

Insights, News & Events

# SIDESTEPPING THE PITFALLS OF SEASONAL HIRING – AN EMPLOYER’S GUIDE TO BRINGING ABOARD MINORS, INTERNS, AND VOLUNTEERS THIS SUMMER

Insights  
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Amid the headlines reporting on the “Great Resignation” and America’s “Labor Crisis,” employers are searching for solutions to the current workforce shortage. According to a recent report from the U.S. Chamber of Commerce, a whopping 94% of state and local chambers said businesses were finding it difficult or very difficult to find workers. As summer approaches and many employers move into their busiest season, you may be looking at staffing options you may have never considered in the past, including hiring teen workers, creating internship programs, and offering volunteer opportunities. Any or all of those may be viable options for your organization, but there are a host of potential compliance pitfalls that you need to consider. Here is a guide to bringing aboard minors, interns, and volunteers this summer.

## Employing Minors

Both federal and state laws restrict the time of day and number of hours that minors can work, the type of work that minors can perform, and the equipment they can use. The Fair Labor Standards Act (FLSA) is the federal law that governs child labor and the Department of Labor’s Wage and Hour Division (WHD) is the agency

## Service Focus

Wage and Hour

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## Industry Focus

Hospitality

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charged with its enforcement. The FLSA allows states to enact more restrictive child labor laws, so you must be aware of any local restrictions as well. In situations where the federal law and state law differ, you must follow the law that provides the most protection for the minor.

### ***Days and Hours of Employment***

- **Age 18** – Those workers who are 18 and older have no restrictions on the type of work they may perform or their work hours.
- **Ages 16 and 17** – Under the FLSA, minors aged 16 and 17 can be employed for unlimited hours in any occupation other than those deemed hazardous by the Secretary of Labor. This is an area where some state laws differ. For example, Indiana, California, and Ohio have restrictions on the number of hours and times of days this age group may work.
- **Ages 14 and 15** – You are limited in the days and hours you can employ children in this age range as follows:
  - The work must be outside school hours;
  - They can work no more than three hours on a school day, including Fridays, and no more than eight hours on a non-school day;
  - They can work no more than 18 hours in a week when school is in session and no more than 40 hours in a week when school is not in session; and
  - They cannot work before 7 a.m. or after 7 p.m., except from June 1 through Labor Day when they may work until 9 p.m.

### ***Occupations***

- **Ages 16 and 17** – The FLSA prohibits minors aged 16 and 17 from working in occupations that the Secretary of Labor has declared to be hazardous. Currently, there are 17 Hazardous Occupations:

- **HO 1.** Manufacturing or storing explosives;
- **HO 2.** Driving a motor vehicle or work as an outside helper on motor vehicles;
- **HO 3.** Coal mining—bans most jobs in coal mining;
- **HO 4.** Occupations in forest fire fighting, forest fire prevention, timber tract, forestry service, and occupations in logging and sawmilling operations;
- **HO 5.** Power-driven woodworking machines;
- **HO 6.** Exposure to radioactive substances and ionizing radiation;
- **HO 7.** Power-driven hoisting apparatus;
- **HO 8.** Power-driven metal-forming, punching and shearing machines;
- **HO 9.** Mining, other than coal;
- **HO 10.** Power-driven meat-processing machines, slaughtering and meat and poultry packing plants;
- **HO 11.** Power-driven bakery machines;
- **HO 12.** Balers, compactors, and power-driven paper-products machines;
- **HO 13.** Manufacturing of brick, tile, and related products;
- **HO 14.** Power-driven circular saws, band saws, guillotine shears, chain saws, reciprocating saws, wood chippers, and abrasive cutting discs;
- **HO 15.** Wrecking, demolition, and ship-breaking operations;
- **HO 16.** Roofing operations and work performed on or about a roof; and
- **HO 17.** Trenching and excavation operations.

There are limited exemptions for a few of the hazardous occupations for 16 and 17-year-olds who are apprentices or student-learners enrolled in approved programs.

It is important to keep in mind how these occupations may cross into unexpected areas. In two recent WHD child labor investigations, one involving a grocery store and one a bakery, the child labor violations did not stem from the grocery store's meat slicer or the bakery's dough mixer. Rather, the violation stemmed from the simple task of trash removal where the trash was loaded in a trash compactor, which violated **HO 12**.

