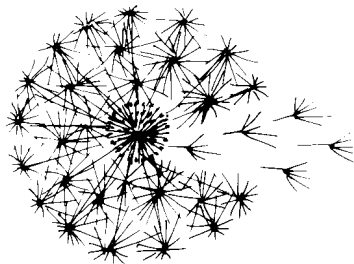

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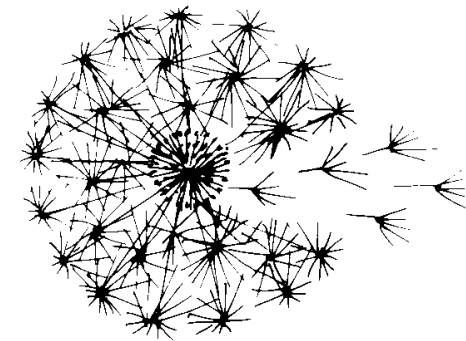


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PAID AND UNPAID HIGH SCHOOL INTERNSHIPS

A Handbook for Employers



**Carolyn Horan
John Mergendoller**

School-to-Career Series

BUCK INSTITUTE FOR EDUCATION

PAID AND UNPAID HIGH SCHOOL INTERNSHIPS A HANDBOOK FOR EMPLOYERS

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WHAT IS THE SCHOOL-TO-WORK OPPORTUNITIES ACT ?

In 1994 the School-to-Work Opportunities Act (STWOA) was passed into law and is scheduled to remain in effect through 1999. Prior to 1994 all laws concerning "minor" workers (any person under 18 years of age, according to California Labor Code), including students' work-based learning experiences, were covered under the federal Fair Labor Standards Act (FLSA) and California child labor provisions.

The STWOA states if certain criteria are met in the workplace, students may be considered "nonemployees" and therefore not subject to FLSA regulations. Thus, the burden placed on employers by the federal regulations are lifted under these circumstances. However, California still requires students to obtain a "Permit to Work" and employers a "Permit to Employ."

Under the STWOA, if the student does not meet certain criteria, he or she will still be considered an "employee" and all state and federal regulations will remain in effect. This means the employer must follow legal standards of wage payment, record keeping, and the treatment of children under 18. If the student does meet the STWOA criteria and qualifies as a "nonemployee" the employer would not be required to pay wages or adhere to federal child labor laws. However, your organization should always adhere to child labor laws regarding the hazardous working conditions listed at the end of this handbook.

NOTES

CAN STUDENTS WORK AS UNPAID INTERNS ?

The STWOA says that a student will not be considered an employee if all the following criteria are met:

1. The student receives ongoing instruction at the employer's work site and receives close on-site supervision throughout the learning experience, with the result that any productive work the student would perform would be offset by the burden to the employer from the training and supervision provided.
2. The placement of the student at the work site during the learning experience does not result in the displacement of any regular employee — i.e., the presence of the student at the work site cannot result in an employee being laid off, cannot result in an employer not hiring an employee the employer would otherwise hire, and cannot result in an employee working fewer hours than the employee would otherwise work.
3. The student is not entitled to a job at the conclusion of the learning experience (although employers should not be discouraged from offering employment to successful graduates).
4. The employer, student, and parent or guardian understand that the student is not entitled to wages or other compensation for the time spent in the learning experience (although a student may receive a stipend for expenses such as books or tools).

If all the above criteria are met, no employment relationship exists, and Federal Labor Standards Act (FLSA) does not apply except for the section on Hazardous Occupations (see list at end of this handbook). Under these conditions, the student need not be paid wages. The student may be given a stipend, but the stipend may not be used as a substitute for wages.

The Federal Labor Standards Act stipulates that for youths under the age of 18 the Secretary of Labor “shall find and by order declare” certain occupations hazardous or detrimental to their health and well-being. This minimum age applies even when the minor is employed by a parent or person standing in place of the parent.

The 17 hazardous occupations orders now in effect are:

1. Manufacturing and storing explosives;
2. Motor-vehicle driving and outside helper;
3. Coal mining;
4. Logging and saw milling;
5. Power-driven woodworking machines;
6. Exposure to radioactive substances;
7. Power-driven hoisting apparatus; shearing machines;
8. Power-driven, metal-forming, punching, and shearing machines;
9. Mining, other than coal mining;
10. Slaughtering, or meat-packing, processing, or rendering;
11. Power-driven bakery machines;
12. Power-driven paper-products machines;
13. Manufacturing brick, tile, and kindred products;
14. Power-driven circular saws, band saws, and guillotine shears;
15. Wrecking, demolition, and shipbreaking operations;
16. Roofing operations; and
17. Excavation operations.

