

Unpaid Work Experiences, Volunteering, and Internships: What's Allowed.

SELN working documents contain information collected in response to SELN state member requests. An SELN working document is intended to share work in progress and may not be a comprehensive analysis or compilation.

What did the states request?

As SELN member states refine how employment services are defined, implemented, and reimbursed, questions arise about how to view certain work experiences, and how to strategically use volunteer opportunities and unpaid work options.

Background

Volunteer work, internships, and unpaid job exploration can be effective strategies for individuals with disabilities looking to gain work-related experience, as well as assessments and training at places of business. However, such activities must be undertaken carefully, with a clear understanding of the purpose of these activities. All parties must know what is permitted from a legal perspective, as well as practical considerations regarding the appropriate use of volunteer and unpaid work experiences.

This working document examines these issues, and provides guidelines on the role of volunteer activities, internships, and unpaid work when assisting and supporting individuals with disabilities. This information is based on interpretation of various federal requirements. However, if readers have questions regarding specific situations, they should consult with the United States Department of Labor (DOL) Wage and Hour Division. In addition, your state may have additional requirements, so it is important to also consult with your state department of labor to ensure compliance with all applicable state labor laws and regulations.

Understanding What's Allowed

The following are the types of experiences discussed in this publication, and the distinctions between them.

- **Volunteering** – Volunteering refers to typical unpaid activities with non-profit groups that are open to all citizens. These might include making phone calls for a political campaign, serving as an assistant coach

in a sports league, helping at a food bank, serving on a board or in an advisory group, or working on a clothing drive for a faith-based organization.

- **Internships** – Internships are temporary positions, either in for-profit or nonprofit organizations, with an emphasis on job training. This publication looks primarily at unpaid internships.
- **Unpaid work experiences** – Under certain circumstances, individuals with disabilities are permitted to work for a short period at any type of business without pay for job exploration, assessment, and training purposes. This is permitted only within very specific parameters.

The DOL has clear rules and guidelines on volunteering, internships, and unpaid work experiences. Each state has additional laws and regulations. It is important for service providers (including schools) not to dive in to the world of volunteer work, internships, and unpaid work experiences without having a strong understanding of what is and is not permitted.

Awareness of these parameters is critical for service providers, individuals with disabilities, and family members. These rules ensure that people with disabilities are being treated fairly, that their rights are not being violated, and that when placing individuals with disabilities into volunteer or unpaid positions, all applicable wage and hour laws are being followed.

Lack of awareness of these parameters can result in possible action by the federal or state labor department against both the service provider, and the volunteer organization or business where the individual is participating in activities. Consequences may include legal and financial penalties, including payment of back wages.

Volunteering: What it is and What's Permitted

As with anyone else who volunteers, it's important to think through the reasons that someone with a disability is giving his or her time and talents for free. What are the benefits to the individual?

- Volunteering may be a step towards employment. It is a way of exploring interests, developing skills, gaining experience, building a resume, and making connections that lead to future paid jobs. At the same time, volunteering should not be a long-term substitute for paid employment.
- Volunteer activities should be based on an individual's interests and preferences.
- When individuals are not working or are underemployed, they may choose to volunteer in order to keep busy and active while looking for paid work.

Where Individuals Can Volunteer

Individuals may volunteer only at non-profit organizations. Volunteering is not permitted at for-profit, private-sector businesses. Per the DOL, individuals may volunteer or donate their services for "public service, religious or humanitarian objectives" without expectation or receipt of payment.

These additional factors can also help determine if an activity meets the DOL's definition of volunteering:

- The activity is generally part-time.
- The activities are the kind typically associated with volunteer work rather than paid employment.
- Services are offered freely and without pressure or coercion--i.e., the person is truly volunteering.
- Regular employees have not been displaced to accommodate the volunteer.
- The individual does not receive or expect to receive any benefit (beyond the experience itself) from the organization where he or she is volunteering. Volunteers may receive reimbursement for expenses, discounts on services, refreshments, small appreciation gifts, etc. They may also be paid a nominal fee, but it cannot be a substitute for paid compensation,

or based on productivity. The amount of the fee/stipend cannot exceed 20% of what an individual would have been paid for the same job. In addition, if the individual receives more than \$500 per year, they no longer have liability protections under the Federal Volunteer Protection Act. In general, organizations should be cautious in providing any sort of payments beyond expense reimbursement to volunteers.

Parent/Guardian Consent Requirements

An individual with a disability must be legally competent to freely volunteer his or her services. Per the DOL, individuals under 18, and those over 18 who are not their own legal guardian, cannot volunteer without the consent of their parent or legal guardian.

Unpaid Internships

Unpaid internships are distinct from volunteering, and are intended to allow an individual to gain job-related experience. Per USDOL, individuals may participate in unpaid internships at for-profit organizations, if they are not considered to be an employee. The primary issue is the "economic reality" of who is the primary beneficiary. If the primary beneficiary is the individual, an unpaid internship is okay. If the primary beneficiary is the business, an unpaid internship is not okay. The following criteria are considered in terms of determining the primary beneficiary.

1. The extent to which the intern and the employer clearly understand there is no expectation of compensation.
2. The extent to which the internship provides training that would be similar to that 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.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

These criteria are considered flexible. No one single factor will determine if an unpaid internship is okay, and the unique circumstances of each case needs to be considered.

See www.dol.gov/whd/regs/compliance/whdfs71.htm for further details.

The DOL guidance specifies that it applies to “for-profit” organizations. An individual can work at a nonprofit as a volunteer, if they meet the criteria discussed earlier. However, if an individual is working at a nonprofit as an unpaid intern (e.g., a student receiving credit), rather than strictly as a volunteer, then the 7 factors regarding primary beneficiary would also apply. As with volunteering, nonprofit organizations can pay stipends to interns, but the amount of the stipend cannot exceed 20% of what an individual would have been paid for the same job.

Unpaid Work Experiences for Job Exploration, Assessment and Training

Using businesses for exploration, assessment, and training is considered best practice in the field of disability employment, rather than using simulated work environments (such as facility-based services and sheltered workshops). When undertaking an assessment, these types of experiences at an employer's place of business are typically called “situational assessments.” (See the resource section on the last page for information on conducting situational assessments.)

Under DOL provisions, individuals with disabilities can spend a limited number of hours engaged in unpaid work experiences at a business for job exploration, assessment, and training. Per the DOL, these types

of unpaid work experiences are permitted when all seven of the following criteria are met:

1. The individual is a person with physical and/or cognitive disability for whom competitive employment at or above minimum wage is not immediately obtainable, and who will need intensive ongoing support to succeed in employment.
2. The time spent at the place of business is for vocational exploration, assessment, or training. It must be conducted under the general supervision of staff from a rehabilitation organization (community rehabilitation provider, public vocational rehabilitation, or other public disability agency), or in the case of a student with a disability, under the supervision of public school personnel.
3. Employment in the community must be a specific goal of the individual's plan of service, specifying the need for exploration, assessment, or training activities. This must be written into the individualized plan for employment (IPE) or individual education plan (IEP).
4. The individual's activities cannot result in an “immediate advantage” to the business. “Immediate advantage” includes the following, all of which are not permitted.
 - ❖ Displacement of regular employees.
 - ❖ Filling of a vacant position by the participating individual with a disability instead of regular employees.
 - ❖ Relieving regular employees of assigned duties.
 - ❖ The participating individual performs services that, although not ordinarily performed by employees, are of clear benefit to the business.
 - ❖ The individual is under direct supervision of employees of the business, rather than a rehabilitation or school professional.
 - ❖ The activities are conducted to accommodate the labor needs of the business rather than according to the requirements of the individual's service plan.
 - ❖ The individual's service plan does not

specifically limit the time spent at any one employer site, or in any specific job classification (i.e., the planning document needs to be specific regarding intent of the person’s time at the employer site in terms of duties and how long they spend there).

5. Although the number of hours does not exclusively determine whether an unpaid work experience is permitted, per the DOL, as a general rule, unpaid work experience is permissible if the following hour limitations are not exceeded.

- ❖ Vocational explorations: 5 hours per job experienced
- ❖ Vocational assessment: 90 hours per job experienced
- ❖ Vocational training: 120 hours per job experienced

In the case of students, these limitations apply during any one school year.

6. The participating individual is not entitled to employment after the unpaid work experience is completed. However, if the individual becomes an employee at that business, he or she cannot be considered a trainee (i.e., unpaid for up to 120 hours) at that particular employer unless working in a different, clearly distinguishable occupation.

7. Upon request, documentation will be provided to the DOL Wage and Hour Division, indicating that the individual is enrolled in a community-based placement program, that this enrollment is voluntary, and that there is no expectation of payment.

Further details of unpaid work requirements are available under Section 64c08 at:
www.dol.gov/whd/FOH/FOH_Ch64.pdf

Considerations in Unpaid Work Experiences

There are a number of practical considerations in the use of unpaid job experiences under these DOL guidelines:

- The use of unpaid work experiences must connect clearly with the goals and objectives of an individual’s service plan, and there should be

a particular rationale why the specific activities at that particular place of business are occurring, documented within the service plan. Simply having an individual participate in unpaid work experiences to “stay busy,” or because it’s a standard part of the employment program for everyone, is not acceptable.

- The planning document (IPE, IEP) must state the specific intent and purpose of the individual’s time at the employer site in terms of the duties and number of hours that will be spent there.
- On the surface, some of the factors in terms of “immediate advantage” may seem to be a challenge to comply with. For example, if an individual is filing as part of an assessment, the business is benefiting from having some filing completed. To address any concerns in this regard, be clear that the purpose of the activity is for exploration, assessment, or training; be explicit that whatever benefit there is to the business is incidental and immaterial; and ensure that all other requirements are fully complied with (supervision by rehabilitation or school personnel, limitations on hours, no displacement of business personnel, documentation, etc.).
- A type of unpaid work experience that is generally not permitted under these guidelines is taking a group of students or adults on an ongoing basis to a business to perform job duties for no pay, unless each individual’s service plan specifically states how this unpaid work experience is connected to the individual’s employment goals, and specifies the number of hours of the unpaid work experience. All other requirements within the guidelines must also be complied with.

The DOL does not define the terms “vocational exploration,” “vocational assessment,” or “vocational training,” although these terms are defined in the rehabilitation literature. The following are practical applications of these terms:

- **Vocational exploration:** Identifying types of jobs an individual may be interested in.
- **Vocational assessment:** Evaluating an individual’s overall employment skills and interest in/suitability for specific occupations.

- **Vocational training:** Developing an individual's skills for a specific occupation, with the expectation that he or she will work in that occupation.

It is highly recommended that there be clear documentation in the individual's file regarding each unpaid work experience. This should indicate the type of experience (exploration, assessment, training), location, specific tasks, number of hours, and recording and analysis of the results. This documentation is useful in using these experiences to guide the career exploration and placement process. This can also support the required documentation for unpaid work experiences (noted above) and address any potential concerns about the nature of these experiences and compliance with DOL requirements.

Many of the issues regarding unpaid work experiences can be resolved simply by having a mechanism in place for payment by the agency or school to the individual (minimum wage or higher), for the time spent at the place of business. An organization may have existing funds available, or could potentially get funding from community foundations or civic groups. Given that the funding goes directly to the person with a disability, and is designed to lead to employment success, funding of these types of work experiences is a relatively simple "sell."

It is important to recognize that if the service provider is paying the individual, then an employment relationship exists. This means that the individual would fall under the coverage of the service provider's workers' compensation insurance.

Assessment as "Job Tryout"

Much of the discussion in this document has focused on use of business settings for exploration and assessment to determine the focus of job development activities. When appropriate, consideration can also be given to use of assessments as a "job tryout" as part of the actual hiring decision. Under this type of strategy, if a potential position looks promising, the employer is offered an opportunity to fully evaluate the individual's ability to perform the tasks of the position. This entails allowing the job seeker to try the job for a few hours, a day, or even a couple of days, prior to a hiring decision by the business.

Worker's Compensation and Liability Coverage

One area that is important to consider regarding unpaid work experiences of all types is workers' compensation and liability coverage. Even if an individual is not considered an employee under the wage and hour laws, they may be considered an employee under the state's workers' compensation law, and as such the employer may be responsible for providing workers' compensation coverage. (For example, in Massachusetts employers must provide workers' compensation coverage for students in work based learning experiences even if they aren't being paid.) In addition, there may be liability concerns regarding the possibility of an individual damaging a piece of employer's equipment during an unpaid work experience. The following are recommendations to address these issues:

1. Consult with the office in your state department of labor responsible for workers' compensation laws, and review any laws and regulations in your state regarding responsibility for coverage in unpaid work experiences.
2. Check with your organization's insurance carrier regarding coverage.
3. Have information readily available to provide to an employer regarding workers' compensation and liability issues, and work with them to resolve any concerns.

While the employer's standard hiring process is generally the preferred choice, this process (application, interview, testing, etc.) does not always create awareness by the potential employer about the strengths and abilities of an applicant with a disability. Due to physical challenges in communicating, difficulties in verbally articulating their thoughts, or simply lack of experience in interviewing, some people with disabilities perform poorly in interviews, which can pose a significant barrier in obtaining employment.

Another challenge is that people with disabilities often lack the work experience that demonstrates their ability to perform successfully in a potential job. Additionally, limited academic skills can create challenges in performing on tests. Therefore, a job tryout approach can be an effective strategy--and can be considered an accommodation within the hiring process under the Americans with Disabilities Act.

If assessment is used as an alternative to the standard

hiring process, the following guidelines are important:

- It is imperative that the parameters of the assessment are clear to all involved, including the length of the assessment, and at what point the hiring decision will be made.
- The person with a disability must be absolutely comfortable with the idea of assessment as a job tryout.
- When using assessment as a job tryout, it should be clearly explained to the employer that the purpose is to determine whether the individual has the potential to successfully perform in the job over the long term. The employer should not necessarily expect the individual to have mastered the job at the end of the assessment, particularly if he or she has a longer learning curve.
- If the job tryout is unpaid, it must comply with the DOL requirements for unpaid work experiences noted earlier.

General Guidelines Regarding Volunteering, Internships, and Unpaid Work Experiences

Volunteering, internships, and unpaid work experience can be part of efforts by individuals with disabilities to develop skills, abilities, and experience that allow them to succeed in paid employment. The following are suggested guidelines for service providers in supporting individuals in these types of activities:

1. Make sure that all activities are based on an individual's skills, preferences, and interests, not simply to provide them some type of activity.
2. Be clear about the type of activity, and distinguish between volunteer activity, internship, and unpaid exploration, assessment, or training.
3. Have a clear rationale for why these specific types of activities are being undertaken, and how they support an individual's goals and plans.
4. Use internships and unpaid exploration, assessment, and training only as necessary and for specific reasons, with careful thought about how these will lead to paid employment. Do not spend time and resources on these types of activities if the individual can successfully obtain employment without them.

5. Reinforce to all participants that volunteering is not an alternative to paid employment, but rather an activity for the individual's personal enjoyment and fulfillment. It may also be an avenue for building skills and connections that may lead to paid employment.
6. Know the laws and regulations that apply to the particular situation.

Conclusion

It's well worth your time to familiarize yourself with the rules and guidelines regarding volunteering and unpaid employment. Understanding the nature of the experience (volunteering, internship, unpaid exploration, assessment, or training), the nature of the setting it will take place in (nonprofit, for-profit), and the nature of the activity can ensure that the necessary rules and guidelines are being applied.

Most important is avoiding situations that are in clear violation of the labor laws (e.g., an individual "volunteering" at a for-profit sector employer).

If you have questions regarding a specific situation, visit the US Department of Labor Wage and Hour Division website for contact information (www.dol.gov/whd/america2.htm), or call them at 1-866-487-9243 or TTY: 1-877-889-5627. Also check with your state department of labor regarding any state rules or regulations that might apply.

Resources

Resources from the US Department of Labor

- **Volunteer guidelines:** www.dol.gov/elaws/esa/flsa/docs/volunteers.asp
- **Trainee guidelines:** www.dol.gov/elaws/esa/flsa/docs/trainees.asp
- **Internship fact sheet:** www.dol.gov/whd/regs/compliance/whdfs71.htm
- **Guidelines on unpaid work exploration, assessment, and training for people with disabilities: Section 64c08:** www.dol.gov/whd/FOH/FOH_Ch64.pdf

Situational assessment information

- www.thinkcollege.net
(search for "situational assessment" in search box)

Note: The information in this publication is based on interpretation of US Department of Labor laws, regulations, and guidelines. It should not be considered as official legal guidance.

How Does This Play Out?

Sample Scenarios

The following are examples of situations regarding volunteering and unpaid work, and whether such a scenario is permitted or not permitted.

- Joachim begins “volunteering” in a clerical position that is vacant at a non-profit organization and hopes to eventually get hired. This is not permitted, unless it is done within the DOL guidelines for unpaid assessments and training. In such a scenario, meeting the requirements for avoiding “undue advantage” would likely be a challenge.
- As part of a school or service provider’s employment program, a group of six individuals goes to a for-profit business on an ongoing basis to do cleaning for no pay. Such a scenario would generally not be permitted, unless: a) the service planning document for each of the six individual specifies that a cleaning position is part of their job exploration, assessment, or training activities; b) the number of hours in the cleaning position are specified in the service plan and limited to those permitted under DOL guidelines; c) all other DOL requirements for unpaid work are complied with.
- Leonora has expressed interest in working with flowers and plants. Her service provider approaches a local garden center about using the garden center as an unpaid assessment site. Duties are identified, and the service provider notes in Leonora’s service plan the specific job duties and number of hours that will be used for the assessment. The staff are clear with the garden center that this activity is strictly for assessment, and it is not “free labor.” Leonora performs the assessment at the garden center, under the supervision of service provider staff. This is permitted as an unpaid assessment.
- Tomeka has extensive work experience, but recently lost her job. She has typically required limited post-placement supports. Her service provider tells an employer that they can either interview Tomeka or do a short-term unpaid job tryout. Generally this would not be permitted, as Tomeka has already demonstrated that she has the ability to work at above minimum wage, and doesn’t need intensive ongoing support.
- Louis wants to work in the health care field. A volunteer opportunity has been identified at a hospital, distributing periodicals to patients, an activity always done by volunteers. This is permitted as a volunteer opportunity to begin to expose Louis to a health care environment and build connections.

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