

Running a Successful Volunteer and Internship Program:

Best Practices and Avoidable Pitfalls

October 2017



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EcoOrg is a nonprofit corporation exempt from taxation under section 501(c)(3) of the Internal Revenue Code with a mission to promote environmental awareness through educational events, advocacy, and media campaigns. EcoOrg has been using volunteers for its community educational events and is contemplating starting an internship program to promote its organization to local college students. However, the board and senior management of EcoOrg want to confirm that the organization's volunteer and intern programs comply with both California and federal law.

This publication will discuss many of the common litigation risks and issues associated with volunteers and interns, including misclassification, compensation, discrimination and/or harassment, disciplinary actions, and injuries in the workplace. This publication is intended to give you a general understanding of some of the basic issues that nonprofits encounter each day and suggest best practices to mitigate such risks.

How the Use of Volunteers Presents a Litigation Risk

EcoOrg is not alone in its use of volunteers. Approximately 62.6 million people volunteered through or for an organization at least once between September 2014 and September 2015.¹ As such, volunteers are the lifeblood of many nonprofits. But as EcoOrg recognized, a volunteer's actions may create litigation risks for the organization that oversees the volunteers' contributions. What if a volunteer later demands payment for his or her services? What if a volunteer gets hurt or injures another employee? What if a volunteer sues EcoOrg for sexual

¹ Volunteering in the United States, U.S. Dep't of Labor: Bureau of Labor Statistics (Feb. 25, 2016), <https://www.bls.gov/news.release/volun.nr0.htm>.

harassment? It's imperative that nonprofits understand how to mitigate these risks in their use of volunteers.

Who Can Utilize Volunteers?

A volunteer is a person who freely offers to donate his or her services with the understanding that he or she will not receive any compensation or benefits for such work.² Under California law, a religious, charitable, or similar nonprofit corporation may utilize volunteers for public service, religious, or humanitarian objectives.³ Such organizations may be incorporated as a “nonprofit public benefit corporation” under California Corporations Code section 5111, or may have tax-exempt status under section 501(c)(3) of the Internal Revenue Code or other provisions of the Internal Revenue Code as well as section 23701(d) of the California Revenue and Tax Code. Generally, for-profit organizations are bound by applicable federal and state minimum wage laws and, accordingly, cannot utilize volunteers.⁴

Pitfall #1: Worker Misclassification

Under the federal Fair Labor Standards Act (FLSA) and the California Labor Code, workers are typically categorized as (1) employees, (2) volunteers, (3) independent contractors, or (4) interns. Misclassification of workers can expose your organization to several risks, including civil litigation, fines, and penalties.

Coverage of FLSA and California Labor Code

The FLSA generally applies to employees employed by businesses with annual gross volume of sales made or business done of at least \$500,000.⁵ Nonprofit charitable organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities that result in sales made or business done, “such as operating a gift shop or providing veterinary services for a fee.”⁶ For example, if EcoOrg were to sell t-shirts to raise money for its programs and its sales generated \$500,000 per year, it would be a covered enterprise under the FLSA.

However, even if a nonprofit charitable organization is not a covered enterprise, an employee may still be entitled to FLSA protections if he or she is individually engaged in interstate commerce, in the production of goods for interstate commerce, or in any closely related process or occupation directly essential to the production of goods for interstate commerce.⁷ Examples of

² “Volunteers, who intend to donate their services to religious, charitable, or similar non-profit corporations without contemplation of pay and for public service, religious, or humanitarian objectives, are not employees.” Division of Labor Standards Enforcement (DLSE) Enforcement Policies & Interpretations Manual § 43.6.7 (2002). Similarly, for the purposes of the FLSA, “an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours.” 29 C.F.R. § 553.101.

³ DLSE Enforcement Policies & Interpretations Manual § 43.6.7 (2002).

⁴ *Id.*; see also Fair Labor Standards Act Advisor, U.S. Dep’t of Labor, <https://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp> (last visited August 29, 2017).

⁵ 29 U.S.C. § 203(s)(1)(A)(ii).

⁶ Non-Profit Organizations and the FLSA (FLSA), Fact Sheet #14A, U.S. Dep’t of Labor Wage and Hour Division (Aug. 2015), <https://www.dol.gov/whd/regs/compliance/whdfs14a.htm>.

⁷ 29 U.S.C. §§ 201; see also Fact Sheet #14A *supra* note 6.

activities that may result in individual coverage include making interstate phone calls, shipping materials across state lines, and transporting persons or property across state lines.⁸ If an employee engages in interstate commerce on only an isolated basis, he or she would likely not be considered a covered employee.

The California Labor Code, however, does not have such limitations—at least for California wage and hour laws. All California employers—including nonprofits—are subject to applicable labor and employment laws that apply to their *employees*, unless expressly exempted.⁹

For example, California law provides wage and hour exceptions for specific types of nonprofit organizations such as sheltered workshops or rehabilitation facilities that employ disabled workers.¹⁰ Such individuals and organizations may be issued a special license by the Division of Labor Standards Enforcement authorizing employment at a wage less than the legal minimum wage.¹¹

Assuming the California Labor Code and/or FLSA applies, nonprofit organizations must avoid misclassifying volunteers and employees.