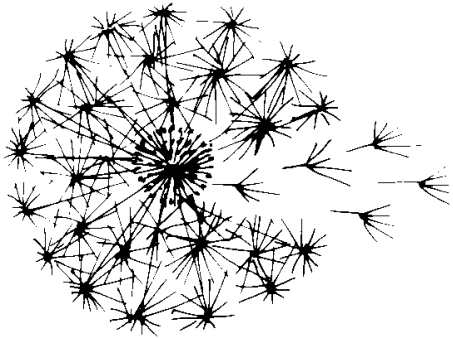
WHEN IS A STUDENT INTERN CONSIDERED TO BE AN EMPLOYEE ?

If the internship does not meet all four requirements to qualify as an unpaid intern, the student will be considered an employee and will be subject to California and Federal Labor Standards Act (FLSA) regulations.

This means they must be paid at least minimum wage, receive no less than 1 ½ times the regular rate of pay for each hour of overtime (work in excess of 40 hours a week), and be employed in accordance with child labor laws.

When a student is considered an employee, no waivers of the FLSA are permitted under the STWOA. Instead, students are treated the same as any other working minors. If the student is subject to FLSA and state regulations, and the two provisions conflict, always apply the more restrictive provision. For example, if the FLSA's minimum wage laws and the California minimum wage laws are not the same, you should pay the higher wage.

HAZARDOUS WORKING CONDITIONS



IS MY BUSINESS OR ORGANIZATION SUBJECT TO FAIR LABOR STANDARDS ACT REQUIREMENTS ?

In theory, not all businesses are subject to Federal Labor Standards Act (FLSA) regulations. Those who are exempt from the FLSA need only adhere to any applicable state child labor provisions. In reality the FLSA reaches almost every business, and it would be best to assume that the FLSA laws apply to your business unless there is a specific exception. The FLSA laws apply to employers who are engaged in interstate commerce. This includes not only businesses that produce goods for interstate commerce, but even those who merely use goods that have traveled through interstate commerce are subject to the FLSA rules.

For example, the simple act of using a pencil that was made outside California would subject a California business to the FLSA regulations. In addition, businesses whose annual sales are more than \$500,000, or the following organizations are subject to FLSA.

- hospitals;
- schools whose primary purpose is the care of the disabled or aged, and reside on the premises;
- schools for children who are either mentally or physically disabled or gifted;
- preschools;
- elementary or secondary schools;
- higher education institutions; or
- public agencies.

This leaves very few businesses, (including nonprofit organizations) outside the FLSA's jurisdiction.

Exceptions to the FLSA and California State child labor laws apply to minors:

1. under the age of 16 years and employed by their parents in an occupation other than manufacturing, mining, or occupations declared as hazardous;
2. employed as actors or performers in films, theater, radio or television;
3. who deliver newspapers; and
4. who work at home and are engaged in the making of wreaths composed principally of holly, pine, cedar or other evergreens.

As mentioned before, due the narrowness of these exceptions and the wide range of businesses that fall under the FLSA's umbrella, it is best to assume your business is subject to FLSA regulations.

RESOURCES

Minor Laws of Major Importance: A Guide to Federal and State Child Labor Laws. Kendall/Hunt Publishing Company, 4050 Westmark Drive, Dubuque, Iowa 52002.

School-to-Work Opportunities and the Fair Labor Standards Act. New Ways Workers, 785 Market Street, Suite 950, San Francisco, CA 94103.

California Child Labor Laws, 1995-96. State of California, Department of Industrial Relations, Division of Labor Standards Enforcement.

Child Labor Requirements in Nonagricultural Occupations Under the Fair Labor Standards Act. U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (WH 1330), Child Labor Bulletin 101

Legal Issues in Experimental Education. Michael Goldstein, National Society for Experiential Education.

California Labor Law Digest, California Chamber of Commerce.

Centerfocus, No. 8/April 1995, National Center for Research in Vocational Education. University of California, Berkeley.

Implementing a Local School-to-Work Partnership: Legal and Labor Considerations. Oklahoma Department of Vocational and Technical Education.

The information in this booklet has been gathered from the sources listed above. We recommend you refer to the Federal Labor Standards Act and the California Child Labor Laws.

Anytown School-to-Work Collaborative Learning Contract

The Anytown School to Work Collaborative has discussed this internship with Sam Jones and has agreed to provide orientation, supervision and assessment of the internship. An assigned mentor will meet with Sam on a regular basis and provide counsel and advice during the internship.

Sam Jones agrees to abide by all the policies and employee regulations of the Anytown School-to-Work Collaborative and will conduct him/herself in accordance with these rules and complete all work assignments in a timely and professional manner to the best of his/her ability.

