

FAQ on Experiential and Funding Opportunities for Undocumented Students

November 1, 2021

The purpose of this document is to provide campuses and their legal counsel with information on developing nonemployment-based, funded experiential opportunities for undocumented students. This document sets forth legal considerations pertinent to experiential and funding opportunities that institutions may consider providing to undocumented students.

The following questions also address common legal constraints for institutions and questions related to such opportunities.¹ This document seeks to offer a framework for consideration of various approaches as institutions endeavor to increase access to funded experiential learning for undocumented students and to help them thrive on their campuses.

I. FREQUENTLY ASKED QUESTIONS

1. *What experiential opportunities can an institution consider for undocumented students?*

When unpaid internships, volunteer activities, and curriculum-based opportunities are structured so as not to constitute employment, they may be defensible as activities in which undocumented students may participate, whether or not financial support is also provided.²

With respect to unpaid internships, a student must be the “primary beneficiary” of the activity in order not to be deemed an employee for federal wage and hour law purposes. The U.S. Department of Labor (DOL) and several federal appellate courts have adopted a multi-factor test to assess whether an intern is the “primary beneficiary”:

- a. The intern and employer clearly understand that the internship is unpaid; even an implied promise of compensation may suggest that the intern is an employee.
- b. The internship provides training similar to that given in an educational environment.
- c. The internship is tied to the intern’s formal education program through integrated coursework or through receipt of academic credit.
- d. The internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
- e. The internship duration is limited to a period that provides the intern with beneficial learning.

¹ This resource was developed by Stephanie Gold at Hogan Lovells US LLP in collaboration with the Presidents’ Alliance. It is intended for informational and policy planning purposes only. Nothing herein constitutes specific legal advice. Because the law in this area is unsettled and ambiguous, we recommend that legal counsel be consulted to address institution- or organization-specific legal issues. For further questions, please contact the Presidents’ Alliance at info@presidentsalliance.org.

² 8 U.S.C. § 1324a. Under the federal Immigration and Nationality Act (INA), institutions generally may not provide employment positions to (or retain services through contract or otherwise from) undocumented students without valid work authorizations. An enforcement framework exists to verify the employment authorization of employees (e.g. through Form I-9 or E-VERIFY); no similar framework exists for verifying the employment authorization of independent contractors.

- f. The intern’s work complements, rather than displaces, the work of paid employees while providing significant education benefits to the intern.
- g. The intern and the employer understand that the intern is not entitled to a paid position at the end of the program.³

Institutions must be mindful of state law, however, which may define what constitutes an “unpaid internship” differently for purposes of state wage and hours law.⁴ In addition, the federal government may change its posture in the future, as unpaid internships have been criticized as barriers for low-income and first-generation students to participate in career opportunities.⁵

Undocumented students may also be able to participate in volunteer activities if those activities are consistent with federal and state wage and hour law principles applicable to volunteer work. Current federal wage and hour law generally exempts individuals who volunteer without expectation of compensation for public and non-profit charitable organizations. Such exemption generally is limited to positions typically handled by volunteers.⁶ For example, a volunteer is generally not involved in commercial activities run by a non-profit organization, volunteers on a part-time basis, and does not displace or perform the work of regular employees.⁷

Undocumented students may be able to participate in curriculum-based activities—where students engage in experiential opportunities as a part of their classes—without triggering work-authorization requirements.⁸ For example, a course may require that students satisfy a study or research component, which may entail an internship at a community organization, service as a teaching assistant, or independent research. Similar to unpaid internships, curriculum-based activities should provide students with training, hands-on learning, professional development, and/or networking to help support that the activities do not constitute employment.⁹

With all of these types of opportunities, a key consideration is whether the structure is defensible as not creating an employment relationship. Violation of federal or state wage and hour law may lead to, among other things, civil monetary liability, additional financial penalties, and, for certain violations, even criminal prosecution.¹⁰ Moreover, under federal immigration law, institutions may be subject to civil fines or criminal penalties for establishing an employment relationship with undocumented students and for failing to comply with the requirements to identify and verify the identity of employees and complete and retain the required form (the so-called “I-9” obligation).¹¹ An institution’s approach to experiential opportunities may vary depending on its internal policies, applicable state laws, and general risk tolerance.

³ U.S. Department of Labor (DOL), [Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act](#) (January 2018).

⁴ See, e.g., New York Department of Labor, [Fact Sheet: Wage Requirements for Interns in For-Profit Businesses](#) (2021) (providing additional requirements for an “unpaid internship” under New York labor law).

⁵ See White House, [Fact Sheet: President Biden Signs Executive Order Advancing Diversity, Equity, Inclusion, and Accessibility in the Federal Government](#) (June 25, 2021) (announcing plan to reduce use of unpaid internships in federal government to promote diversity and equity).

⁶ DOL, [Fact Sheet #71](#), *supra* note 3, fn. 1.

⁷ DOL, [Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standard Act \(FLSA\)](#) (2015).

⁸ Immigrants Rising, [Creating Fellowship Program](#) at 2; see also DOL, [Fact Sheet #71](#), *supra* note 3 (encouraging unpaid internships to be “tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.”).

⁹ *Id.*

¹⁰ DOL, [Enforcement](#) (last visited July 26, 2021).

¹¹ U.S. Citizenship and Immigration Services, [Penalties](#) (last updated July 10, 2020); 8 U.S.C. § 1324a.

2. *Are there ways universities can provide financial support for experiential opportunities?*

Under the DOL’s “primary beneficiary test,” expectation of remuneration may suggest that the student is an employee. But not all remuneration necessarily gives rise to an employment status. In a 1996 opinion letter, the DOL stated that “the payment of a stipend to . . . the interns does not create an employment relationship under the [federal wage and hour law] as long as it does not exceed the reasonable approximation of the expenses incurred by the interns involved in the program.”¹² Thus, payments to undocumented students in connection with experiential opportunities are not per se indefensible, but such payments ought to be determined with the DOL opinion in mind, and larger payments may increase the risk that the experiential opportunity is deemed to result in an employment relationship.¹³ To facilitate compliance, an institution may consider obtaining information from the intern regarding expenses the intern is incurring as a means to establish a reasonable basis for the amount of any stipend.

Funding for experiential learning may take various forms. For example, the funding may be a scholarship or fellowship from the institution or from a third party. Another approach may be a program whereby a student may apply for a grant from the institution to support a student’s summary activity, which may entail independent research or a non-funded opportunity with a third party. In providing such funding to an undocumented student, an institution should consider whether provision of the funding, particularly when coupled with experiential learning, is defensible as not giving rise to an employment relationship.

Funding may implicate tax requirements as well.¹⁴ For tax purposes, undocumented individuals who have been in the United States long enough to become U.S. tax residents (roughly 183 days) are subject to the same rules as documented individuals in the same situation. Most undocumented students are thus likely to be U.S. tax residents because they typically have been in the U.S. for more than 183 days. Funding to undocumented students may therefore raise tax considerations. For example:

- a. **Scholarship/Fellowship.** The federal tax code (i.e., the Internal Revenue Code) defines a scholarship to be an amount paid to a student for the purpose of study.¹⁵ Scholarships can be either qualified or non-qualified. Qualified scholarships go toward tuition and other required fees and may not be paid for services.¹⁶ Non-qualified scholarships (also called stipends) are paid toward non-required fees, such as living expenses, travel, room, and board.¹⁷

¹² DOL, *Opinion Letter Fair Labor Standards Act (FLSA)*, 1996 WL 1031777, at 1 (1996).

¹³ There are no similar special rules for students or interns under the Internal Revenue Code (Code). Therefore, payment of a student’s or intern’s expenses could create an employment relationship for tax purposes if anything of value is provided in exchange for services, such as teaching or research. If a student or intern is considered an employee under the Code, not only will the tax treatment of amounts paid to the individual be different (as described in the text of the FAQs), but the individual could be subject to additional requirements. For example, the individual might have to be included in the institution’s employee benefit plans, unless the plans exclude them by their terms, and, if they work more than 30 hours a week, they might have to be offered health insurance under the Affordable Care Act (ACA), which is incorporated into the Code.

¹⁴ For tax purposes, undocumented individuals who have been in the United States long enough to become U.S. tax residents (roughly 183 days) are subject the same rules as documented individuals in the same situation. Thus, for example, the special rules for nonresident aliens do not apply to either group.

¹⁵ Internal Revenue Service (IRS), [Topic No. 421 Scholarships, Fellowship Grants, and Other Grants](#), (last updated Mar. 2021).

¹⁶ 26 U.S.C. § 117(b).

¹⁷ IRS, *Topic No. 421*, *supra* note 12.

The qualified vs. non-qualified distinction implicates different tax and disclosure considerations. Institutions are not required to report qualified scholarships to the IRS.¹⁸ Qualified scholarships also are not taxable income.¹⁹ Institutions are not required to report non-qualified scholarships for U.S. tax residents either, unless the scholarships are for services in which case they must report them on Form W-2.²⁰ But even if they are not reported, non-qualified scholarships are taxable income, and U.S. tax residents may be expected to self-report this income.²¹ For tax reporting purposes of non-employment based funding, undocumented students can obtain and use an Individual Taxpayer Identification Number (ITIN), instead of a social security number.²² Students who receive nonreportable but still taxable scholarships may be subject to quarterly estimated tax payments. In addition, institutions may be required to report on Form 1098-T both qualified and non-qualified scholarships provided to U.S. tax residents.²³

- b. **Awards/Prizes for academic accomplishments.** Institutions must report awards and prizes on Form 1099-MISC if the total amount is over \$600 or if they are for services, in which case they must report them on Form W-2.²⁴ In any event, they are usually taxable income. Students receiving awards and prizes reportable on Forms W-2 or 1042-S may be subject to tax withholding and students receiving other prizes and awards may be subject to quarterly estimated tax payments.
 - c. **Gift payments from private donors.** Gifts are not taxable to the recipient but are subject to a separate gift tax (payable by the donor) unless the gift is \$15,000 or less, or, together with other gifts, are less than the donor's lifetime limit of about \$12 million.²⁵ Award or scholarship-type payments are not considered gifts unless they are motivated by family or philanthropic considerations.²⁶
3. *What are some factors institutions may consider when developing potential experiential and funding opportunities that include undocumented students?*
- a. **Funding.** If an institution wants to provide funding to students who are participating in a particular experiential opportunity, the funding amount warrants consideration.²⁷ As indicated above, in a 1996 opinion letter, the DOL stated that “the payment of a stipend to . . . the interns does not create an employment relationship under the [federal wage and hour law] as long as it does not exceed the reasonable approximation of the expenses incurred by the interns involved in the program.”²⁸ Therefore, an institution may want to consider whether the amount of proposed funding is a reasonable approximation of the expenses incurred by students in the program. A funding amount that is in excess of a reasonable approximation of expenses raises a risk that regulators may deem the program to create an employment relationship under federal wage and hour law. In addition, consistent with federal student financial aid rules, an institution's financial aid

¹⁸ 26 C.F.R. § 1.6041-3(n).

¹⁹ See 26 U.S.C. § 117(a).

²⁰ 26 C.F.R. §§ 1.1461-1(c), 1.6041-3(n).

²¹ 26 U.S.C. §§ 61, 1441.

²² See IRS, [Taxpayer Notification Numbers \(TIN\)](#) (last updated Jan. 07, 2021); see also IRS, [About Form W-7, Application for IRS Individual Taxpayer Identification Number](#) (last updated Dec. 07 2020) (application for ITIN).

²³ 26 U.S.C. § 6050S; 26 C.F.R. § 1.6050S-1.

²⁴ IRS, [About Form 1099-MISC, Miscellaneous Income](#) (last updated June 7, 2021).

²⁵ IRS, [Frequently Asked Questions on Gift Taxes](#) (Nov. 9 2020).

²⁶ 26 C.F.R. § 1.117-3(a).

²⁷ Presidents' Alliance, [FAQs on non-employment based educational funding opportunities](#) (2018), p.1.

²⁸ DOL, [Opinion Letter Fair Labor Standards Act \(FLSA\)](#), 1996 WL 1031777, at 1 (1996).

policies may require that a student's financial aid not exceed the student's cost of attendance. Cost of attendance includes a student's tuition and fees, room and board, and other types of expenses, such as reasonable costs associated with study abroad programs approved for credit.²⁹ Institutional financial aid policies may cause funding in connection with experiential opportunities to displace a student's existing financial aid awards, if the combination of the two would result in financial aid in excess of cost of attendance.

- b. **Curriculum-based activities.** If an institution wants to offer curriculum-based activities, it may want to consider the amount and type of school credit. Under federal wage and hour law, a student is more likely to be the "primary beneficiary" when the experiential opportunity is "tied to the intern's formal education program by integrated coursework or the receipt of academic credit."³⁰ To satisfy this "academic integration" factor, institutions may seek to provide coursework with academic credits for experiential opportunities. Courses for academic credit typically entail a fee, so an institution may want to explore non-degree credits to lessen the financial burden on students. While institutions have developed mechanisms to provide non-degree credits on student transcripts for internships in order to tie student participation in internships with academic credit, we should note that it is unclear whether such non-degree credits that do not satisfy student's graduation requirements qualify for this purpose. Institutions might still seek to satisfy the "integrated coursework" prong through additional approaches.³¹ Courts have previously found that an internship was tied to an intern's formal education program where a student received formal training during the internship, discussed the internship with a college faculty member, and/or executed various assignments, including papers reflecting the internship experience.³²
- c. **Stakeholders.** Invested stakeholders, including faculty members, HR representatives, financial aid coordinators, business office personnel, and student affairs staff are critical to a program's success.³³ Experiential opportunities require supervision from faculty members who are invested in the program, in order for students to receive ample feedback and to obtain enriching experience. Human resource administrators and financial aid coordinators can help structure student funding in a way that factors in employment and immigration law and institutional aid policies. Business office personnel can provide general information on tax implications, depending on the kind of funding. Student affairs staff can partner with faculty and other offices to provide outreach and informational sessions for students.

4. *Can an institution offer an experiential program or scholarship that is restricted to undocumented students?*

Even as it can be considered a best practice to ensure that, to the extent possible, all non-employment based funding opportunities, fellowships, scholarships, and internships are

²⁹ 20 U.S.C. § 1087l.

³⁰ DOL, *Fact Sheet #71*, *supra* note 3.

³¹ *See Wang v. Hearst Corp.*, 877 F.3d 69, 74–75 (2d Cir. 2017) (finding that not receiving academic credit does not necessarily undermine the connection between the intern's formal education program and the internship).

³² *See Id.*; *See also Sandler v. Benden*, 715 Fed.App'x. 40, 44 (2d Cir. 2017) (finding the internship to be tied to the intern's formal education program when the student received training during her internship; performed one group assignment; and wrote three reflection papers per week that described the student's experience as a social work intern). At the same time, institutions want to be mindful of students' limited time and resources and not present undue challenges to a student's timely fulfillment of degree requirements.

³³ Immigrants Rising, *supra* note 7 at 2–3.

available to undocumented students, there are questions about restricting programs or scholarships to undocumented students. Experiential programs or scholarships tailored exclusively to undocumented students may implicate federal or state non-discrimination law. On a federal level, for example, Section 1981 of the Civil Rights Act of 1866 prohibits discrimination based on alienage.³⁴ On a state and local level, several jurisdictions have adopted statutes that prohibit discrimination or preferential treatment based on alienage or immigration status.³⁵ For example, some state and municipal laws specifically address immigration status in awarding scholarships:³⁶

