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## Are the Kids Alright? Summer Employment & Child Labor Laws

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As the school year draws to an end, businesses will be inundated with applicants searching for temporary summer employment. For minors there may be no more pencils, no more books, and no more teachers' dirty looks, but for employers summer comes with its own homework assignment: child labor law compliance. Accordingly, employers' summer reading should include a review of applicable statutes and regulations governing minors' employment, including requirements, obligations, and pitfalls associated with hiring minor employees.

### Permitted and Prohibited Employment

Both federal and state laws place restrictions on the type of employment minors may perform and the equipment they may use. The federal Fair Labor Standards Act (FLSA) provides that "[n]o employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce."<sup>1</sup> The U.S. Department of Labor's (DOL) Wage and Hour Division is charged with enforcing federal child labor laws and has created detailed regulations governing prohibited and permitted employment for minors falling in one of two categories: (1) 16 and 17 years old; and (2) 14 and 15 years old. Moreover, the FLSA permits states to enact more restrictive child labor laws.<sup>2</sup> Accordingly, employers cannot assume that adhering to federal standards will guarantee state law compliance. Employers should follow whichever law provides minor employees with the most protection.

### 16 & 17 Years Old

Under the FLSA, "oppressive child labor" includes conditions of employment the Secretary of Labor deems "particularly hazardous."<sup>3</sup> The DOL has promulgated regulations related to the following non-agricultural occupations and equipment it deems particularly hazardous for 16- and 17-year-old employees:

- Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components;

<sup>1</sup> 29 U.S.C. § 212.

<sup>2</sup> 29 U.S.C. § 218.

<sup>3</sup> 29 U.S.C. § 203.

- Occupations of motor-vehicle driver and outside helper;
- Coal-mine occupations;
- Forest fire fighting and forest fire prevention occupations, timber tract occupations, forestry service occupations, logging occupations, and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill;
- Occupations involved in the operation of power-driven woodworking machines;
- Exposure to radioactive substances and to ionizing radiations;
- Occupations involved in the operation of power-driven hoisting apparatus;
- Occupations involved in the operation of power-driven metal forming, punching, and shearing machines;
- Occupations in connection with mining, other than coal;
- Occupations involved in the operation of power-driven meat-processing machines and occupations involving slaughtering, meat and poultry packing, processing, or rendering;
- Occupations involved in the operation of bakery machines;
- Occupations involved in the operation of balers, compactors, and paper-products machines;
- Occupations involved in the manufacture of brick, tile, and kindred products;
- Occupations involving the operation of circular saws, band saws, guillotine shears, chain saws, reciprocating saws, wood chippers, and abrasive cutting discs;
- Occupations involved in wrecking, demolition, and shipbreaking operations;
- Occupations in roofing operations and on or about a roof; and
- Occupations in excavation operations.<sup>4</sup>

Limited exceptions may apply. For example, concerning "occupations involved in the operation of bakery machines," 16- and 17-year-old employees may operate "lightweight, small capacity, portable counter-top power-driven food mixers that are, or are comparable to, models intended for household use" if the mixer "is not hardwired into the establishment's power source, is equipped with a motor that operates at no more than ½ horsepower, and is equipped with a bowl with a capacity of no more than five quarts."<sup>5</sup>

As noted above, states can also enact their own child labor provisions. Federal law controls in states without occupation and equipment laws governing the employment of 16- and 17-year-old employees (e.g., Arkansas, Idaho, Missouri). Most states, however, have enacted their own child labor laws. Although some state laws may appear to mirror federal proscriptions, what may seem like small differences can cause employers large problems, especially if the state law differences provide greater employee protections. As with most wage and hour laws, state laws tend to be far more cumbersome than their federal counterparts and may include prohibitions not covered under the FLSA.

Where state laws appear to be less restrictive than the FLSA, such as Colorado, which permits a 16-year-old employee to work in an occupation involving the use of motor vehicles if properly licensed,<sup>6</sup> employers should follow the FLSA, which permits only limited "incidental and occasional" driving by 17-year-old employees.<sup>7</sup>

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4 29 U.S.C. §§ 570.51 - 570.68.

5 29 C.F.R. § 570.62.

6 Colo. Rev. Stat. § 8-12-109.

7 29 C.F.R. § 570.52.

## 14 & 15 Years Old

In addition to proscribing certain prohibited employment for minors under 16 years old, the FLSA regulations also address permitted occupations for 14- and 15-year-old employees. As noted above, where different or additional state law provisions also exist, to the extent they are more restrictive, employers should follow them.

