for purposes of the FLSA during their training period. The Court considered the "economic reality" of their training, as well as the circumstances surrounding the training, and concluded that the training program neither contemplated compensation for the trainees nor provided the employer an immediate or direct advantage.

Following *Walling*, the U.S. Department of Labor ("DOL") issued a six-part test to help determine whether an individual is a trainee, as opposed to an employee requiring compensation. According to the DOL, if *all* of the following criteria apply, the trainees are not employees within the meaning of the FLSA and need not be paid:

- The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- The training is for the benefit of the trainees;
- The trainees do not displace regular employees, but they do work under regular employees' close supervision;
- The employer that provides the training derives no immediate advantage from the activities of the trainees and, on occasion, the employer's operations may actually be impeded;
- The trainees are not necessarily entitled to a job at the conclusion of the training period; and
- The employer and the trainees understand that the trainees are not entitled to wages for the time spent training. (Note that as an exception to this criterion, tuition assistance and nominal stipends for students are not considered wages.)

While this test is consistent with judicial interpretations, most courts do not hold that all six criteria must be met. Instead, they follow *Walling* and analyze the economic reality of the training, focusing primarily on whether there was an expectation or contemplation of compensation and whether the employer received an immediate advantage from work completed. Common examples of when an intern will *not* be considered a trainee include:

- The employer uses the intern as a substitute for regular workers or as a supplement to its current workforce;
- If not for the intern, the employer would have hired additional employees or asked its existing staff to work additional hours; or
- The intern is engaged in the employer's routine operations and/or the employer is dependent upon the intern's work.

However, an intern *will* be considered a trainee when the internship is part of an academic experience (*e.g.*, when an intern receives academic credit from his educational institution for completion of the internship).

**Workers as "Volunteers"**

Nonprofit organizations also need not compensate their "volunteers." Although the FLSA only defines "volunteers" with respect to state or local government agencies, the U.S. Department of Labor's Wage and Hour Division ("DOL-WHD") nevertheless looks to the FLSA's definition for guidance when considering whether an individual qualifies as a volunteer at a nonprofit organization. Under the FLSA, an individual is a volunteer so long as (1) he or she receives no compensation apart from expenses and/or a nominal fee to perform services for which he or she volunteered, and (2) such services are not the same type of services for which the individual is employed. In particular, the DOL-WHD will consider whether the individual had a clear understanding prior to providing services that he or she would not be compensated for his or her services and that such services were offered without pressure or coercion from the nonprofit organization. In the event of a private lawsuit, courts will lend credence to the DOL-WHD's interpretation of whether an individual is a volunteer, especially in light of the lack of statutory authority regarding workers in the nonprofit sector. However, only nonprofit organizations may take advantage of this "volunteer" exception. For-profit employers must comply with all federal wage laws, regardless of whether their workers are willing to perform services on a volunteer basis.

DOL-WHD investigators and federal and state courts will likely determine that workers fall outside the definition of volunteer if they work a full-time schedule and perform substantially the same activities as paid employees. The limited guidance currently available suggests that the definition of volunteer contemplates individuals performing humanitarian services on a part-time basis. In this context, examples of "volunteers" include individuals who help distribute food at a homeless shelter on the weekends, participate in a big-brother/sister program, or drive a vehicle to help provide transportation for a nonprofit organization's field trip.

The more common scenario encountered by nonprofits involves employees who volunteer to perform services on behalf of their nonprofit employers. Fortunately, nonprofit organizations may allow their employees to serve as volunteers so long as the voluntary activities occur outside regular working hours and are not similar to the employees' regular duties. The same considerations regarding the expectation of compensation and whether the services were offered without pressure or coercion from the nonprofit organization apply in this context.

* * * * *

In light of several recent indications from the DOL, nonprofit organizations can expect and should stay tuned for further guidance from the DOL related to whether their unpaid interns are exempt from minimum wage laws. Nonprofit organizations should be mindful that state wage and hour laws often vary from their federal counterpart and may call for a different conclusion. To ensure jurisdictional compliance, it is recommended that nonprofits consult with legal counsel.