- a. **California.** The California Dream Act³⁷ allows undocumented and non-resident documented students who meet the eligibility requirements of AB 540³⁸ to apply for and receive private scholarships funded through public universities, state-administered financial aid, university grants, community college fee waivers, and Cal Grants. The California Student Aid Commission processes the application and any aid received can only be used at eligible California public or private institutions. Thus, although undocumented students are not eligible for federal financial aid, they may still be eligible for state or college aid under AB 540, in addition to private scholarships under the California Dream Act.
- b. **New York City.** The New York City Human Rights Law (NYCHRL)³⁹ prohibits discrimination in employment, housing, and public accommodations based on race, color, creed, age, national origin, alienage or citizenship status, gender (including gender identity and sexual harassment), sexual orientation, disability, marital status, and partnership status.
- c. **New Jersey.** New Jersey's S699⁴⁰ allows certain undocumented immigrants who meet certain criteria to qualify for state student financial aid programs and prohibits discrimination against eligible students based on their immigration status.

³⁴ See *Juarez v. Nw. Mut. Life Ins. Co.*, 69 F. Supp. 3d 364, 367 (S.D. N.Y. 2014) (declining to dismiss claim that policy of hiring only U.S. citizens or lawful permanent residents could constitute alienage discrimination, reasoning that discrimination against a subclass of aliens is actionable under Section 1981).

³⁵ See, e.g., California Dream Act, SB 160, Ca. Reg. Leg. Sess. (2007) (California); Educ. L. § 11(7) (N.Y. 2012) (New York); SB 699, 218th Leg. (2018) (New Jersey).

³⁶ For the list of states that currently provide access to state financial-aid or scholarships, see Tuition and Financial Aid Equity section on the [Higher Ed Immigration Portal](#). See also [Higher Ed Guide to Tuition, Financial Aid, & Other Funding Opportunities for Undocumented](#), Presidents' Alliance on Higher Education and Higher Educationlast updated July 2021.

³⁷ See California Dream Act, SB 160, Ca. Reg. Leg. Sess. (2007).

³⁸ AB 540 creates an exemption from the payment of non-resident tuition for certain non-resident students who have attended high school in California and received a high school diploma or its equivalent. See AB 540 (Ca. 2001).

³⁹ See N.Y.C. Admin. Code §§ 8 – 101.

⁴⁰ See SB 699, 218th Leg. (2018).

Based on federal and state non-discrimination law, federal harboring law,⁴¹ and institutional policies, an institution may seek to design a program that does not utilize eligibility and admissions criteria that are limited to undocumented students. Institutions may use a mix of varied neutral selection criteria such as (but not limited to):

- a. Period of time living in a particular country or location
- b. Period of time in a particular country or location where they graduated high school
- c. A particular language, other than English, is spoken in the home, when coupled with need
- d. Commitment to and interest in supporting diversity in academic or other fields, e.g. STEM, health professions, or legal professions
- e. Birth in a large geographic region, such as Africa, Asia, Latin America, or Europe, when coupled with need
- f. Interest in pursuing studies in immigration, or the history or culture of a particular country or location

⁴¹ A program or scholarship restricted to or specifically designed for undocumented students may implicate the U.S. Immigration and Nationality Act (“INA”), which establishes criminal penalties and fines with respect to persons who knowingly employ or “bring in and harbor” unauthorized aliens, among other activities. *See* 8 U.S.C. § 1101 et seq. The INA’s harboring provision, in part, targets persons who conceal, harbor, or shield from detection in any place, or who encourage or induce an alien to come to, enter, or reside in the United States. Federal courts have held that a defendant “encourages” an unauthorized alien to “reside” in the United States when the defendant takes some action “to facilitate the alien’s ability to live in this country indefinitely.” Defendants have been convicted under this statute, for example, for occasionally employing an alien housekeeper while offering advice on how to avoid deportation. Many typical cases involve employers providing additional aid to unauthorized employees that encourages them to stay. Accordingly, it is unclear how far an educational institution would have to go in order to trigger liability under the harboring provision, especially given the lack of precedent in this specific context and the differences among the circuits in interpreting the statute.