

To Pay or Not to Pay: That is the Question Regarding Your Interns & Volunteers

To Pay or Not To Pay: That Is the Question Regarding Your Interns & Volunteers

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Employers & Lawyers, Working Together

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Let's Be Clear . . .

- Of course, interns can always be paid minimum wage or more.
 - And maybe they should be!
- But, for those organizations desiring an unpaid internship program, there are new rules and new options.



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Institutional & Public Policy Goals

- This is an important internal and cultural decision.
 - How does company want to recruit future employees?
 - What image does company want to portray?
 - In support of community service/involvement mission?
- Public policy concerns if students must “pay to play.”
 - Economically-challenged students left out?
 - Do you want to miss out on those prospective employees?

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“Old” Federal DOL Rule (Fact Sheet #71, 2010)

- Must meet all six factors:
 - 1) Similar to “training” in educational environment
 - 2) Benefits intern (rather than company)
 - 3) Regular employees not displaced
 - 4) Company derives no benefit
 - 5) Intern not entitled to job at end
 - 6) Parties agree that it’s unpaid



Several Federal Court Decisions Attacked the “Old” Rule

- Some courts (but not all) said the “primary beneficiary” and “economic reality” analysis should be used (not the DOL’s strict six-factor test)
- Trump Administration fixed/streamlined the conflict between the federal DOL’s official enforcement rule and the decisions in those federal courts

New Federal DOL Rule (Fact Sheet #71, 2018)

- Weigh the extent of seven (non-exhaustive) factors:
 - 1) Clear understanding that it’s unpaid
 - 2) Provides training similar to education
 - 3) Tied to formal education program
 - 4) Corresponds to academic calendar
 - 5) Duration limited to period of “learning”
 - 6) Intern complements regular employees
 - 7) Clear understanding that no guarantee



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New Federal DOL Rule

- Now the “primary beneficiary” and “economic reality” analysis and test governs everywhere for purposes of federal FLSA law and enforcement

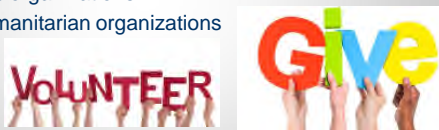


Basic test . . .

- Who benefits more from the program?
 - The intern?
 - The company/organization?
- To meet the test, the program might even be described as detrimental to the company/organization from an operational perspective, i.e., costs time, money and effort.

For-Profit vs. Non-Profit Analysis

- New DOL Guidance states that unpaid internships generally permissible at:
 - Non-profit charitable organizations
 - Religious organizations
 - Civic/humanitarian organizations



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State Laws May Differ

- Some states have/will automatically defer to the current federal guidelines in effect.
- Other states implemented the previous rule and need to affirmatively implement the new rule for it to apply to state law requirements.
 - Otherwise, the previous rule still applies under that state's laws/regulations

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Example of Deferral -- Missouri

- Missouri law specifically follows whatever federal wage and hour law requires/allows.
- Accordingly, changes at the federal level **automatically** result in changes in analysis under state law.



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Example of Express Adoption -- California

- State law in California previously adopted the 2010 federal rule/guidance.
- Unless and until the California state Dept. of Industrial Relations expressly adopts the new federal DOL test (or a different test), the old "required six factor" test should be followed.



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California DOL test +

■ CA DLSE may look at additional factors:

- Work is an essential part of a valid educational curriculum that trainees is concurrently enrolled in;
- No employment benefits;
- Work is general enough to prepare individual for work in similar business (not only your business);
- Screening process should be different (applicant understands what they applying to do);
- Advertisements must clearly indicate not paying for work



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Rights Afforded Interns & Volunteers

■ California Rights

- Right to Privacy
 - U.S. Constitution (4th, 5th and 14th Amendments)
 - California Constitution – Article 1 Section 1: *All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possession and protecting property and pursuing and obtaining stability, happiness and privacy*



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Rights Afforded Interns & Volunteers

■ California Rights

- Right to be free from Discrimination and Harassment
 - Top tips on how to avoid claims based on discrimination and harassment involving Interns
 - Use objective criteria for decision making
 - Document reasoning for decisions



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Protection from Privacy Violations

- Establish a privacy policy for all employees and volunteers.
- Keep them separate
- Educate staff on the privacy policy
- Ask volunteers if they want public credit for services

Protection from Discrimination Suits

- Use objective criteria for decision making
- Document reasoning for decisions

Types of Claims by Interns & Volunteers

- Claims by your Interns and volunteers
- Claims against your Interns and volunteers
- Claims caused by your Interns and Volunteers

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Limiting Claims

- Tips to limit claims by, against and/or due to your Interns and Volunteers
 - Insurance for Interns and Volunteers
 - Be cautious about how Interns and Volunteers are utilized
 - Careful Supervision
 - Be cautious about ratifying conduct/treating Intern as your agent
 - “The generous employer” – gifts to Interns



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Claims by Volunteers & Interns



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Hypotheticals

- \$30 of Gratitude
- The eager intern
- The Unruly Gardener



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\$30 of Gratitude

Great volunteer; Consistently volunteering every weekend; Always on time; You want to reward him as gratitude for all he has done

- Your organization gives him \$30.00
- What about a gift card?
- Reimbursement for expenses?