*For more information, please contact Jeff Tenenbaum at* ***jstenenbaum@Venable.com****, Kristine Sova at* ***kasova@Venable.com****, or Nick Reiter at* ***nmreiter@Venable.com****.*

*The authors are attorneys in the law firm of Venable LLP. This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.*

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## Articles

**May 18, 2011**

# Focus on Misclassification: Are Your Nonprofit's Workers 'Employees' or 'Independent Contractors?'


### AUTHORS

Jeffrey S. Tenenbaum

David R. Warner


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Many nonprofit employers use independent contractors to supplement their regular employee workforces, but not all of them properly distinguish between "employees" and "independent contractors." Out of concern for the rights of misclassified workers, and in the interest of boosting their own tax revenues, federal and state governments are increasing their efforts to identify and correct independent contractor misclassifications. The consequences for violators can be significant.

Please join us for an in-depth discussion of the IRS and U.S. Department of Labor rules concerning the scope of the "independent contractor" construct, the varying state definitions of the classification, and the significant legal implications of getting it wrong.

Moderator: **Jeffrey S. Tenenbaum**
Speakers: **David R. Warner**, **Brian M. Hudson**

**Schedule:**
Lunch and Networking: 12:00 - 12:30 p.m. EST
Program and Webinar: 12:30 - 2:00 p.m. EST

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## Articles

April 14, 2011

# *Johnston v. Carnegie Corporation of New York*: How Strong Are Your Nonprofit's Severance Agreements?

**AUTHORS**

Edmund M. O'Toole

Jeffrey S. Tenenbaum

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By Edmund M. O'Toole, Esq. and Jeffrey S. Tenenbaum, Esq.
Venable LLP[1]

Nonprofits often feel like Davids in a world of Goliaths. Struggling with tight budgets and lean staffs, the last thing they want to add to their basket of worries is a complex regime of human resource policies. Often, overworked senior staffers rely on outdated, internally generated employment documents that haven't been reviewed by a lawyer in years. Worse still, these documents have frequently been overwritten to the point where they are so ambiguous and confusing so as to become meaningless. In these moments, the would-be Davids become vulnerable themselves to legal challenges from disgruntled employees.

This phenomenon appears to be perfectly captured in a recent New York federal court decision, *Johnston v. Carnegie Corporation of New York*,[2] wherein Magistrate Judge Debra Freeman allowed a *pro se* plaintiff's state and federal disability discrimination claims to survive a motion to dismiss, even though the plaintiff-employee had signed a severance agreement that included a full release of those claims. Why? Applying a multi-factor analysis, Judge Freeman concluded that the severance agreement was confusing and ambiguous to the point that it created a factual issue as to whether the employee's release was knowing and voluntary.[3]

### The Facts of the Case

The plaintiff, Dylan Johnston, suffered from bipolar disorder and depression, and complained vocally that he was being treated unfairly by his nonprofit employer, the Carnegie Corporation (the "Foundation"), and its principals.[4] For months, Johnston attempted to increase both his hours and his pay at the Foundation but the Foundation repeatedly refused to adjust his part-time status.[5] In a January 8, 2009 email, Johnston suggested that the Foundation had performed "a background check and found that I was disabled…." In this email, Johnston also claimed that the Foundation's refusal to increase his hours was due to its reluctance to increase its medical insurance payment obligations relating to his disability.[6] The next day, in a meeting with the Foundation's Chief of Staff and Vice President of Human Relations, Johnston's employment was terminated. At the meeting, the Foundation offered Johnston a severance package and a letter agreement containing a release.[7]

The release in the agreement – offered in exchange for a severance payment of $4,050 (subject to employment taxes) – was broad, encompassing "any and all causes of action…by reason of plaintiff's employment and/or cessation of employment with [the Foundation]… Such claims include, without limitation, any and all claims under…the American with Disabilities Act, … and any and all other federal, state or local laws, statutes, rules and regulations pertaining to employment, as well as any and all Claims under state contract or tort law." The letter agreement further contained a sentence that warned: 'DO NOT SIGN THIS RELEASE UNLESS YOU THOROUGHLY UNDERSTAND IT." The agreement also gave Johnston 21 days to consider the agreement and provided for a seven-day revocation period.[8]