### Prohibited Employment

In addition to the prohibitions applicable to minors age 16 and 17 years old, 14- and 15-year-old employees cannot perform certain work related to the following occupations or equipment:

- Certain manufacturing, mining, or processing occupations;
- Occupations that involve operating, tending, setting up, adjusting, cleaning, oiling, or repairing hoisting apparatus;
- Work performed in or about boiler or engine rooms or in connection with the maintenance or repair of the establishment, machines, or equipment;
- 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;
- Occupations as motor vehicle operators and helpers;
- Outside window washing that involves working from window sills, and all work requiring the use of ladders, scaffolds, or their substitutes;
- Certain baking and cooking activities;
- Work in freezers and meat coolers and certain work preparing meats for sale;
- Youth peddling;
- Loading and unloading of goods or property onto or from motor vehicles, railroad cars, or conveyors;
- Catching and cooping of poultry in preparation for transport or for market;
- Public messenger service;
- Occupations in connection with:
  - Transportation of persons or property by rail, highway, air, water, pipeline, or other means;
  - Warehousing and storage;
  - Communications and public utilities;
  - Construction.<sup>8</sup>

As with prohibited occupations for 16- and 17-year-old employees, limited exceptions may apply. Moreover, exceptions may apply for minors enrolled in and employed in qualifying work and career exploration programs, or enrolled in qualifying work-study programs.<sup>9</sup>

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<sup>8</sup> 29 C.F.R. § 570.33.

<sup>9</sup> See 29 C.F.R §§ 570.36, 570.37.

## Permitted Employment

In addition to detailing what occupations 14- or 15-year-old employees cannot perform and equipment they cannot use, FLSA regulations set forth what occupations said minors can perform and what equipment they *can* use:

- Office and clerical work, including the operation of office machines;
- Work of an intellectual or artistically creative nature, *e.g.*, computer programming, writing software, teaching or performing as a tutor;
- 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 grounds maintenance (however, minors cannot use power-driven mowers, cutters, trimmers, edgers, or similar equipment);
- Kitchen work and other work involved in preparing and serving food and beverages, including operating machines and devices used in performing such work;
- 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;
- Loading and unloading onto and from motor vehicles certain items;
- Lifeguarding (only if age 15 and certain training requirements have been satisfied).<sup>10</sup>

## Hours of Employment

The FLSA regulates not only the type of work for minors, but also the hours of employment. The FLSA's hours requirements are only applicable to minors aged 14 or 15 years old. However, various states have enacted their own laws governing when and how long minors of any age may be employed. Certain states, such as Indiana and Louisiana, may apply one standard for 16-year-old employees and another for minors that are 17.

Additionally, different time and hour restrictions may apply to work performed on school days or days preceding school days, and potentially relaxed standards during summer may not apply to minor employees enrolled in summer school.

### **14 & 15 Years Old**

Under the FLSA, a 14- or 15-year-old employee *cannot* work:

- More than three hours on a school day;
- More than 18 hours a week while school is in session;
- More than 23 hours a week while school is in session if the minor is enrolled in an approved work experience or career exploration program;
- More than eight hours in any one day when school is not in session;
- More than 40 hours a week while school is not in session;

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<sup>10</sup> 29 C.F.R. § 570.34.

- Hours other than between 7 a.m. and 7 p.m., *except* that from June 1 through Labor Day nighttime work hours may be extended until 9 p.m.<sup>11</sup>

The FLSA does not expressly limit how many days per week a 14- or 15-year-old employee can work. However, some states, such as Alabama, Delaware, and Massachusetts, do. Accordingly, when scheduling minors, employers must ensure that the minor employee does not work more days than permitted. A minor employee should also not be permitted to cover another employee's shift if that additional shift would violate the restrictions provided by federal and state law.

## **16 & 17 Years Old**

The FLSA does not regulate how many hours per day or week a 16- or 17-year-old employee may work, nor does it address the maximum number of days a 16- or 17-year-old employee may work per workweek. For employers operating in states such as Arizona, Georgia, and Oklahoma that also have no time and hour restrictions applicable to these particular minor employees, employers need only comply with relevant time and hour restrictions applicable to adult employees.

However, many states have time and hour requirements for employees aged 16 or 17 years old (e.g., Michigan, New Hampshire, Pennsylvania). As with standards applicable to 14- and 15-year-old employees, these may vary depending on whether school is in session and whether work is performed on a school day or a day preceding a school day. Additionally, there may be a limit on how many days per week a 16- or 17-year-old employee may work.

## **Summer School**

As indicated above, different standards may apply depending on whether school is in session. Although generally summer provides minors an academic reprieve, some students may be enrolled in summer school. In some states the "in session" time and hour restrictions apply equally to minors enrolled in summer school (e.g., 14- and 15-year-old employees in Pennsylvania). Accordingly, employers must determine whether states in which they do business have such a requirement and, if so, whether any of their minor employees are or will be enrolled in summer school. Employers must also make certain that this information is conveyed to individuals charged with scheduling workers to protect against minors being scheduled too many daily or weekly hours.

## **Other Considerations**

It is important to recognize there is no uniform age division among the states concerning time and hour restriction laws for minor employees. Therefore, employers with multi-state operations should not attempt to construct and apply a nationwide child labor time and hour policy. Instead, employers should conduct a state-by-state analysis to ensure compliance, which will require separate trainings and guidelines for supervisory and managerial employees.

## **Meal & Rest Periods**

On top of understanding daily and weekly time and hour restrictions for minor employees, employers must be sensitive to additional obligations that are triggered based on the hours per shift a minor works, e.g., meal and rest periods. Where applicable, these laws generally detail how long an employee must work to be entitled to a meal and/or rest period, how many breaks the employee must be provided, when they must be provided, and how long breaks must last.

The FLSA does not require that employees receive rest or meal breaks. However, federal regulations specify that rest breaks between five and 20 minutes must be paid.<sup>12</sup> Bona fide meal periods of 30 minutes or more during which an employee is not expected or required to perform work, however, may be unpaid.<sup>13</sup>

<sup>11</sup> 29 C.F.R. § 570.35.

<sup>12</sup> 29 C.F.R. § 785.18.

<sup>13</sup> 29 C.F.R. § 785.19.

Around half the states have enacted rest and/or meal break requirements for adult employees. Moreover, in those states, separate and more stringent rules may apply for minor employees (e.g., Delaware, Oregon, West Virginia). Even in states without applicable meal and/or rest period provisions for adults, minor-employee-specific requirements may apply (e.g., Florida, Michigan, Ohio). Around half the states have specific provisions covering meal and/or rest periods for either all minors (e.g., Alaska, Kentucky, Maryland) or for minors of a certain age (e.g., Alabama & Hawaii—14- & 15-year-old employees). Moreover, some states have enacted industry-specific regulations for minors (e.g., California—entertainment industry; Utah—minors engaged in door-to-door sales).

In the absence of child labor-specific meal and rest period requirements, adult standards, if applicable, will apply to minor employees. If no adult or minor employee meal and/or rest period standards exist, employers must familiarize themselves with what constitutes "hours worked" for wage and hour purposes to determine whether meal and/or rest periods are paid or unpaid.

## Compensation

Maintaining adequate workforce levels within a set budget is a constant challenge, particularly when the economy sours. Under tight constraints, employers may look for creative solutions to resolve staffing shortfalls. One option employers may consider is hiring younger employees. Younger employees' lack of work experience generally means they do not command significant compensation. In certain instances they may also legally be paid a subminimum wage, possibly less if they work as interns. However, there are risks associated with these practices.

### ***Sub-minimum Wage***

Under the FLSA, employees under age 20 may be paid \$4.25 per hour during the first 90 consecutive days of employment, which is \$3 per hour less than the normal FLSA minimum wage. Certain states may also provide that a minor employee may be paid a lower hourly rate than adult employees for an interim period or generally. However, where a state law provides for a higher rate (or no exception to minimum wage for younger employees), employers must comply with the state law.

### ***Internships***

Internships can be mutually beneficial for employers and interns. Interns receive valuable work and life experience, and develop contacts with potential future employers. In turn, employers get to train, and evaluate the work ethic and skill of, potential future applicants. However, internships also present a host of potential legal pitfalls for employers.<sup>14</sup>

Labeling a working relationship as an internship alone does not absolve an employer of its wage and hour obligations. The U.S. Department of Labor uses a six-factor test to determine whether the individual is an intern or an employee. According to the DOL, an individual is an intern only if all six criteria are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.<sup>15</sup>

<sup>14</sup> For a more detailed discussion about the perils of internships, see Christopher Kaczmarek and Ryan Crosswell, [Internship Programs Present Potential Wage and Hour Risks for Employers](#), Littler ASAP (Apr. 19, 2012).

<sup>15</sup> U.S. Department of Labor, Wage and Hour Division, [Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act](#) (Apr. 2010).

Additionally, state laws may have separate and distinct internship requirements.<sup>16</sup>

With the onset of the most recent economic crisis, there has been an increase in the use of unpaid internships. This increase has not gone unnoticed by the plaintiffs' bar, which increasingly filed lawsuits against employers in various industries, alleging they misclassified employees as interns. The suits seek compensatory and punitive damages for federal and state minimum wage and overtime violations, as well as penalties associated with state wage payment provisions.

The cost benefit of classifying a relationship as an internship will quickly dissolve if the arrangement does not meet legal standards. A noncompliant employer could end up paying what those individuals would have been entitled to earn as employees, plus additional damages, penalties, and attorneys' fees and costs of both their own counsel and counsel for the plaintiff(s). Accordingly, employers must perform a thorough examination of the program prior to (and possibly during) the internship to determine whether it will pass muster under federal and state law.

## Employment Eligibility & Verification

Maintaining a legal workforce is essential and requires that an employer take specific compliance actions. Additional steps must be taken when hiring minors. First, an employer must determine whether a minor is legally authorized to work in the United States. Next, it must establish the minor applicant is legally permitted to be employed. To this end, employers must comply with federal I-9 and state work permit requirements.

### I-9 Requirements

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing an individual who is not authorized to work in the United States.<sup>17</sup> The IRCA requires that employers document new hires' identity and authorization to work in the U.S. by completing a Form I-9 within a prescribed timeframe. It also requires that I-9 documentation be retained during the individual's employment and for three years after the hire date, or one year after the employee is terminated, whichever results in a longer retention period. Additional prohibitions against employing individuals who cannot legally work in the U.S. may be found in state law, as might authentication and document retention requirements. Accordingly, employers must take active steps to ensure immigration-related federal and state requirements have been satisfied when a minor is hired.

Failure to authenticate a new hire's legal work status can result in penalties. Moreover, depending on the employer's business, the ability to bid for and obtain federal, state, or local government contracts can be impacted. These requirements apply regardless of whether a new hire is an adult or a minor. However, for minor employees, the authentication process does not stop after confirming an applicant's legal work status; his or her ability to be employed must also be validated.

### Work Permits

The FLSA does not contain a work permit requirement. However, many states have requirements, which vary by jurisdiction. In these states employers must examine additional pre-hire documentation, *i.e.*, a work permit, before hiring a minor.

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16 See, e.g., New York State Department of Labor, [Fact Sheet: Wage Requirements for Interns in For-Profit Businesses](#) (Apr. 2011) (Requiring that a working relationship will be considered a valid internship only if 11 criteria are satisfied: 1) The training, even though it includes actual operation of the employer's facilities, is similar to training provided in education programs; 2) The training is for the benefit of the intern; 3) The intern does not displace regular employees, and works under close supervision; 4) The activities of trainees or students do not provide an immediate advantage to the employer. On occasion, operations may actually be impeded; 5) The trainees or students are not necessarily entitled to a job at the conclusion of the training period and are free to take jobs elsewhere in the same field; 6) The trainees or students are notified, in writing, that they will not receive any wages and are not considered employees for minimum wage purposes; 7) Any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity; 8) The trainees or students do not receive employee benefits; 9) The training is general, and qualifies trainees or students to work in any similar business. It is not designed specifically for a job with the employer that offers the program; 10) The screening process for the internship program is not the same as employment, and does not appear to be for that purpose. The screening only uses criteria relevant for admission to an independent educational program; and 11) Advertisements, postings, or solicitations for the program clearly discuss education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment).

17 8 U.S.C. § 1324a.

Normally, work permits are issued by the local school authority. However, in some jurisdictions, permits may be issued by the state labor department. State laws will generally outline:

- How old a minor must be to obtain a permit;
- Parental and/or school administration approval of employment;
- What information employers may be required to provide;
- Documentation required to authenticate a minor's age.

Employers must understand that permits contain limitations such as what type of employment is allowed while working under a permit. A permit may be restricted to a specific employer and thereby be incapable of transference to a new employer. Additionally, upon termination of a minor's employment, an employer may have to return the permit to the issuing agency. Permits will also expire after a certain amount of time, so employers must ensure permits are valid before and during employment.

### Proof of Age

Federal regulations *recommend* that employers obtain an age certificate for a minor employee if:

- There is reason to believe the minor's age is below the applicable minimum for the position or occupation;
- The minor claims to be one or two years above the minimum age;
- The minor claims to be more than two years older than the minimum age, but his or her physical appearance indicates this may not be true.<sup>18</sup>

State law, however, may *require* that an age certificate be obtained before employing a minor, and kept on file or posted during the minor's employment. Because requirements vary by state, employers cannot rely on uniform pre-hire policies and procedures. Instead, they must familiarize themselves with applicable laws and create state-specific guidelines to ensure compliance.

The DOL's Wage and Hour Division issues federal age certificates. State certificates may be issued by the state labor department or local school officials, depending on the jurisdiction. A valid, unexpired federal age certificate, or a certificate issued by a DOL-approved state<sup>19</sup>(*e.g.*, age, employment, or working certificate or permit) provides employers with proof the minor is old enough to perform a certain occupation or use certain equipment, and may act as a defense against child labor law violation allegations.

One requirement for obtaining a federal age certificate is providing documentation that establishes the minor's age, *e.g.*, birth certificate, baptism record, or school record.<sup>20</sup> Additional forms of documentation may suffice when obtaining a state age or employment certificate, or work permit, so employers should understand unique state law requirements where they operate. Employers must also be conscious of additional federal and state law informational and documentary requirements for obtaining qualifying certificates.

## Posting Requirements

Federal or state law may impose unique notice or posting requirements if minors are employed in the workplace. For example, FLSA-covered employers must conspicuously post the "Employee Rights Under the Fair Labor Standards Act" poster, which contains information related to child labor. In addition to the federal and state postings applicable to all employees, some states have separate child labor law posters (*e.g.*, District of Columbia, Indiana, Kansas). Various jurisdictions, including some without a child-labor-specific meal period law, require that employers post the time allowed for minors' meal periods (*e.g.*, Nebraska, New Hampshire, New York). In states with work permit or age certificate requirements, an employer may be obligated to post the permit or certificate at the minor's workplace, or post a list of minors employed on a work permit (*e.g.*, Alabama, Missouri, New Mexico).

<sup>18</sup> 29 C.F.R. § 570.5.

<sup>19</sup> Alabama; Arkansas; California; Colorado; Connecticut; Delaware; District of Columbia; Florida; Georgia; Hawaii; Illinois; Indiana; Iowa; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Puerto Rico; Rhode Island; South Dakota; Tennessee; Vermont; Virginia; West Virginia; Wisconsin; and Wyoming. 29 C.F.R. § 570.9.

<sup>20</sup> 29 U.S.C. § 570.7.

## Labor Department Enforcement & Penalties

Failure to comply with federal and state child labor laws can result in investigations, fines, and lawsuits by federal or state labor officials. Protecting younger workers is one of the goals set by the DOL in its [Strategic Plan: Fiscal Years 2011-2016](#). As outlined in the plan: "[Wage and Hour Division] local offices target industries and workplaces in which young workers are most likely to be injured or killed on the job, and each WHD on-site investigation includes a requirement to check the employer's compliance with the child labor laws." Publicized investigations and enforcement actions reveal that the Department has pursued actions against employers in numerous industries, including, for example, retail, food service, timber, livestock auctioning, and agriculture.<sup>21</sup> Additional efforts by state labor departments should alert employers that child labor law compliance is an important objective for enforcement officials.<sup>22</sup> Accordingly, if employing minors, employers must also make complying with child labor laws a priority.

## Recommendations for Employers

In the coming weeks, employer inboxes will be flooded with applications from minors seeking to join the summer workforce. Employers, however, cannot let these individuals' enthusiasm for work experience distract them from acknowledging and considering the heightened responsibilities that accompany employing minors. Potential short-term benefits must be weighed against potential liability and additional hiring obligations. Before taking on minor employees, employers should consult with knowledgeable employment law counsel to determine whether and how minors may be successfully incorporated into their workforce while ensuring compliance with relevant federal and state child labor laws.

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<sup>21</sup> Press releases related to child labor enforcements actions by the U.S. Department of Labor's Wage and Hour Division are available at <http://www.dol.gov/whd/media/press/whdprss.htm>.

<sup>22</sup> See, e.g., Kara Kenney, [Beech Grove city contractor cited for child labor laws violation](#), RTV6 ABC (May 30, 2013) [Indiana].