Classifying Volunteers

Veronica wants to get involved with an environmental organization, and asks EcoOrg if she can help out. Mike, a manager at EcoOrg, happily agrees and informs her that she can start right away. Mike calls Veronica a volunteer, but schedules her for 40 hours a week. Mike also mentions how grateful he is for Veronica’s help because they recently laid off two employees. Veronica is not paid for her volunteer work. Is Veronica a volunteer?

To determine whether an individual is a true volunteer engaged in “ordinary volunteerism,” as opposed to work performed by an employee, the U.S. Department of Labor (DOL) considers a number of factors, although no single factor is determinative.¹² The factors include:

- Whether the organization that will benefit/receive services from the volunteer is a nonprofit organization;
- Whether the activity is less than a full-time occupation;
- Whether the services are offered freely and without pressure or coercion;
- Whether the services are of the kind typically associated with volunteer work;

⁸ Fact Sheet #14A *supra* note 6.

⁹ Industrial Welfare Commission, Minimum Wage Order (MW-2017), <https://www.dir.ca.gov/IWC/MW-2017.pdf> (last accessed Aug. 29, 2017).

¹⁰ Cal. Lab. Code §§ 1191-1191.5.

¹¹ *Id.*

¹² FLSA 2001-18 Op. Letter, U.S. Dep’t of Labor (July 31, 2001), https://www.dol.gov/whd/opinion/FLSA/2001/2001_07_31_18_FLSA.pdf; *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303 & n.25 (1985).

- Whether regular employees have been displaced to accommodate the volunteer; and
- Whether the worker receives (or expects) any benefit from the organization to which it is providing services.

California state law has similar standards for volunteers. The California Division of Labor Standards Enforcement (DLSE), which enforces California wage and hour laws, has issued an opinion letter discussing the use of volunteers by nonprofit organizations.¹³ The DLSE has stated that the controlling factor in determining whether an individual is a volunteer is the intent of the parties—specifically, whether a person intends to volunteer his or her services for public service, religious, or humanitarian objectives, not as an employee, and without contemplation of pay.¹⁴ The DLSE further stated that volunteers may not be utilized by nonprofits that operate commercial enterprises that serve the general public (such as restaurants or thrift stores), or by nonprofits that contract to provide personal services to businesses.¹⁵

Even though Mike calls Veronica a volunteer, classification is not determined by a person’s title. Veronica is likely an employee—not a volunteer—because she is working full time and Mike suggests that Veronica will be covering the duties of the two former employees who were laid off. The fact that Veronica freely offered her services does not protect EcoOrg from potential liability as a result of Veronica’s misclassification, if she is seen to be effectively displacing the services of paid employees.

Developing an Internship Program

EcoOrg wants to develop an unpaid summer internship program to allow local college students to learn about EcoOrg’s purpose. The internship would allow interns the opportunity to use social media to engage the community, assist with community events, and coordinate online marketing and advertising campaigns. EcoOrg plans to have each intern shadow a current employee for the first month of its program. That employee would become the intern’s mentor for the summer, and would teach the intern basic social media and advertising skills. For the last two months of the program, the mentor would assign the intern different projects and the intern would work under the mentor’s supervision to complete each task. EcoOrg would like to consider the interns for future employment at EcoOrg, but plans to inform the interns that future employment is not guaranteed. EcoOrg does not have enough funding to pay the interns, but will cover the cost of running the program, including any training and equipment for the interns. What steps can EcoOrg take to develop its internship program in compliance with California law?

Nonprofit organizations can offer unpaid or paid internships to students seeking entry into the workforce or the nonprofit sector. In some circumstances, an organization *must* pay an intern if the intern can be classified as an employee. A DLSE opinion letter adopted the DOL’s six criteria for determining whether individuals should be classified as interns, which were derived

¹³ DLSE Op. Letter (Oct. 27, 1988), <https://www.dir.ca.gov/dlse/opinions/1988-10-27.pdf>.

¹⁴ *Id.*; DLSE Op. Letter, (Nov. 3, 2000), <https://www.dir.ca.gov/dlse/opinions/2000-11-03.pdf> (stating that “[t]he nature of the entity to whom the services are provided, and the intent of the parties, is controlling”).

¹⁵ DLSE Op. Letter (Oct. 27, 1988).

from the Supreme Court’s decision in *Walling v. Portland Terminal Co.*¹⁶ The six criteria include:

1. The training, even though it includes actual operation of the employer’s facilities, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the intern.
3. The intern does not displace regular employees, but works closely under their supervision.
4. The employer derives no immediate advantage from the activities of interns, and on occasion the employer’s operations may be actually impeded.
5. The interns are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and interns understand that the interns are not entitled to wages for the time spent in training.

Courts and agencies have focused on different aspects of this test in determining employment status, taking into consideration the “totality of circumstances.”¹⁷ While not all of these six factors are analyzed in every case or opinion letter, they all require the participant’s training and personal goals to be the primary purpose of the program, rather than benefits received by the employer.

In our example, the fact that EcoOrg trains the students on social media and advertising practices indicates that the students will likely be interns, rather than employees. The training that EcoOrg offers and its shadow program are evidence that the training is for the benefit of the intern. EcoOrg did not fire any employees in order to hire the interns. Moreover, EcoOrg has the interns shadow its employees for part of the summer, which indicates that the interns are working with other employees, not displacing them. The fact that EcoOrg is paying for the interns’ training and equipment in addition to allowing interns to shadow its employees suggests that EcoOrg will not derive an immediate advantage from the interns’ work, and, if anything, EcoOrg’s operations may be impeded. In addition, EcoOrg plans to inform the interns that they are not entitled to a job after the internship. Assuming EcoOrg advertises its internship as unpaid and clearly informs the interns at the beginning of the internship that they will not be paid, EcoOrg can weigh in favor of a finding that the workers are interns rather than employees.

A few federal courts in California have rejected the DOL’s six-factor test as overly rigid.¹⁸ These courts have adopted the “primary beneficiary” test, which considers:

¹⁶ DLSE Op. Letter Re: Educational Internship Program (Apr. 7, 2010), <https://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf>; 330 U.S. 148, 152 (1947).

¹⁷ See, e.g., *Gerard v. Mitchell Sys.*, No. CV 14-4999 DSF (SHX), 2016 WL 4479987, at *5 (C.D. Cal. Aug. 22, 2016) (citations omitted).

¹⁸ *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2015); *Gerard*, 2016 WL 4479987, at *6.

- The extent to which the intern and the employer clearly understand that there is no expectation of compensation; any promise of compensation, express or implied, suggests that an intern is an employee.
- The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitment by corresponding to the academic calendar.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The “primary beneficiary” test is a non-exhaustive list and no one factor is determinative.¹⁹ Please consult an attorney to determine whether your internship program complies with the applicable test(s) in your jurisdiction.

Generally, it is best practice to treat paid interns like other employees, and to limit unpaid interns to the parameters of volunteers. Before setting up an internship or volunteer program, consider the purpose of the program and examine whether the worker can qualify as an intern or volunteer based on the above-described tests.

Can You Pay Volunteers?

Volunteers, unlike employees, are not entitled to the payment of wages. However, organizations sometimes provide *some* payment to volunteers. If EcoOrg decides to give its volunteers some payment, are these volunteers now considered employees? What if EcoOrg provides some amount to pay for the volunteer's transportation cost to get to the office?

Payment for work typically falls into the following three categories: (1) compensation, (2) stipend, and (3) reimbursement. If a volunteer receives a nominal stipend or reimbursement for work-related expenses, then the volunteer will likely still be considered a volunteer. However, if the volunteer begins to receive compensation for his or her work, then the volunteer is an employee and EcoOrg will need to ensure that it complies with both federal and California wage and hour law.

¹⁹ *Glatt*, 811 F.3d at 537 (holding that “[n]o one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee” and that “courts may consider relevant evidence beyond the specified factors in appropriate cases.”).

Volunteer Stipends and Other Benefits

The FLSA regulations provide that in the public agency context, “[v]olunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.”²⁰ Further, the FLSA regulations also provide that “determining whether the expenses, benefits, or fees would preclude an individual from qualifying as a volunteer under the FLSA requires examining the total amount of payments in the context of the economic realities of a particular situation.”²¹ The DOL presumes that volunteers can be paid a fee or stipend if it is “nominal”—and therefore not considered “wages.” The fee or stipend is considered “nominal” so long as the fee does not exceed 20% of what an employer would otherwise pay to hire a full-time employee for the same services.²² The stipend also should not be tied to the volunteer’s time or the success of the program.²³ “If the amount varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal.”²⁴

In *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Supreme Court examined a nonprofit, religious foundation that derived its income from the operation of commercial businesses (such as grocery outlets, construction companies, and a motel).²⁵ The foundation staffed the businesses largely with “associates,” most of whom were former substance abuse addicts or convicted criminals before their conversion and rehabilitation through the foundation.²⁶ The Court found that these “associates” were employees within the meaning of the FLSA because they received “compensation” for their work.²⁷ The Court applied the “economic reality” test adopted in *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32-33 (1961), to determine a worker’s employment status by examining whether the worker is economically dependent on an employer.²⁸ In applying that test, the Court focused on the associates’ long-term dependence on the foundation and that they received food, clothing, shelter, and medical benefits, but did not receive a salary or wages for their work.²⁹ The Court recognized that compensation can be express or implicit.³⁰ Thus, the Court concluded that these benefits were “wages in another form.”³¹ Given the Supreme Court’s holding in *Alamo*, nonprofit organizations engaging in ordinary commercial activities should be cautious when providing benefits or stipends to any volunteers, and should consult counsel regarding potential liability.

²⁰ 29 C.F.R. § 553.106(a).

²¹ *Id.*; 26 C.F.R. § 553.106(f).

²² DOL Wage & Hour Div. Op. Letter, FLSA 2006-28 (Aug. 7, 2006), https://www.dol.gov/whd/opinion/FLSA/2006/2006_08_07_28_FLSA.htm.

²³ *Id.*; 29 C.F.R. § 553.106(e).

²⁴ DOL Wage & Hour Div. Op. Letter, FLSA 2008-28 (Aug. 7, 2006).

²⁵ 471 U.S. 290, 302 (1985), *c.f.*, *Williams v. Strickland*, 87 F.3d 1064 (9th Cir. 1996) (holding that a volunteer at an adult rehabilitation center was not an employee, even though he received room, board, work therapy, and counseling services for six months, because the volunteer offset the costs of room and board with his food stamps and other benefits, and plaintiff worked “to give him a sense of self-worth, accomplishment, and enabled him to overcome his drinking problems and reenter the economic marketplace.”).

²⁶ *Alamo*, 471 U.S. at 292.

²⁷ *Id.* at 301.

²⁸ *Id.*

²⁹ *Id.* at 293, 301.

³⁰ *Id.* at 301 (citing *Walling v. Portland Terminal Co.*, 330 U.S. at 152).

³¹ *Id.*

Under California law, as long as a volunteer is properly classified as indicated above, there is no law that prohibits an organization from providing meals, transportation, or lodging related to the volunteer work, so long as it remains clear that the intent is to provide the services without contemplation of pay.³² However, nonprofits should be cautious about providing monetary stipends to volunteers because it may invalidate their volunteer classification. California law provides that *interns* may receive an *educational stipend* if it is considered “a modest contribution towards living and other expenses incurred by the interns.”³³ Such education stipends do not constitute the payment of wages for purposes of California Labor Law.³⁴

Reimbursement for Expenses

Organizations can also choose to reimburse volunteers for reasonable expenses incurred.³⁵ But remember to ask volunteers to submit receipts and to properly document the receipts and purposes of the expenses.

Potential Consequences of Employee Classification

If an employee is misclassified as a volunteer or intern, there could be potential consequences for the employer. Employers, including nonprofit organizations, have significant obligations towards their employees, including:

1. **Minimum Wage and Overtime Requirements:** As of January 1, 2017, the California minimum wage increased to \$10.00 an hour for employers with 25 or fewer employees, and \$10.50 an hour for employers with more than 26 employees.³⁶ In addition to the state minimum wage, some cities (e.g., San Francisco, San Jose, and Los Angeles) have their own “living wage,” which further increases the minimum wage for those cities. In terms of overtime, organizations must provide *employees* 1.5 times the regular rate of pay for all hours worked beyond eight hours in a single workday, all hours worked beyond 40 straight-time hours in a workweek, and the first eight hours worked on the seventh consecutive day worked in a single workweek.³⁷ The organization must provide two times the regular rate of pay for all hours worked beyond 12 hours in a single workday and the hours worked beyond 8 hours on the seventh consecutive day worked in a single workweek.³⁸

³² See Cal. Lab. Code § 1720.4(a)(2) (providing that in the public agency context, “an individual may receive reasonable meals, lodging, transportation, and incidental expenses or nominal nonmonetary awards without losing volunteer status if, in the entire context of the situation, those benefits and payments are not a substitute form of compensation for work performed”); see also *id.* § 3352(i) (excluding from the definition of an employee “[a]ny person performing voluntary service for a public agency or a private, nonprofit organization who receives no remuneration for the services other than meals, transportation, lodging, or reimbursement for incidental expenses”).

³³ DLSE Op. Letter *supra* note 16, at 17; see, e.g., *Regents of Univ. of Cal. v. Pub. Employment Relations Bd.*, 41 Cal. 3d 601, 629 (1986) (citations omitted).

³⁴ DLSE Op. Letter *supra* note 16, at 17.

³⁵ See Cal. Lab. Code § 1720.4(a)(2).

³⁶ *Id.* § 1182.12

³⁷ Overtime, Department of Industrial Relations, http://www.dir.ca.gov/dlse/FAQ_Overtime.htm (last accessed Aug. 29, 2017).