These investigations serve as good reminders that you should review all of the job duties that will be assigned to minor workers and compare those with DOL's prohibited occupations. You should also check state law, which may have additional restrictions on the types of occupations that employees under 18 can work.

Another area that can create confusion for employers is driving. Under the FLSA, no employee under 17 years of age may drive a motor vehicle on public roads as part of their job. Minors who have reached the age of 17 may drive on public roadways as part of their employment, but only during daylight hours on an "occasional and incidental" basis, and subject to several other stringent restrictions. Importantly, 17-year-olds are not permitted to make urgent, time-sensitive deliveries, such as pizza deliveries.

- **Ages 14 and 15** – In addition to Hazardous Occupations, minors aged 14 – 15 are also prohibited from working in:
  - Manufacturing, mining, or processing occupations;
  - Occupations that involve hoisting apparatus (operating, tending, setting up, adjusting, cleaning, oiling, or repairing);

- Work performed in or about boiler or engine rooms, including repair and maintenance;
- Occupations that involve operating, tending, setting up, adjusting, cleaning, oiling, or repairing any power-driven machinery, including but not limited to lawn mowers, golf carts, all-terrain vehicles, trimmers, cutters, weed-eaters, edgers, food slicers, food grinders, food choppers, food processors, food cutters, and food mixers;
- Operating motor vehicles and serving as helpers on motor vehicles;
- Outside window washing that involves working from windowsills, and all work requiring the use of ladders, scaffolds, or similar equipment;
- Very limited baking and cooking activities;
- Work in freezers and meat coolers and limited work preparing meat for sale;
- Youth peddling (also known as door-to-door sales);
- Loading and unloading of goods or property onto or from motor vehicles, railroad cars, or conveyors;
- Catching and cooping of poultry for transport or for market;
- Public messenger service; and
- Occupations in connection with:
  - Transportation of persons or property;
  - Warehousing and storage;
  - Communications and public utilities; and
  - Construction, with exceptions for some office and sales work.

Limited exceptions to these prohibitions may be available for children enrolled in an approved Work

Experience and Career Exploration Program or Work-Study Program.

The child labor regulations provide direction on the types of work youth ages 14 -15 are permitted to perform, including:

- Office and clerical work;
- Work of an intellectual or artistically creative nature;
- Cooking with electric or gas grills which does not involve cooking over an open flame;
- Cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping;
- Price marking and tagging by hand or machine, assembling orders, packing, and shelving;
- Bagging and carrying out customers' orders;
- Errand and delivery work by foot, bicycle, and public transportation;
- Clean up work, including the use of vacuum cleaners and floor waxers, and the maintenance of grounds (but **not** including the use of power-driven mowers, cutters, trimmers, edgers, or similar equipment);
- Kitchen work and other work involved in preparing and serving food and beverages;
- Cleaning vegetables and fruits, and the wrapping, sealing, labeling, weighing, pricing, and stocking of items, including vegetables, fruits, and meats, when performed in areas physically separate from a freezer or meat cooler;
- The loading onto motor vehicles and the unloading from motor vehicles of certain items; and
- Lifeguarding at traditional swimming pools and water amusement parks (only if 15 years of age and subject to several other restrictions).

Importantly, any job that is not specifically permitted for this age group is prohibited.

- **Age 13** – Those workers who are 13 or younger may generally:
  - Deliver newspapers to homes of subscribers or consumers;
  - Baby-sit on a casual basis;
  - Work as an actor or performer in motion pictures, television, theater, or radio; and
  - Work in a business solely owned or operated by the youth's parents (but not in manufacturing, mining or any occupation deemed hazardous by the Secretary of Labor).

### ***Work Permits/Age Certificates***

Work permits and age certificates are not required under the FLSA, but many states require them for workers of certain ages. Work permits are usually issued by the local school authority or the state labor department. States that have work permit requirements generally require employers to review the work permit documentation before hiring a minor.

Some states require that you obtain an age certificate before hiring a minor. These are typically issued by the states in which the minor works, but DOL will issue age certificates if the minor employee's state does not. A valid, unexpired federal certificate of age or a certificate issued by a state designated by DOL provides proof that a minor is at least the minimum age to work in a particular occupation and it may provide a defense to a claim for child labor violations.