Central High School is a partner in supporting this Internship and has agreed to provide coordination and instruction related to the assignment.

A detailed job description and performance agreement signed by the collaborative, student, parent, and school are attached to this agreement.

The internship may be terminated by mutual agreement and notification to the School-to-Work Coordinator.

DO INTERNS NEED PERMITS TO WORK ?

All minors employed in the state of California must have a "Permit to Work," unless they are excluded as described earlier. In addition, the Fair Labor Standards Act (FLSA) requires a certificate of age for working minors. However, the State's more restrictive Permit to Work qualifies as the federal certificate of age.

Even though the STWOA tried to remove these types of restrictions from what they consider "nonemployees," the STWOA does not provide a waiver of the California Education Code and the State still requires Permits to Work and Permits to Employ for both paid and unpaid employees (e.g., unpaid interns).

Both permits are always required (even during school vacation) and are issued by the minor's school. Permits are not general in nature but rather are issued for specific employment at a specific address. Both the California child labor provisions and the FLSA restrict, by specific age group, the type of work and the amount of work a minor may undertake.

The permit must contain the maximum number of hours a minor may work in a day, the range of hours during the day the minor may work, any occupational limitations, and any additional restrictions imposed at the school's discretion.

While the school has the power to apply more restrictive conditions on the student, depending on the minor's particular circumstances, neither school nor labor officials have the power to waive any minimum labor standard established in state or federal law or regulation. The more

WHAT ARE LEARNING CONTRACTS ?

restrictive provision always applies. Any violation of such special restrictions will subject the permit to revocation.

It is the employer's duty to have a Permit to Employ on file and available for inspection by school and labor officials at all times. (Permits to Work and Permits to Employ are issued on the same form.)

A Permit to Work and Employ may be denied or canceled any at time by a school official or the labor commissioner whenever the conditions for issuance no longer exist or never have existed. Additionally, school officials may revoke the permit if it is determined that the health or schoolwork of the minor is suffering due to the employment. Permits expire each year five days after the close of the school year and must be renewed annually.

Once an employer agrees to hire a minor or take them on as an STWOA nonemployee (unpaid intern), the minor should obtain from his or her school a "Request for Work Permit and an Intent to Employ" form. The form should then be completed by the minor and signed by the minor's parent and prospective employer. A school official may then issue the Permit to Work and the Permit to Employ.

(EXCEPTION: minors employed in the entertainment industry must have Permits to Work issued by the Division of Labor Standards Enforcement.)

Often schools use Learning Contracts for student interns. These contracts can also be used by regular employers. A contract need not be written in a legalistic form to be enforced. Verbal contracts, express contracts, and implied contracts are all enforceable as long as the rights and responsibilities of each party can be shown. Therefore, it is suggested that if the student is a nonemployee (unpaid intern) working for experience or credit, in order to avoid any confusion, disappointment, or even a possible law suit, a learning contract between the student and the school or employer be established.

The contract need not be a formal document but should set fourth the responsibilities and expectations of the student and the school, as well as the criteria necessary to allow the school to award credit. A sample Learning Contract appears on the following page.

WHAT ARE THE REGULATIONS ON THE HOURS STUDENTS CAN WORK ?

The following chart summarizes working hours for students between the ages of 14 and 18 whether they are paid employees or “nonemployees” (unpaid interns).

	Ages 14 and 15 (students in 8th grade and higher)	Ages 16 and 17 (not high school graduates)
SCHOOL IN SESSION		
Non Work Experience Students	3 hours per day outside school hours ----- 18 hours per week	4 hours per day on school days lasting 240 minutes or more 8 hours on any day that precedes a non-school day or on any non-school day 48 hours per week
Work Experience Education (WEE) Students	During school hours and up to 23 hours per week	Up to 8 hours on school days lasting 240 minutes or more
SCHOOL NOT IN SESSION	8 hours per day 40 hours per week	8 hours per day 40 hours per week
ALLOWABLE WORKING HOURS		
Day after Labor day to June 1st	7:00 am to 7:00 pm	5:00 am to 10:00 pm
June 1 through Labor Day	7:00 am to 9:00 pm	5:00 am to 12:30 am preceding non-school days or through WEE programs

Information based on ED Codes: 49112; 49116;
and Labor codes 1391; and 1392.
Some exceptions apply.

INDEMNIFICATION

As indicated earlier, proper insurance (on behalf of both the employer and the school) can be obtained to cover most risks. In addition either party can seek indemnification from each other or a third party. This can be an agreement between the school and the school-to-work partner, or a third party acting as a go-between. This type of agreement may provide for one party to protect the other party from loss regardless of who is at fault. These types of agreements are enforceable and require the review of counsel.

