
UNPAID INTERNSHIPS UNDER ONTARIO MINISTRY OF LABOUR SCRUTINY

*By Barry W. Kwasniewski**

A. INTRODUCTION

The Ontario Ministry of Labour is presently carrying out “workplace inspection blitzes” between the months of April and June, 2014, which will focus on the issue of employer use of unpaid interns. Media reports have confirmed that as a result of these inspections, Toronto Life magazine and The Walrus magazine (which is a registered charity), have ended their unpaid internship programs. Other employers may follow in either ending or modifying their internship programs in light of this increased attention to the issue. For charities and not-for-profits, the labour of volunteers is crucial to achieving organizational goals. However, in light of the increased attention by the government to the issue of unpaid work, charities and not-for-profits need to be mindful and aware of the limits imposed by law for unpaid work, and take appropriate steps to protect themselves from claims that the people who carry out the work need to be compensated in accordance with employment standards laws.

This Bulletin will discuss this evolving and important issue, and will review the *Employment Standards Act, 2000* (the “ESA”) requirements for retaining an unpaid intern, as well as the differences between interns and volunteers.

* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters’ Ottawa office and would like to thank Dianne T. Hajdasz, B.Sc. (Hons.), B.Ed., J.D., Student-At-Law, for her assistance in the preparation of this *Bulletin*.

B. ONTARIO'S EMPLOYMENT STANDARDS ACT, 2000¹

The Ontario *Employment Standards Act, 2000* (“ESA”) sets out the rights and responsibilities of employees and employers in Ontario.² Under the ESA, an employer which violates its provisions regarding labour standards may be subject to investigation, prosecution and possible fines. Employees cannot waive their rights under the ESA, meaning, for example, that if an employee is entitled to minimum wages under the ESA, he or she *cannot* waive his or her rights to receive that minimum wage.

Section 3 of the ESA states that the statute applies to an employee and employer if the employee’s work is to be performed solely in Ontario; or if the work is performed in and out of Ontario then the portion performed outside of Ontario must be a continuation of the work that was executed *in* Ontario. With few exceptions, charities and not-for-profits operating in Ontario will be subject to the ESA.

C. THE ESA AND INTERNSHIPS

There has been recent coverage in the news about the Ontario Ministry of Labour’s attention to unpaid interns in workplaces, including charities and not-for-profits. The Ministry’s intention is to protect the rights of workers under the ESA. Under the ESA, an employer must pay employees “at least the prescribed minimum wage”.³ One way in which the government is enforcing the ESA standards is by conducting “inspection blitzes” whereby employment standards officers visit employers and evaluate the employer’s compliance with the ESA.⁴ The current inspections relating to internships are being conducted in the sectors of marketing/public relations, software development, retail, media, film and entertainment.⁵ For charities and not-for-profits, these inspections raise the important issue of ESA compliance with respect to the use of unpaid labour, either pursuant to a volunteer engagement or an internship.

What then is an internship and who is considered to be an intern? The answer is not as clear-cut as one would hope. Generally, the term “intern” has been understood to apply to a situation where a person enters a workplace to learn a professional skill for a period of time, often (but not always) with either little or no

¹ *Employment Standards Act, 2000*, SO 2000 c41, online at:

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_00e41_e.htm#BK5

² “Frequently Asked Questions”, Ontario Ministry of Labour, online at:

<https://www.labour.gov.on.ca/english/es/faqs/general.php#purpose>

³ *Supra* note 1 at s.23(1).

⁴ “Inspection Blitzes and Initiatives”, Ministry of Labour, online at: <https://www.labour.gov.on.ca/english/resources/blitzschedule.php>

⁵ *Ibid.*

compensation. The intern may have an expectation of securing later employment with that organization, or at least acquire professional skills and experience. However, the ESA does not define “intern” or “internship”. Therefore, for guidance one must look to the ESA definition of “employee”. If an individual falls under the definition of “employee”, then he or she cannot be an unpaid intern and as a result, he or she must be compensated with at least minimum wage. The ESA defines an “employee” in section 1 as the following:

- (a) a person, including an officer of a corporation, who performs work for an employer for wages,
 - (b) a person who supplies services to an employer for wages,
 - (c) a person who receives training from a person who is an employer, as set out in subsection (2), or
 - (d) a person who is a homemaker,
- and includes a person who was an employee;⁶

As previously mentioned, an “employee” under the ESA must be paid at least the prescribed minimum wage. There are two exceptions to this minimum wage requirement. The ESA, and its provisions about minimum wage, do *not* apply to an individual who is:

- “a secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled; [or]
- an individual who performs work under a program approved by a college of applied arts and technology or a university”.⁷

In addition, if a person receives training from an employer and the trained skills are used by the employer’s other employees, this person would ordinarily be subject to the ESA and the provisions about minimum wage, *unless* all six conditions set out below are met:

1. The training is similar to that which is given in a vocational school.
2. The training is for the benefit of the individual.
3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained.

⁶ *Supra* note 1 at s.1.

⁷ *Supra* note 1 at s.3(5).

4. The individual does not displace employees of the person providing the training.
5. The individual is not accorded a right to become an employee of the person providing the training.
6. The individual is advised that he or she will receive no remuneration for the time that he or she spends in training.⁸

If *all* of the six conditions mentioned above apply to an employee's situation, then the employer is not required to pay the individual.

In summary, if a person falls under the definition of "employee" under the ESA, then he or she must receive at least the prescribed minimum wage, unless the person falls under the exception for secondary school students, the exception for college and university programs, or the exception for training. The fact that the person may be called an "intern" does not matter. It is the definition of an "employee" under the ESA that applies, not the title of the person's position.

D. INTERNS AND VOLUNTEERS: IS THERE A DIFFERENCE?

The Ministry of Labour website notes that "volunteers" are not covered by the ESA.⁹ Therefore, volunteers are not employees and can be unpaid. Interns on the other hand are employees and must be paid at least minimum wage, unless they fall under the listed ESA exceptions. When then is a person considered to be a volunteer (unpaid) or an intern/employee (paid)? The ESA does not define "volunteers" or "interns". According to The Volunteer Centre, a volunteer is "someone who chooses to act in recognition of a need, with an attitude of social responsibility and without concern for monetary profit".¹⁰ According to the Oxford Dictionaries, a volunteer is "a person who freely offers to take part in an enterprise or undertake a task".¹¹ The United Nations defines volunteering as the following: "There are three key defining characteristics of volunteering. First the activity should not be undertaken primarily for financial reward. Second, the activity

⁸ *Supra* note 1 at s.1(2).

⁹ "Frequently Asked Questions", Ministry of Labour, online at: <http://www.labour.gov.on.ca/english/about/faqs/#volunteers>

¹⁰ What is a Volunteer?, The Volunteer Centre, online at: http://volunteercentre.ca/?page_id=350

¹¹ Oxford Dictionaries, definition of the word "volunteer", available online at: <http://www.oxforddictionaries.com/definition/english/volunteer?q=volunteer+>

should be undertaken voluntarily, according to an individual's own free-will. And third, the activity should be of benefit to someone other than the volunteer him or herself, or to society at large."¹²

E. HOW TO PROTECT YOUR ORGANIZATION

If a person is in fact a true volunteer, then the ESA requirements would not apply and the volunteer can continue to assist the organization without compensation. Even with charities and not-for-profits, there may be a fine line between whether a person will legally be considered to be an intern or a volunteer. For example, if a person is carrying out a function that is normally carried out by a paid employee and is paid a small stipend, there is a risk that the person would be viewed by the Ministry of Labour as an employee, and not a volunteer. The same result could arise if the person is training for a possible future paid position within the charity or not-for-profit. Therefore, to protect your organization from these potential risks, it must only retain interns who fall within the legal requirements as mandated by the ESA. Further, the organization should make sure the documents retaining the intern are clear and well drafted to properly set out the nature of the relationship. Finally, in retaining volunteers, the organization should use properly drafted volunteer agreements, which would likewise set out the nature of the relationship, and the respective roles and responsibilities of each party. An article about the importance of volunteer agreements can be found online at: "The Benefits of Volunteer Agreements" <http://charityinfo.ca/articles/The-benefits-of-volunteer-agreements>.¹³

¹² Assessing the Contribution of Volunteering to Development, Handbook for UN Volunteers, Programme Officers and Managers, UN Volunteers, August 2011, page 9, online at: http://www.unv.org/fileadmin/docdb/unv/pdf/UNV%20Assessing_web%20version.pdf

¹³ "The Benefits of Volunteer Agreements", Barry Kwasniewski, June 18, 2013, online at: <http://charityinfo.ca/articles/The-benefits-of-volunteer-agreements>