### ***Meal and Rest Breaks***

In addition to the days and hours of employment requirements, you must also comply with applicable state law obligations related to meal and rest breaks. These generally include provisions on the number of

meal and/or rest breaks that must be provided, when they should be provided, and how long they should last. While the FLSA does not require meal or rest breaks, the regulations require that rest breaks that last between 5 and 20 minutes must be paid. Meal periods of 30 minutes or more may be unpaid.

## ***Postings***

Employers who hire minors may be required to display additional postings. Federal law requires FLSA-covered employers to conspicuously post the "Employee Rights Under the Fair Labor Standards Act" poster, which includes information related to child labor. Some states have their own separate child labor posters and may also require you to post age-related permits or certificates, a list of the minors employed, or their meal and rest breaks.

## **Creating Internship Programs**

You may also be considering internship programs to help alleviate your staffing woes. The National Association of Colleges and Employers reported that employers expect to boost their intern hiring by over 22% for the academic year that is wrapping up this summer. However, be careful not to think that internships are a ready-made solution to help you fill open roles or otherwise replace departed employees, as they are not necessarily like-for-like replacements for your paid employees.

As a general rule, the FLSA requires "for-profit" employers to pay employees for work. In some instances, however, interns and students may not be considered "employees" and therefore may not be entitled to compensation.

To determine whether an employment relationship exists between an employer and an intern, courts examine the "economic reality" of the relationship to see which party is the "primary beneficiary" of the relationship. If the employer is the primary beneficiary,

the intern must be paid. If the intern is the primary beneficiary, the intern may be unpaid.

### **7-Factor Test**

The “primary beneficiary test” includes seven factors. The test is flexible and no single factor is determinative, so the determination about whether the individual should be considered a paid employee or an unpaid intern is made on a case-by-case basis.

1. The extent to which the intern and employer clearly understood that there is **no expectation of compensation** (any promise of compensation suggests the intern is an employee);
2. The extent to which the internship provides **training that would be similar to that which would be given in an educational environment**;
3. The extent to which the internship is tied to the intern’s **formal education program** by integrated coursework or the receipt of academic credit;
4. The extent to which the internship accommodates the intern’s academic commitments by **corresponding to the academic calendar**;
5. The extent to which the internship’s **duration is limited to the period** in which the internship provides the intern with beneficial learning;
6. The extent to which the intern’s work **complements, rather than displaces, the work of paid employees** while providing significant educational benefits to the intern; and
7. The extent to which the intern and the employer understand the internship is conducted **without entitlement to a paid job** at the conclusion of the internship.

State laws may have separate internship requirements, so you should examine the requirements under both federal and state law. You should also review

educational documentation to ensure your internship program aligns with the goals and approach of the intern's educational program. You may want to coordinate with local colleges and universities to define the parameters of the internship program and to obtain assistance identifying candidates who may be interested in an internship.

To avoid blurring lines between employees and interns, you should not use interns to fill open positions. You should also refrain from giving any assurances of a job after the internship ends.

## **Drafting Volunteers**

For public sector and non-profit organizations, volunteers may also be a viable option to ease some of the current strain they are feeling. This is not the case for private sector, for-profit employers.

DOL guidance indicates that a volunteer generally will not be considered an employee for FLSA purposes if the individual freely volunteers for public service, religious, or humanitarian objectives, and without contemplation or receipt of compensation. Examples may include members of a men's or women's organization assisting patients in nursing homes, parents reading to students in a school library, or individuals driving a school bus to transport a school band on a trip.

To be considered a "volunteer," the individual:

- Typically serves on a part-time basis;
- Does not displace regular employees or perform work that would otherwise be performed by a regular employee; and
- Does not expect to receive compensation.

Volunteers who are employed by a non-profit organization may not volunteer to provide the same types of services to their non-profit organization that they are employed to perform. Volunteers may be paid

expenses, reasonable benefits, a nominal fee, or any combination thereof for their service without losing their status as volunteers. However, those payments cannot be a substitute for compensation or tied to productivity.

## Conclusion

By understanding the specific rules surrounding volunteers, interns, and minors, you may be able to develop a new crop of valuable talent to your organization this summer. These new relationships could be rewarding to both the individuals you bring aboard and your business. If your business wants to retain assistance of volunteers, interns, or minors this summer, you should contact your your Fisher Phillips attorney, the author of this Insight, or any attorney in [Wage and Hour Practice Group](#) for assistance.

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