Even if a student or a student's parent wants to sign a waiver of liability in favor of the employer, you cannot waive another person's negligent acts and as a legal theory any waiver would have very little consequence.

ASSUMPTION OF RISK

This theory allows individuals to assume certain risks that are inherent in the job to be performed. However, the assumption is limited to ordinary risk. A rock climbing instructor would be a good example: A student working as a rock climbing instructor can assume the risk that goes along with rock climbing. However, this may include only ordinary risk: if the student was injured because the business provided defective rope that business is negligent and would be held responsible.

In California the student must be informed of the specific risk and knowingly consent to the risk. In addition parental consent should be obtained. If the job is in the medical or psychiatric field, criminal justice, or entails field expeditions assumption of risk consent should always be obtained.

BUSINESS POLICIES AND PROCEDURES

The business should have a policy on equal access, equal treatment, and freedom from harassment. The policies and related procedures must be accessible to all school-to-work partners and participants.

WHAT ARE THE REQUIRED WAGES FOR PAID INTERNSHIPS

- the student was acting within the scope of his or her duties; or
- the student was acting with apparent authority (e.g., the student has performed these duties before), implied authority (the duties are inherent in the job description), or has the actual authorization of the organization; and
- the student is negligent (e.g., does not exercise a reasonable standard of care).

As can be seen, the main conditions are scope of employment and negligence. Each case will have to be answered on its own merits. For example, a student delivering documents stops at a convenience store to buy a soda and hits another car in the parking lot. Was that student acting within the scope of his or her employment? The threshold question would be whether or not the student's stopping at the store was foreseeable or not. Did the student, or other employees, regularly stop during deliveries? Was their supervisor aware of these stops? Did the employee have permission to stop? As an employer the best thing to do is clearly state the scope of the student's duties and instruct the student not to deviate from them.

If a student causes injury to a co-worker, the injuries are generally covered by Workers' Compensation. The main exception would be an intentional harmful act by the student. In that case the student would be liable and possibly the school if it knew of the student's propensity toward violence.

Employers subject to the Federal Labor Standards Act (FLSA) must pay the applicable federal minimum wage and overtime rates, unless the state minimum wage is higher. In California, minors must be paid at least a minimum wage and applicable overtime rates established by the California Industrial Welfare Commission (IWC).

Minimum wage rates* and increase schedule is as follows:

Effective	Jurisdiction	Rate
Now	Federal	\$4.75
Now	California	\$5.00
9/1/97	Federal	\$5.15
3/1/98	California	\$5.75

**Note: There is an exception for a "training wage" for employees under 20 years old during their first 90 days on the job. Refer to IWC regulations for clarification.*

Minors who are high school graduates or hold a certificate of proficiency must be paid the same as adults when they perform the same quantity, quality and classification of work. This is true even when the wage rate is above the minimum wage. Also, all wages are subject to taxes.

There are some exceptions where STWOA employers are exempt from minimum wage requirements and employers can get a subminimum wage certificate. The California Industrial Welfare Commission (IWC) allows minors to be paid 85% of the adult minimum wage rounded to the nearest

nickel when minors do not account for more than 25% of the total persons regularly employed in the same establishment. This applies during the school year and not during vacations.

Subminimum rates are regulated by federal and state regulations which often conflict with each other. Employers paying subminimum rates should check with the California Industrial Welfare Commission and the U.S. Department of Labor, Wage and Hour Division.

HOW DOES THE STWOA AFFECT MY LIABILITY AS AN EMPLOYER ?

The STWOA does not change the employer's risk of liability. Therefore, an employer's liability as a school-to-work partner is no different from that which already exists. There is an important distinction depending upon whether the student is an employee or nonemployee (unpaid intern).

If the student is an employee, and an injury arises out of the scope of employment, the employee's exclusive remedy is Workers' Compensation.

If the student is a nonemployee and is injured during the scope of the internship placement, the rights are the same as the general public (i.e., they may file a lawsuit). The fact that the employer is participating in a school-to-work program does not increase the employer's liability, nor enable the nonemployee (unpaid intern) to seek Workers' Compensation.

The best way to protect yourself as a school-to-work partner is to contact your insurance agent and make sure your liability coverage is sufficient.

INJURIES OR DAMAGES CAUSED BY THE STUDENT

Businesses can be held liable for injuries or damages caused by student Interns. This is a complicated issue, and there are no simple or clear-cut regulations. However, here are some general guidelines.

An organization may be liable for injuries or damages caused by student interns if: