

2011 NALP EDUCATIONAL CONFERENCE

Leveraging Opportunities: How Law Schools Can get the Edge on Paid and Unpaid Opportunities for Students and Recent Graduates at the US Dep't of Justice Handout

The following information supplements a concurrent session presentation by the Office of Attorney Recruitment and Management, U.S. Department of Justice.

VOLUNTEER V. GRATUITOUS SERVICES

Acceptance of volunteer services by federal agencies generally violates the Anti-Deficiency Act, 31 U.S. Code § 1342, which states in pertinent part: “an officer or employee of the United States Government . . . may not accept voluntary services for . . . [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.” The primary purposes of the Anti-Deficiency Act are to avoid instances where the Executive Branch obligates Congress to commit funds to pay for costs of an operation after the fact and that exceed allocated budgets, and to prevent any unfair advantage for individuals who are willing and able to work for the government for free over those persons who may provide similar services only with pay.

Absent a specific statutory exception to the Anti-Deficiency Act, voluntary services may only be performed by a private individual in an unofficial, unappointed capacity, at the individual’s own initiative and without request of or necessarily any agreement by the government. Most Federal agencies may not accept *volunteer* legal services from law school graduates; those that can must have specific statutory authority carving out an exception to the Anti-Deficiency Act (*see, e.g.*, 10 USC §1588(a)(5); 10 USC § 1044(d)(2)).

There is a legal distinction, however, between the terms between *voluntary services*, which are not permissible, and *gratuitous services*, which are permissible in certain limited circumstances. Under extremely limited conditions, federal agencies may accept *gratuitous* services from a law school graduate. Gratuitous services are permissible when they are official services that are performed by an *appointed* individual pursuant to a statutory allowance or requirement that has no minimal level of compensation for the individual. An individual may perform services for the Federal Government without compensation when a statute allows a salary “set at zero.” Generally,

gratuitous services may *not* be in place of work that would otherwise be performed by paid employees in the course of their regular duties and may *not* involve tasks that would normally be provided by the agency, although there are some exceptions. If an employee performing gratuitous services does the work of a regular, salaried employee, the arrangement is akin to a waiver of salary, which is unlawful.

LAW STUDENT VOLUNTEERS

The authority to accept volunteer services from students is an exception to the Anti-Deficiency Act established by Title 5, U.S. Code § section 3111, as implemented by 5 C.F.R. §§ 308.101- 308.103. Federal agencies may accept volunteer services from students enrolled not less than half-time at a qualifying educational institution as part of a program established for the purpose of providing educational experiences for the student.

Student volunteer services must terminate upon graduation, regardless of the end date of the current appointment. Assignments must fall within a program designed to provide educationally related work for students. Student volunteer services may not be used to displace any regular employee or to staff a position that is a normal part of the agency’s work force.

STATUTORY APPOINTMENT AUTHORITIES FOR GRATUITOUS SERVICES

Listed below are statutory appointment authorities that permit federal agencies to accept gratuitous services; two of which are specific to the Department of Justice. The scope of acceptable work varies depending on the appointment authority used. This guidance is intended only for an analysis of uncompensated services provided to a federal agency by a law school graduate. Other federal agencies may have independent statutory appointment authority not listed here.

Special Attorney (SA). Title 28 U.S. Code § 515 (a) permits any attorney “specially appointed by the Attorney General under law” to conduct legal proceedings and represent the United States. This authority is specific to DOJ.

Special Assistant U.S. Attorneys (SAUSA). Title 28 U.S. Code § 543 grants the Attorney General authority to appoint “special attorneys” to assist U.S. Attorneys (Special Assistant U.S. Attorneys or SAUSAs). This appointment authority is specific to DOJ.

Statutory Gift Acceptance Authority. The Attorney General has the authority “to accept, hold, administer, and use gifts ...[of] services for the purpose of aiding or facilitating the work of the Department of Justice.” (*See* 28 U.S. C. § 524(d)(1)). There are *significant* constraints on the type of work that may be performed. Other agency heads have similar statutory authority.

Expert or Consultant. Title 5, U.S. Code § 3109, as implemented by 5 C.F.R. §§ 304.101 – 304.108, allows federal agencies to procure by contract the temporary (not in excess of 1 year) or intermittent services of experts and consultants, with or without compensation. In some agencies (e.g., DOJ), acceptance of uncompensated services requires the exercise of the agency head’s gift acceptance authority (*see e.g.*, Title 28, U.S. Code § 524(d)(1)). There are *significant* constraints on the type of work that unpaid experts/consultants may perform and recent law school graduates likely do not qualify as experts or consultants

The Intergovernmental Personnel Act (IPA). Title 5, U.S. Code §§ 3371 – 76, as implemented by 5 C.F.R. Part 334, permits federal agencies to enter into a written agreement to accept the temporary services (not to exceed 2 years) of an individual employed in a career position with a State, local, or Indian tribal government, institution of higher education, or other eligible organization for work of mutual concern.

EXPERTS AND CONSULTANTS

Agencies may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts and consultants, with or without compensation. Employment without compensation means unpaid service that is provided at the agency’s request to perform duties that are unclassified. It is not volunteer service. Acceptance of uncompensated services requires the exercise of the agency head’s gift acceptance authority. In the absence of a prior career, recent law school graduates are highly unlikely to meet the regulatory criteria for appointment as an expert or consultant, and there are *significant* limitations on the type of work that unpaid experts or consultants may perform.

Expert - A person who is specifically qualified by education and experience to perform difficult and challenging tasks in a particular field beyond the usual range of achievement of competent persons in that field. An expert is regarded by other persons in the field as an authority or practitioner of unusual competence and skill in professional, scientific, technical, or other activities.

Expert Position - One that requires the services of a specialist with skills superior to those of others in the same profession, occupation, or activity to perform work on a temporary (not to exceed 1 year) and/or intermittent basis assigned by a Federal official.

Consultant - A person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience.

Consultant Position - One that requires providing advice, views, opinions, alternatives, or recommendations on a temporary and/or intermittent basis on issues, problems, or questions presented by a Federal official.

Permissible tasks assigned to unpaid experts or consultants are limited to those that *aid or facilitate* the agency's operations. If the task is something that *must* be done at some point, would require an agency employee to take over upon the departure of the unpaid expert/consultant, involves a policy-making position, or will not be completed within a year, it is likely impermissible. Permissible tasks are discretionary in nature and not required for the agency's operations.

SPECIAL ATTORNEY (SA) & SPECIAL ASSISTANT U.S. ATTORNEY (SAUSA)

SA: Title 28 U.S. Code § 515(a) allows any attorney "specially appointed by the Attorney General under law" to conduct legal proceedings and represent the United States. Section 515(b) states that the attorney specially retained is commissioned as a "special assistant to the Attorney General or special attorney," and states that the Attorney General "shall fix the annual salary of a special assistant or special attorney," (SA) yet states no minimum salary.

SAUSA: Title 28 U.S. Code § 543 grants the Attorney General authority to appoint special assistant U.S. Attorneys (SAUSA) to assist U.S. Attorneys. SAUSAs are subject to a salary fixed by the Attorney General with a specific statutory maximum (28 U.S.C. § 548); however, there is no mandatory minimum salary.

The salary for an SA or SAUSA may be set at zero. These individuals may provide gratuitous services to the Department under some conditions. SAs typically are current AUSAs who are appointed to handle matters for which another USAO is recused; however, SA appointments are not limited to AUSAs or USAOs. Once appointed, a SA may handle a variety of legal matters, including matters separate from the purpose of the original appointment. On rare occasions, the

Attorney General (or designee acting for the Attorney General) may determine the need for a SA for reasons other than recusals. SAUSAs typically are attorneys from state or federal agencies, however, at least one USAO has created a program to employ other attorneys interested in gaining work experience as full-time, short-term (6 - 12 months) SAUSAs. (See, e.g., the USAO-District of Columbia Legal Fellowship Program. For details, contact Ben Friedman at (202)514-6921 or see www.justice.gov/usao/dc/Employment/legal_fellowship_program.pdf.)

Generally, SAs and SAUSAs must be US citizens who are active members of a bar (any US jurisdiction) in good standing. They are subject to the full range of conflict of interest laws and ethical restrictions imposed on Department employees. Thus, conflict of interest issues may arise under the ethics laws or regulations, and the rules of professional responsibility, including conflicts that may arise under 18 U.S.C. § 208 or 5 C.F.R. §§ 2635.501-502.

STATUTORY GIFT ACCEPTANCE AUTHORITY

Distinct from the government's authority to accept gratuitous services in certain circumstances, some federal agencies also have statutory authority to accept "gifts of services" to aid or facilitate the mission of that agency. (See, e.g., 28 U.S. C. § 524(d)(1)). There are significant limitations on the type of work that may be performed. An agency cannot accept a gift of services if those services encompass what an agency is *required* to do; the services cannot be in place of an employee's performance of duties or be the same as the performance or execution of the government's functions. Even if an assignment is not mandatory, an agency may not accept a gift of services for a task that is within the agency's regular mission and operations, and would have been performed by a paid departmental employee had it not been done by the individual providing the gifted services.

Agencies authorized to accept gifts of services *may* accept uncompensated services if a task or assignment is discretionary and the agency would forego the matter entirely or abandon a partially performed project in the absence of the gift. Such agencies may also accept services that normally are contracted out; since there is no displacement or substitution of a federal employee's duties. When determining whether services may be accepted, the agency must determine that no employee has the responsibility to perform the proffered function. Permissible work could include discretionary research projects that are not assigned because of the lack of resources and staff given other pending priorities (e.g., a monograph on a particular legal principle or a survey and assessment project).

THE INTERGOVERNMENTAL PERSONNEL ACT (IPA)

Pursuant to Title 5, U.S. Code §§ 3371 – 76, as implemented by 5 C.F.R. Part 334, federal agencies may enter into a written agreement to accept the temporary services (not to exceed 2 years) of an individual employed in a career position with a State, local, or Indian tribal government, institution of higher education, or other eligible organization for work of mutual concern, including work that would otherwise be performed by paid employees in the course of their regular duties. Such individuals must have been employed for at least 90 days before starting work at the agency.

Under an IPA agreement, attorneys can be assigned to the agency either by an appointment or by a detail. An appointment entitles the individual to a Federal salary (paid by the agency). A detail does not entitle the individual to pay from the agency, except to the extent that the pay received from the State, local, or Indian tribal government, institution of higher education, or other eligible organization is less than the appropriate rate of pay which the duties would warrant under the applicable pay provisions of Title 5 or other applicable authority.

All IPA agreements at the Department of Justice involving attorneys or law school graduates must be approved by the Office of Attorney Recruitment and Management in advance. DOJ Components accepting services from a detailee pursuant to an IPA agreement must inform the attorney of relevant conflict of interest laws and ethical restrictions imposed on Department employees, including the ethics statutes, ethics regulations, the rules of professional responsibility, and conflicts that may arise under 18 U.S.C. § 208 or 5 C.F.R. §§ 2635.501-502.

In recent years, the Department of Justice has accepted IPA details from Yale University to place Heyman Fellows with the National Security Division, the Civil Division. Yale Heyman Fellows have also been detailed to other federal agencies, including the Department of State, Department of Defense, and the Department of Treasury.

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