³⁸ *Id.*

2. Meal and Rest Period Requirements: An employer cannot employ someone for more than five hours without providing an unpaid, off-duty meal period of at least 30 minutes, unless there is a valid meal period waiver.³⁹ In addition to meal periods, employers must provide a 10-minute rest period for every four hours worked *or major portion thereof*.⁴⁰ Rest periods should not be combined with or added to meal breaks or other rest periods.⁴¹
3. Itemized Wage Statements: Employers must provide employees an itemized wage statement, setting forth the information specified in California Labor Code section 226.
4. Leaves of Absence: Nonprofit organizations are obligated to provide a number of leaves for their employees. Certain employers must provide pregnancy disability leave, paid sick time, and/or family and medical leave to eligible employees. Other California leaves that may apply for certain employers include drug and alcohol rehabilitation, jury duty, civil witness duty, crime and domestic abuse victim leave, voting leave, extended military leave, volunteer firefighter duty/reserve peace officer and emergency reserve personnel/civil air patrol leave, organ and bone marrow donor leave, school activity leave, and literacy leave.
5. Workers' Compensation: If the DLSE determines that an employer is operating without workers' compensation insurance, a stop order will be issued. This order prohibits the use of employee labor until coverage is obtained, and failure to observe it is a misdemeanor punishable by imprisonment in the county jail for up to 60 days, or by a fine of up to \$10,000, or both. The DLSE will also assess a penalty of \$1,500 per employee on the payroll at the time the stop order is issued and served, up to \$100,000.⁴²
6. Unemployment Insurance Taxes: Nonprofits that qualify as section 501(c)(3) organizations do not need to pay federal unemployment taxes, but must still comply with state withholding requirements for employees.⁴³ In California, the penalty for employers that fail to pay unemployment insurance contributions and personal income withholdings and other employer taxes is 15% of the amount of contributions.⁴⁴
7. Social Security Taxes and Medicare Taxes (FICA)⁴⁵: Nonprofit organizations must withhold Social Security taxes from an employee's payroll. Like a for-profit company, a nonprofit organization must also match the employee's Social Security withholding.

³⁹ Cal. Lab. Code §§ 512, 226.7.

⁴⁰ Rest Periods/Lactation Accommodation, Department of Industrial Relations (Mar. 4, 2011), http://www.dir.ca.gov/dlse/FAQ_RestPeriods.htm.

⁴¹ *Rodriguez v. E.M.E., Inc.*, 246 Cal. App. 4th 1027, 1040, 201 Cal. Rptr. 3d 337, 348 (2016) (holding that "in an eight-hour shift with a single meal break, the preferred schedule requires the provision of a rest break in the middle of each 'work period' before and after the meal break," and that deviation from the preferred schedule, such as combined rest breaks, is only permissible in limited circumstances.); Rest Periods/Lactation Accommodation, Department of Industrial Relations (Mar. 4, 2011), http://www.dir.ca.gov/dlse/FAQ_RestPeriods.htm.

⁴² Cal. Lab. Code § 3722(a), (f).

⁴³ Exempt Organizations: What Are Employment Taxes?, Internal Revenue Service (Nov. 7, 2016), <https://www.irs.gov/charities-non-profits/exempt-organizations-what-are-employment-taxes>.

⁴⁴ Cal. Unemp. Ins. Code § 1112.

⁴⁵ 26 U.S.C. §§ 3101-3125.

Solving Misclassification Issues for Volunteer and Internship Programs

Best Practices for Volunteer Program

1. Use a Written Volunteer Agreement: Volunteer roles should be defined in position descriptions or volunteer agreements that emphasize volunteer status and clearly state that no compensation will be provided. Consult an attorney for assistance in drafting a volunteer agreement.
2. Remember the Volunteer Service Rule of Three: True volunteers are those who (1) work toward public service, religious, or humanitarian objectives; (2) do not expect or receive compensation for services; and (3) do not displace genuine employees.
3. Be Aware of the Risks of Compensating Volunteers: As explained further above, the payment of a fee, stipend, or valuable benefits may call into question the legal status of a volunteer.

Best Practices for Internship Program

1. Require Academic Credit from the Intern's Educational Institution: An internship program is more likely to be seen as tied to a formal education program if proof of eligibility for academic credit is required.
2. Design Educational Sessions for Interns: Create and facilitate educational sessions that teach interns about the practical realities of working in the nonprofit's field and provide interns with education and vocational benefits through hands-on job experience.
3. Monitor the Frequency of Menial Tasks Performed by Interns: One common problem for unpaid internship programs is the frequency of menial tasks the interns perform. For instance, a court is more likely to find an employment relationship if the bulk of an intern's day is spent making deliveries, performing data entry, and running other errands because such tasks undercut the educational value of the internship. While menial tasks are not altogether prohibited, nonprofits should ensure that the majority of an intern's time is not spent on "drudge work." Non-menial tasks for interns may include substantive tasks that paid employees would otherwise perform, or, alternatively, a nonprofit may assign an intern to shadow a paid employee. Tasks that provide interns with an educational benefit are ideal.
4. Beware of Lengthy Intern Relationships: A nonprofit should ensure the length of its internship program is not excessive in comparison to the period of beneficial learning. Typically, an internship program should last no more than six months.
5. When in doubt about an intern's classification, treat him or her as an employee.

Pitfall #2: Prevention of Discrimination and Harassment

California's discrimination and harassment law includes protections for volunteers and unpaid interns if an organization regularly employs five or more persons and is not a religious nonprofit association.⁴⁶

Organizations cannot discriminate against, harass, retaliate against or terminate an employee, unpaid volunteer, or intern on the basis of a number of protected characteristics, including race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.⁴⁷

There are several negative consequences when harassment occurs in the workplace, including legal liability. But, even if there is no legal liability, harassment can negatively impact morale, productivity, employee/volunteer turnover, publicity, and reputation.

