NTACT
National Technical Assistance Center on Transition

Overview of Labor Laws and Employment Related Issues

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3:00 PM (Eastern)

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FAIR LABOR STANDARDS ACT: Worker Rights Are Disability Rights

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Why do you think FLSA compliance is so important?

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Forces and Influencers…

- Increased emphasis of IDEA on transition services and support
- Pre-employment Transition Services in WIOA
- Employment First
- Expansion of work-based learning experiences through Career Development and Occupational Studies (CDOS) credential

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FLSA compliance hinges on…

…whether or not there is an assertion of an employment relationship.

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"The FLSA establishes minimum wage, overtime pay, recordkeeping, pay equality, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.".

WHD
U.S. Wage and Hour Division

"The Wage and Hour Division (WHD) of the US DOL administers and enforces the FLSA."

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Federal Statements of Principle

- *"The U.S. Departments of Labor and Education are committed to the continued development and implementation of individual education programs, in accordance with the Individuals with Disabilities Education Act (IDEA), that will facilitate the transition of students with disabilities from school to employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or programs providing rehabilitation services to individuals with disabilities."* (1992)

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- *"The U. S. Department of Labor and community-based rehabilitation organizations are committed to the continued development and implementation of individual vocational rehabilitation programs that will facilitate the transition of persons with disabilities into employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or other programs providing rehabilitation services to individuals with disabilities."* (1993)

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EMPLOYMENT RELATIONSHIP

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Employment Relationship

- In order for the FLSA to apply there must be an employer-employee relationship. This requires…
  - an "employer" and "employee" and
  - the act of condition of employment
    - method of compensation not material

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Non-Assertion Of Employment Relationship

In an effort to promote vocational training for youth and adults with disabilities, WH will **not** assert an employment relationship between the individual with a disability, the rehabilitation facility or school, and/or the business where the individual has been placed when **all** of the **seven** following criteria are met *(**note**: the criteria are the same for both students and nonstudents enrolled in vocational rehabilitation programs):*

https://www.dol.gov/whd/FOH/ch64/64c08.htm

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Criteria 1

- Participants are individuals with physical and/or mental disabilities for whom competitive **employment at or above the minimum wage level is not immediately obtainable** and who, because of their disability, will need intensive ongoing support to perform in a work setting.

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Criteria 2

- Participation is for **vocational exploration**, **assessment** or **training** in a community-based work site under the general supervision of rehabilitation organization personnel, or in the case of a student with a disability, public school personnel.

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Criteria 3

- Community-based placements must be clearly **defined components of individual rehabilitation programs** developed and designed for the benefit of each individual.
  - Each student with a disability shall have an Individualized Education Program (IEP) which lists the needed transition services established for the exploration, assessment, training, or cooperative vocational education components.
  - Each participant in a community-based rehabilitation organization program must have an Individual Plan for Employment (IPE) which includes a statement of needed transition services established for exploration, assessment, or training components.

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Criteria 4

- Documentation will be provided to WH upon request that reflects that **the individual is enrolled in the community-based placement program, that this enrollment is voluntary and that there is no expectation of remuneration.** However, the information contained in the IEP or IPE does not have to be disclosed to WH. The individual with a disability and, when appropriate, the parent or guardian of each individual must be fully informed of the IEP or IPE and of the community-based placement component of the plan.

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Criteria 5

– The activities of the individuals with disabilities (participants) at the community-based placement site do not result in an **immediate advantage to the business**.

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Criteria 5 Continued

- Factors that would indicate the business is advantaged by activities of the individual include:
  - Displacement of regular employees.
  - Vacant positions have been filled with participants rather than regular employees.
  - Regular employees have been relieved of assigned duties.
  - Participants are performing services that, although not ordinarily performed by employees, clearly are of benefit to the business.
  - Participants are under continued and direct supervision of employees of the business rather than representatives of the rehabilitation facility or school.
  - Placements are made to accommodate the labor needs of the business rather than according to the requirements of the individual's IEP or IPE.
  - The IEP or IPE does not specifically limit the time spent by the participant at any one site, or in any clearly distinguishable job classification.

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Criteria 6

- While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours spent in each activity, as a general rule, an employment relationship is presumed not to exist when each of the three components **does not exceed the following limitations**:
  - 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.

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Criteria 7

- Individuals are **not entitled to employment** at the business at the conclusion of the IEP or IPE. However, if an individual becomes an employee, he or she cannot be considered a trainee at that particular community-based placement unless in a different, clearly distinguishable occupation.

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An employment relationship will exist unless all of the criteria described in FOH 64c08(c) are met. If an employment relationship is found to exist, the employer will be held responsible for full compliance with the FLSA.

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In light of FOH-64c08(c), what type of documentation should be maintained in file to ensure FLSA compliance and to verify non-assertion of an employment relationship?

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NEW RULES GOVERNING INTERNS AND STUDENTS

(JANUARY 2018)

https://www.dol.gov/whd/regs/compliance/whdfs71.htm

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Primary Beneficiary Test

The FLSA requires "for-profit" employers to pay employees for their work. Interns and students, however, may not be "employees" under the FLSA—in which case the FLSA does not require compensation for their work.

- This test allows courts to examine the "economic reality" of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship.
- Courts have described the "primary beneficiary test" as a flexible test, and no single factor is determinative. Accordingly, whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case.

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Seven Factors of the Test

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
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.

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- 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.

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Further FLSA Exemptions

- The FLSA exempts certain people who volunteer to perform services for a state or local government agency or who volunteer for humanitarian purposes for non-profit food banks.
- WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations.
- Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.

https://www.dol.gov/whd/regs/compliance/whdfs71.htm

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Consequences?

- If analysis of these circumstances reveals that an intern or student is actually an employee, then he or she is entitled to both minimum wage and overtime pay under the FLSA.
- On the other hand, if the analysis confirms that the intern or student is not an employee, then he or she is not entitled to either minimum wage or overtime pay under the FLSA.

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Final thoughts

- There are specific rules governing volunteerism covered in section 64c04 of the FOH.
- There are specific rules governing patient workers covered in section 64c01 of the FOH
- There are specific rules governing patients in alcohol and drug abuse treatment programs covered in section 64c02 of the FOH.
- Child labor laws must also be complied with and are outlined in chapter 33 of the FOH.

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HANDOUTS & RECORDINGS

- This webinar is being recorded.
- The PowerPoint and handouts can be found at www.transitionTA.org – under "Events"
- The recording of today's webinar will be available at www.transitionTA.org by Monday, July 29, 2019
- A captioned recording will be available at www.transitionTA.org by Friday, August 9, 2019

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Upcoming Events

- Midyear Cadre - Improving Outcomes for Students with Complex Support Needs – October 23, 2019 – 8:00 AM – 5:00 PM – PSD - Westin/Seattle, WA
- NTACT CTE Perkins V Plan Collaboration Summit – December 3rd and 4th, 2019 – Anaheim, CA

Registration for both events is now open on www.transitionta.org – under EVENTS

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YOUR FEEDBACK

Take 5 minutes to tell us what you think…..

Watch for a follow-up email tomorrow
With this link to survey
http://bit.ly/OverviewOfLaborLaws

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Thank You for Participating in Today's Webinar

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