Johnston signed the agreement and release on January 15, 2009, and returned it to the Foundation. He stayed on at the Foundation in an unpaid capacity until February 27, 2009 and claims the Foundation promised him positive job recommendations that never materialized. He filed a charge with the EEOC on October 2, 2009, received a "right to sue" letter from the EEOC on November 10, 2009, and commenced his *pro se* action against the Foundation on February 3, 2010. The complaint alleges disability discrimination under both the Americans with Disabilities Act, New York State and New York

City law, and retaliation for having brought his disability to the Foundation's attention.[9]

**The Decision**

On June 22, 2010, the Foundation moved to dismiss the complaint based upon the release and on the ground that the complaint failed to state a cause of action.[10] The court principally focused on the validity and enforceability of the release under a "totality of the circumstances" analysis, applying the Second Circuit Court of Appeals' six part test that includes:

> (1) the plaintiff's education and business experience; (2) the amount of time plaintiff had possession of or access to the agreement before signing it; (3) the role of the plaintiff in deciding the terms of the agreement; (4) the clarity of the agreement; (5) whether the plaintiff was represented by or consulted with an attorney; and (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.[11]

But, as Judge Freeman emphasized, "[t]hese factors are neither exhaustive nor must all the factors be satisfied before a release is held unenforceable."[12]

Applying these six factors, Judge Freeman concluded that it would be premature to conclude, on the face of the pleadings, that plaintiff's release of his claims was "knowing and voluntary."[13] With respect to the first factor, Judge Freeman noted that, despite having received a college education, Johnston was a "low level employee" who lacked work experience. Given "the confusing nature of certain aspects of the parties' release agreement, it is not clear that Plaintiff's education and experience gave him sufficient sophistication to understand all of the agreement's terms." Judge Freeman found that the second factor – the amount of time provided to consider the release – supported the release's validity. As to the third factor, the court found that the absence of any negotiations between Johnston and the Foundation "slightly favors a finding of invalidity." Given the remaining factors in the analysis, Judge Freeman held that "at this stage of the litigation, the release cannot be deemed knowing and voluntary."[14]

Judge Freeman placed great significance on the fourth and sixth factors – the clarity of the agreement and the extent to which Johnston received consideration for giving his release – to tilt her analysis toward finding the release invalid.[15] She pointed to several confusing terms, and inconsistencies and ambiguities in the language of the release agreement that muddied whether Johnston was actually being paid both severance payments *and* an additional lump-sum payment of $4,050 for giving the release, or whether the lump-sum payment was the sole compensation offered in exchange for the release. In fact, in analyzing the sixth factor, she noted that there was a dispute as to whether the lump sum actually constituted a payment given in exchange for the release or whether it represented, as Johnston contends, back pay and benefits.[16]

Considering the "totality of the circumstances," Judge Freeman held that the court could not conclude that the release was "knowing and voluntary." Indeed, crucial to this finding was the dispute as to the amount of consideration actually paid to Johnston in exchange for the release.[17]

**Avoiding the Pitfalls of Sloppy Severance Agreements**

Nonprofit employers preparing to terminate an employee and utilize a severance and release approach should carefully review their existing "form" severance agreements to see if they make sense, both as to the release that is being provided and the amount of any additional payments that are being offered to secure the release. For example, if severance is being paid to the departing employee pursuant to an organization’s stated severance policy, make that clear in the agreement. If an additional payment or other consideration is then offered in exchange for the release (which generally is required for the release to be binding and enforceable), denominate it with a separate description like "Additional Payment" or "Release Payment" that makes this special consideration clear to the average reader.

In addition, in any severance agreement, it is wise to give the departing employee a clear sense of what the organization expects of him or her. Give a clear date for the last day of employment, what the departing employee's responsibilities are, if any, during the provided severance period, and what, if any, back health, salary and/or vacation benefits are being paid for as part of the severance plan.

One might argue that, notwithstanding the inclusion of several unambiguous and routinely enforceable provisions within the severance agreement, the court in *Carnegie Corporation* was giving the *pro se* former employee the benefit of the doubt on a preliminary motion to dismiss. There is no doubt, however, that several confusing internal inconsistencies and poorly defined terms in the severance agreement contributed to the suggestion that it should not be enforced against a college-educated individual who had been invited to consult an attorney for as many as 21 days. By bringing fresh scrutiny to each severance agreement that an organization offers to departing employees, nonprofit employers may be able to avoid the court costs and litigation headaches that often flow from confusing and ambiguous documents.

*For more information, please contact the authors at* ***emotoole@venable.com*** *or* ***jstenenbaum@venable.com****.*

*This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*

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[1] Edmund O'Toole is the partner-in-charge of Venable's New York office and is a commercial litigator. Jeffrey Tenenbaum chairs Venable's nonprofit organizations practice and resides in the firm's Washington DC office.

[2] 2011 WL 1085033 (S.D.N.Y. Feb. 24, 2011)(PAC)(DF).

[3] Judge Freeman's analysis is set forth in her February 24, 2011 report and recommendation to the Honorable Paul A. Crotty, U.S.D.J. By order dated March 23, 2011, Judge Crotty adopted Judge Freeman's report and recommendation in full. 2011 WL 1118662 (S.D.N.Y. Mar. 23, 2011)

[4] Id. at *1.

[5] Id. at *1-2.

[6] Id. at *3.

[7] Id.

[8] Id. at *4.

[9] Id. at **4-5.

[10] Id. at *5.

[11] Id. at *7 (citing Borman v. AT&T Comm., Inc., 875 F.2d 399, 403 (1989))

[12] Id. (quoting Laramee v. Jewish Guild for the Blind, 72 F. Supp.2d 357, 360 (S.D.N.Y. 1999)) (remaining citations omitted).

[13] Id. at *8.

[14] Id.

[15] Judge Freeman determined that the parties failed to address the fifth factor – whether Johnston consulted with a lawyer prior to signing the agreement even though the agreement – specifically recommended that Johnston do so. Id. at *9.

[16] Id. at **8-9.

[17] Id. at *9.

VENABLE LLP

# labor and employment alert

www.Venable.com
March 2011


**Please contact the below authors or any of the attorneys in our Labor and Employment Group if you have any questions regarding this alert.**

**Authors:**

**Ronald W. Taylor**
rwtaylor@Venable.com
410.244.7654

**Todd J. Horn**
thorn@Venable.com
410.244.7709


## Complaint or Not Complaint: That is the Question

Like most, if not all, employment statutes, the Fair Labor Standards Act (the federal law that prescribes minimum wage, maximum hour, and overtime pay requirements), makes it unlawful for employers to retaliate against employees who engage in certain activities. Thus, the FLSA, like Title VII, forbids employers from discriminating against employees who initiate or participate in proceedings before the administrative agency charged with enforcing the law. The FLSA also provides that an employer may not discharge or discriminate against any employee "because such employee has filed any complaint" alleging a violation of the law. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court considered whether the protection afforded by the FLSA for filing a complaint extends to oral complaints as well as written complaints. In a remarkably narrow decision issued on March 22, the Supreme Court answered yes to this question.

The case involved a claim by Kasten that he was fired after complaining to Saint-Gobain officials that the location of employee time clocks prevented workers from receiving credit for the time they spent putting on and taking off their work clothes, allegedly in violation of the FLSA requirement to compensate employees for time spent "donning and doffing" certain required protective gear and walking to work areas. Kasten contended that he repeatedly called the issue to Saint-Gobain's attention and told an HR representative, among other things, that he was thinking about starting a lawsuit about the placement of the time clocks, a lawsuit which he opined the Company would (and in a separate but related lawsuit did) lose. The trial court granted summary judgment to Saint-Gobain and dismissed Kasten's lawsuit, not because Kasten had not filed a complaint, but because it concluded the FLSA did not protect oral complaints so that there had not been illegal retaliation. The U.S. Court of Appeals for the Seventh Circuit agreed with the district court.
Kasten petitioned the Supreme Court to consider his case, which agreed to do so to resolve the conflict among the federal Circuit Courts of Appeal regarding whether an oral complaint is protected under the FLSA.

The only question considered by the Supreme Court was whether an oral complaint alleging a violation of the FLSA is protected conduct under the FLSA's anti-retaliation provisions. According to the Court, the protection afforded by the FLSA to employees who have "filed any complaint" was unclear because the word "filed" means different things in different contexts. Indeed, even after reviewing related statutes, regulations promulgated by administrative agencies, and contemporaneous judicial usage of the word "filed," the Court found the language of the FLSA was inconclusive: "The phrase 'filed any complaint' might, or might not, encompass oral complaints." Nevertheless, considering the language in light of the basic remedial objectives of the FLSA and its reliance on information about possible violations received from sometimes "illiterate, less educated, or overworked" employees, the Court concluded that a liberal interpretation of the word "filed" which included oral complaints was appropriate.

Responding to Saint-Gobain's contention that virtually any utterance or off-hand remark will be transformed into the talisman of a "complaint" by employees seeking to avoid discipline or discharge, the Court balanced its expanded interpretation by acknowledging that an employer must have fair notice that an employee is making a complaint that could subject the employer to a later claim of retaliation. Consequently, the Court stated that, to be protected, an expression of concern about pay issues by an employee, whether written or oral, must be sufficiently clear and detailed that a reasonable employer would understand it to actually be a complaint protected by the FLSA.

Although this ruling might seem to vastly expand the scope of protected activity, the Court's holding is actually exceptionally narrow. In particular, the Court took pains to point out that it did not consider or decide the question of whether an internal complaint to an employer, as opposed to an outside administrative agency, is protected, declining to do so on grounds relating to the Court's procedural rules.
The Court's decision thus only defines what constitutes a complaint, not whether the complaint is protected activity. Nevertheless, the Court's decision does provide several instructive points for employers:

- Because a majority of the federal Courts of Appeal already hold that an oral complaint is protected, the specific holding of the Court is unlikely to wreak havoc among employers. Indeed, cautious employers, consistent with an approach typically taken under other federal statutes such as Title VII, should carefully consider any complaint, whether oral or written, as potentially protected. Pending resolution of the status of internal complaints by the Court, cautious employers should treat even internal complaints as protected. Obviously, such complaints should be investigated and resolved in order to minimize potential liability should the complaint have merit.

- Consistent with the requirement that employees complaining under other statutes such as Title VII usually must exhaust internal remedies, employers should consider formalizing complaint procedures and educating employees on how to articulate their concerns. In addition to better assuring that the employer actually receives fair notice of any real complaints, the failure of an employee to take advantage of existing avenues of relief may afford a prudent employer a defense in any subsequent charge or litigation.

- Employers should continue to ensure that their policies are effectively communicated to employees and that all employment decisions are consistent with those policies and based on legitimate, nondiscriminatory and nonretaliatory grounds.

For additional information, you are invited to contact the authors or any of their colleagues in Venable's Labor and Employment Law Practice Group.

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CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

1.888.VENABLE | www.Venable.com

**Please contact any of the attorneys in our Labor and Employment Group, or the authors below, if you have any questions regarding this Labor and Employment Alert.**

**Authors:**

**Megan H. Mann**
mmann@Venable.com
212.370.6260

**David R. Warner**
drwarner@Venable.com
703.760.1652

# Turns Out, There's No Such Thing As "Free Labor" Either: Why Most Employers Should be Paying Interns or Modifying/Abandoning Their Unpaid Internship Programs

In light of the recent economic downturn, it is not surprising that an increasing number of young, inexperienced people are turning to unpaid internships as a gateway into the working world. What is surprising, however, is that this potentially symbiotic relationship may actually be illegal, violating federal and state wage laws. The Department of Labor ("DOL") is cracking down on the illegal use of free labor, which means that employers should proceed with extra caution before creating or continuing an unpaid internship program.