In order to prevent workplace harassment and discrimination, an organization should provide trainings to employees, volunteers, and interns, even if the state or local jurisdiction does not require such trainings. These trainings should educate workers about examples of harassment, explain the organization's policies regarding harassment, and encourage workers to utilize the organization's complaint procedures. Also, organizations should always take complaints seriously and fully investigate these complaints. Organizations should respond appropriately to any complaints of discrimination or harassment, and keep a record of any investigations and the response taken.

Pitfall #3: Counseling and/or Terminating a Volunteer Relationship

Veronica has been volunteering at EcoOrg for two months. Mike has been supervising Veronica and has received several complaints from other volunteers about Veronica's poor performance issues. Mike really appreciates Veronica's willingness to help, but finds that she often makes mistakes that create a lot of work for the other volunteers. What should Mike and the organization do?

Organizations should clearly explain their expectations to their volunteers and take appropriate steps to manage volunteer performance. For example, if a volunteer's performance is substandard, then an organization should inform the worker right away; document any counseling, verbal warnings, and issues; and institute performance improvement immediately.

General Steps in Managing Performance

1. Coaching and candid feedback
2. Verbal warning (with documentation)
3. Written warning or performance improvement plan
4. Follow-up sessions to ensure compliance

⁴⁶ Cal. Gov't Code § 12926(d).

⁴⁷ Cal. Gov't Code § 12940(j)(1).

It is important to follow these steps because they help evidence a legal and legitimate reason for employment actions and they help reinforce fairness and morale with all workers.

Questions to Consider Before “Terminating” a Volunteer

- Why is the volunteer relationship being terminated?
- Is termination fair to the volunteer?
- Will the volunteer be surprised?
- Are there special risk concerns?
- What documentation is available to support your decision?

As stated above, an organization may be exposed to liability if it ends the volunteer relationship or otherwise counsels a volunteer because of the volunteer’s protected characteristic.⁴⁸ A nonprofit organization should document its reasons for terminating a volunteer in order to rebut claims of discrimination.

Pitfall #4: Injuries Suffered by Volunteers

Manager Mike accidentally spilled his glass of soda on the break room floor. Mike was about to grab some napkins to clean up the mess when he received a time-sensitive work call. Volunteer Veronica did not see the puddle on the floor and slipped. She broke her arm as a result. Can the organization be held liable for Veronica’s injuries?

What happens if a volunteer is injured while he or she is engaged in service to a nonprofit organization? How can a nonprofit mitigate its liability and prevent injuries to volunteers? The concern is real. According to the U.S. Bureau of Labor Statistics, there were 287 fatal occupational injuries among volunteers from 2003 to 2007.⁴⁹

Workers’ Compensation

Under California law, a nonprofit can opt into workers’ compensation coverage with respect to its volunteers. Opting into workers’ compensation coverage requires an affirmative resolution of the nonprofit’s board to have volunteers deemed employees for purposes of workers’ compensation and insurance coverage.⁵⁰

Absent such an affirmative election, a volunteer for a nonprofit organization generally is *excluded* from the definition of “employee” and therefore is not covered by workers’ compensation and insurance laws.⁵¹

⁴⁸ Cal. Gov’t Code § 12940(c); (j)(1).

⁴⁹ Fatal Occupational Injuries to Volunteer Workers, 2003-07, U.S. Dep’t of Labor: Bureau of Labor Statistics (Dec. 15, 2010), <https://www.bls.gov/opub/mlr/cwc/fatal-occupational-injuries-to-volunteer-workers-200307.pdf>.

⁵⁰ Cal. Lab. Code § 3363.6(a).

⁵¹ Cal. Lab. Code § 3352(i).

Liability for Volunteer Injuries

Organizations have a duty to provide a safe work environment for volunteers. Thus, an organization may be liable to volunteers for injuries suffered as a result of volunteer work. In order to limit liability for injuries sustained by volunteers, a nonprofit organization may wish to require its volunteers to sign waivers and releases of liability. Under such a waiver, the volunteer agrees to release an organization of responsibility for any harm the individual sustains through volunteering and gives up the right to bring a claim based on the organization's negligence. Keep in mind that not all waivers of liability will be honored by a court. Nonprofit organizations should consult an attorney for assistance in drafting a volunteer liability waiver.

Nonprofits should also seek to prevent injury to all their workers by providing a safe workspace. At a minimum, while the federal Occupational Safety and Health Act and California's similar statute do not appear to protect volunteers, the Occupational Safety and Health Administration (OSHA) has indicated that its coverage provides that any charitable or nonprofit organization that employs one or more employees must comply with OSHA's requirements and regulations.⁵² In any case, the proper supervision of volunteers should include the provision of a safe working environment.