Regulators insist that violations abound, yet enforcement efforts are made difficult by the interns' reluctance to file complaints, due to fear of professional repercussions. Determined to ferret out wage law violators, state and federal governments are now increasing their investigation efforts and issuing fines to employers. In New York State, Patricia Smith, formerly the state's labor commissioner, last year ordered investigations into several firms' internship programs. Her new role as DOL Solicitor of Labor, the department's top law enforcement official, heralds an increase in enforcement activities nationwide.

*The Definition of "Employment" and the Narrow "Trainee" Exception*

The Fair Labor Standards Act ("FLSA") defines employment very broadly. To "employ" is to "suffer or permit" to work. Generally speaking then, individuals who are permitted to work must be compensated. Moreover, interns cannot waive this federal right, which requires minimum wage and overtime pay to compensate for labor. The DOL has, however, made an exception for "trainees," and internships which meet all six prongs of the trainee test will generally be exempt from federal wage law.

The DOL's Wage and Hour Division ("WHD") recently published these six factors in a Fact Sheet ("Fact Sheet #71"), along with additional guidance to "for profit" employers with internship programs. The fact sheet cautions that "[i]nternships in the 'for profit' private sector will most often be viewed as employment" unless the test laid forth by the DOL is met. Prior to Fact Sheet #71's publication, most courts held employers need not necessarily meet ***all six*** of the particular criteria. However, courts are now likely to require that all six prongs of the test be satisfied to avoid liability. While the facts and circumstances of each individual program should still be considered, the following criteria must apply to the position in order for it to be subject to the DOL's exclusion:

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

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

Many critics feel that the criteria—developed by the DOL over 60 years ago—are outdated and fail to account for the realities of the modern work force, particularly in the white collar arena.

***Are the Only Compliant, Unpaid Internships Useless or Strictly Educational?***

One of the most difficult challenges to employers will undoubtedly be ensuring that they derive "***no immediate advantage***" from the intern's activities. It may prove difficult to provide interns with an engaging work experience that renders absolutely no benefit to the employer. If the intern routinely engages in the employer's business operations or performs what the DOL refers to as "productive work" (e.g. clerical or assistant work), then the internship benefits the employer and is thus subject to FLSA coverage, regardless of whether the intern is also benefiting in any way from the experience. The DOL advises that, in general, the more an internship program is structured around an ***academic*** experience, whereby the intern learns skills applicable to multiple employment settings, the more likely the internship is to be viewed as *bona fide* educational experience and not employment.

Although Fact Sheet #71 explicitly refers to "for profit" employers, the DOL's guidance includes a footnote to the not-for-profit sector, which states in part, "[u]npaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible." However, such employers should note that there is ***no blanket non-profit exclusion*** in the law itself. Generally speaking, the FLSA covers individuals who are engaged in interstate commerce by virtue of the work they perform (e.g. regularly handling interstate mail and phone calls), irrespective of the organization type. Given the tension between this footnote advisement and the law, the DOL's guidance to non-profits, while helpful, is far from conclusive.

### *Designing a Defensible Internship Program*

Given the legal hurdles and enforcement activities surrounding unpaid internships, employers wanting to create or maintain such programs should consult with counsel and formalize the internship program to the greatest extent possible. For example, the internship relationship should be outlined in writing, signed by the intern and a representative for the employer. The writing should, at a minimum, contain the terms of the relationship, including explanation of: (a) the unpaid nature of the program, (b) any contemplated scholarly credit or a description of the educational intent of the program, (c) the fixed duration of the internship, and (d) language that the internship ***is not*** a trial period for prospective employment. Additionally, employers should closely monitor the intern throughout the course of the relationship, to ensure that the benefit of the program lies solely with the intern—unexpected benefit to the employer could result in a violation.

Moreover, organizations should be mindful that state wage and hour laws often vary from their federal counterpart. For example, in a handful of states, including California, unpaid interns ***must receive*** college credit. However, college credit alone does not exempt these students from federal and state wage laws. To ensure jurisdictional compliance, employers should consult with legal counsel.

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