Best Practices Concerning Injuries

- Prioritize safety
- Require employees and volunteers to attend work safety trainings
- Utilize liability waivers to help reduce exposure to lawsuits and potential claims, and create awareness of the potential risks involved for employees and/or volunteers
- Purchase liability insurance to cover volunteers

Pitfall #5: Injuries Caused by Volunteers

EcoOrg volunteer Victor was asked to help prepare dinner for the organization's big gala event. Specifically, Victor was asked to wash and cut vegetables in the kitchen. While Victor was cutting the vegetables, he was fooling around and negligently dropped the knife he was using, which injured another volunteer, Veronica. Is the organization liable for Veronica's injuries? Can Victor also be liable for Veronica's injuries?

Potential Vicarious Liability

Nonprofit organizations may be vicariously liable for harm caused by their volunteers' acts and omissions.⁵³ An injured party may successfully bring a claim against an organization if they can

⁵² OSHA Op. Letter No. 1975.4(h)(4) (May 13, 2005),

https://www.osha.gov/pls/oshaweb/owadis.show_document?p_table=INTERPRETATIONS&p_id=25097.

⁵³ Cal. Civ. Code § 2338; see *Jeffrey v. Cent. Baptist Church*, 197 Cal. App. 3d 718, fn. 6 (Cal. App. 4th Dist. Jan. 7, 1988) (noting in dicta that respondeat superior applies to unpaid volunteers and paid employees).

establish that the volunteer and the organization had an “agency” relationship.⁵⁴ A volunteer is an agent of the organization if:

- The volunteer was under the direction and control of the organization; and
- The volunteer was acting within the scope of his or her responsibilities when the incident occurred.⁵⁵

In the above fact pattern, EcoOrg will likely be held liable for Veronica’s injuries. Volunteer Victor was under the direction and control of the organization because the organization told Victor what should be done (wash and cut the vegetables) and even where to do it (in the kitchen). Victor was also acting within the scope of his responsibilities when the incident occurred because he was helping to prepare the gala dinner, an activity approved by the organization. Even if he did not carry out the instructions correctly, Victor’s conduct was still within the scope of his responsibilities. In other words, the organization did not ask or tell him to negligently handle the knife, but the organization can still be liable for Victor’s conduct.

Independent Theories of Liability

Additionally, organizations may be liable for negligent entrustment, negligent hiring, or negligent supervision of the volunteer if the injured party establishes that the volunteer was an agent of the organization.⁵⁶

In California, an organization can be held liable for negligent hiring if the organization knows the agent is unfit, has reason to believe that the agent is unfit, or fails to use reasonable care to discover the agent’s unfitness before selecting the agent.⁵⁷ For example, a California court found that an organization was required to do background checks on its volunteers because the organization knew that its volunteers had contact with children and the background checks did not impose an undue burden on the organization.⁵⁸

⁵⁴ *Leno v. Young Men’s Christian Ass’n of S.F.*, 17 Cal. App. 3d 651, 658-59 (Cal. App. 1st Dist. May 19, 1971) (holding YMCA vicariously liable for drowning of scuba diving student during open-water class because volunteer scuba instructor acted as its agent, where YMCA director exercised supervisory authority over instructor and open-water class was within scope of instructor’s duties); *Fernquist v. S.F. Presbytery*, 152 Cal. App. 2d 405, 412 (1957) (recognizing that volunteer workers on the construction of a church building were acting as agents of religious corporation even though their services were performed gratuitously, and both their knowledge and negligence were imputable to their principal).

⁵⁵ Courts have held that “an employee’s willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts.” *Flores v. Autozone W., Inc.*, 161 Cal. App. 4th 373, 379 (Cal. App. 4th Dist. Feb. 28, 2008).

⁵⁶ Restatement (Second) of Agency § 213 (1958) (“A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless.”).

⁵⁷ *Juarez v. Boy Scouts of Am., Inc.*, 81 Cal. App. 4th 377, 395, 97 Cal. Rptr. 2d 12, 24-25 (Cal. App. 1st Dist. May 12, 2000) (applying the test for negligent hiring, retention, and supervision from the employment context to the volunteer context).

⁵⁸ *Doe v. U.S. Youth Soccer Ass’n*, 8 Cal. App. 5th 1118, 1138, 214 Cal. Rptr. 3d 552, 571 (Cal. App. 6th Dist. Feb. 22, 2017), *as modified on denial of reh’g* (Mar. 16, 2017), *review denied* (June 14, 2017) (“balancing the degree of foreseeability of harm to children in defendants’ soccer programs against their minimal burden” and concluding that the “defendants had a duty to require and conduct criminal background checks of defendants’ employees and volunteers who had contact with children in their programs”).

An organization can also be liable for negligent supervision if the organization is negligent or reckless in the supervision of the agent's activity.⁵⁹ However, an organization is not liable for negligent supervision if it did not know or have reason to know that the volunteer or agent "could not be trusted to act properly without being supervised."⁶⁰

Volunteer Protection Act of 1997 (VPA)⁶¹

Under the federal Volunteer Protection Act (VPA), a volunteer at a nonprofit organization may be immune from liability when he or she injures another, provided he or she meets the following requirements⁶²:

- The volunteer acted within the scope of his or her responsibilities;
- The volunteer, if appropriate or required, was properly licensed, certified, or authorized to act in the state in which the harm occurred;
- The volunteer did not cause the harm through his or her own willful or criminal misconduct, reckless misconduct, gross negligence, or conscious, flagrant indifference to the rights or safety of the injured party; and
- The volunteer did not cause the harm through operation of a motor vehicle, vessel, aircraft, or other vehicle requiring the operator to possess a license or maintain insurance.

The VPA only protects a volunteer from liability brought by the injured party. It does not limit the injured party's ability to bring a civil action against the nonprofit organization. Thus, the injured party may still sue the organization, and the organization may face liability, even when the volunteer is immune under the VPA. However, the VPA does not limit the organization's ability to bring a civil action against the volunteer.⁶³

Liability Waivers

An enforceable waiver can protect nonprofit organizations from vicarious liability when a volunteer injures another volunteer or a third party. As discussed above, they can also potentially protect an organization from liability if a volunteer injures him or herself. To be enforceable, a written release for future negligence must be "clear, unambiguous, and explicit in expressing the intent of the subscribing parties."⁶⁴ Organizations should have each volunteer sign a waiver releasing the organization from liability for injuries received while volunteering. Organizations

⁵⁹ Restatement (Second) of Agency § 213 (1958).

⁶⁰ *Juarez*, 81 Cal. App. 4th at 395; *Amarra v. Int'l Church of Foursquare Gospel*, No. B159587, 2003 WL 254023 (Cal. App. Feb. 6, 2003) (holding that the church did not negligently supervise volunteers who were holding a ladder that dropped because the church did not know nor should have known that the volunteers were incapable of holding ladder) (unpublished/noncitabile).

⁶¹ 42 U.S.C. § 14503.

⁶² 42 U.S.C. § 14503(a). Note that the doctrine of charitable immunity has been abolished. *Malloy v. Fong*, 37 Cal. 2d 356 (1951).

⁶³ 42 U.S.C. § 14503(b).

⁶⁴ *Huverserian v. Catalina Scuba Luv, Inc.*, 184 Cal. App. 4th 1462, 1467 (Cal. App. 2d Dist. May 26, 2010) (citation omitted).

should also consider requiring patrons or individuals using its services to sign a waiver if appropriate for the nature of services offered. A proper waiver for future negligence will shift the risk to the injured party, and such a waiver may present a complete defense in the event of litigation. An organization should obtain assistance from an attorney in reviewing and drafting a waiver agreement to make sure that it is enforceable.

Prevention

In order to mitigate potential risk, organizations should consider mandatory trainings for its staff, especially those who supervise volunteers, and for its volunteers.

Pitfall #6: Personal Liability for Board Directors

Can EcoOrg’s volunteer board directors ever be personally liable? While nonprofit directors do not ordinarily face personal liability for the acts of the nonprofit, the California Labor Code imposes liability on directors and officers who, while acting on behalf of the nonprofit, violate any wage and hour law.⁶⁵

Officers and board directors can also be held personally liable for an organization’s failure to properly withhold and remit payroll taxes to the Internal Revenue Service (IRS). The Internal Revenue Code provision that holds individuals personally responsible for nonpayment is broadly worded: “Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.”⁶⁶

The IRS has demonstrated that it will treat nonprofits and charitable organizations no differently than for-profit organizations. Directors and officers may be particularly at risk if they are aware of the organization’s financial affairs. Directors *must* ensure that the government is sent all withheld employee taxes.

Summary: How to Minimize Risk When Using Volunteers

- Use a written volunteer agreement.
- Avoid paying volunteers and/or interns unless it is reimbursement for reasonable work-related expenses incurred or a nominal stipend.
- Act professionally.
- Treat employees fairly.
- Don’t play favorites.
- Don’t discriminate or retaliate.

⁶⁵ Cal. Lab. Code § 558.1.

⁶⁶ I.R.C. § 6672(a).

- Reasonably accommodate disabilities.
- Ensure good performance management and documentation.
- Maintain open communication.
- Promptly investigate and resolve any complaints.
- Host mandatory trainings regarding the organization's policies regarding discrimination, harassment, retaliation, and safety concerns.
- Ensure supervisors/managers understand and comply with their legal responsibilities.
- Require supervisors/managers to attend training in volunteer risk management.
- Require volunteers to attend training on safety protocol, prohibited activities, and standards of conduct.
- Require each volunteer to sign a waiver of liability in which the volunteer agrees to assume all risks of injury inherent in the volunteer activity (regardless of whether those risks are known to him or her at the time) and that releases the organization from liability for any injuries sustained while working as a volunteer.
- Require patrons to sign a waiver if appropriate for the type of services the organization offers.
- Mitigate risk by properly screening volunteers through an application process if appropriate for the type of services the organization offers.
- Include volunteers in insurance coverage.