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The Eager Intern

Recent college grad; looking for work; offers to intern for your organization; you were going to hire a receptionist, but think this is a great way to save money and do more for the community; you offer a 6 month internship.

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Unruly Gardener

You are starting a community garden; gather a group of volunteers; one is goofing around with equipment; he gets hurt

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Defining Volunteer: Why It Matters

- Their duty to you
- Your liability to them
- Employment laws
- Insurance coverage

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Statutory Definition of Volunteer

- US Dept of Labor: "Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and **without contemplation of pay**, are not considered employees of the religious, charitable or similar non-profit organizations that receive their service"

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CLAIMS DUE TO VOLUNTEERS



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Who can sue your organization?

■ GROUP CAN GET SUED BY

- CLIENTS
- SUPPLIERS
- SERVICE PROVIDERS

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Hypothetical



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Michael Scott has your Company's


- Business Card
- Credit Card
- Shirt with the logo on it

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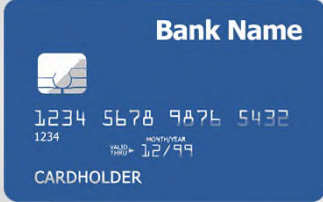
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VAN




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Your Credit Card



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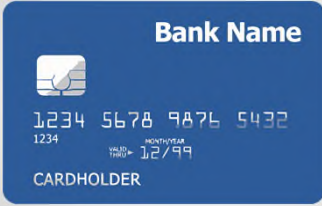
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Your Credit Card!



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Too Many Kids!



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“EXOTIC CAR RENTALS”



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STRETCH LIMMO



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“CAN I TRUST *HER*?”

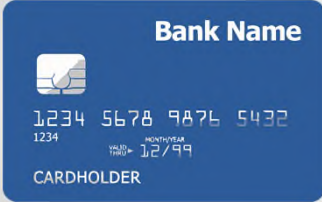


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Your Credit Card!



Bank Name

1234 5678 9876 5432
1234 12/99
CARDHOLDER

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HEY KIDS!!!



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- VAN RENTAL
- TIRE
- HUMMER

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Dear Nonprofit Group,
You're being sued.
Sincerely,
Your friends at . . .




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Hypothetical



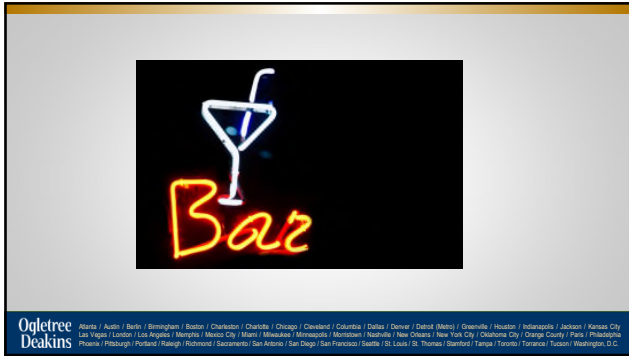
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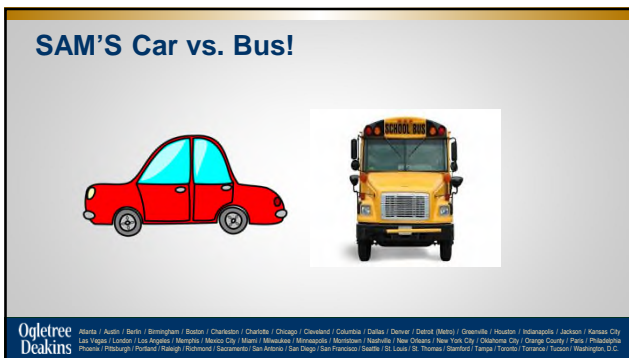
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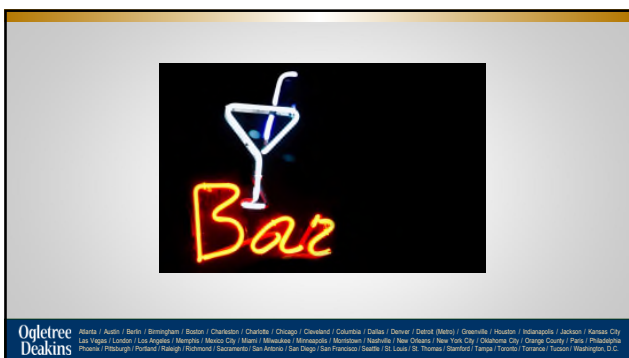


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CLIFF vs. Bus!



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Theories of Liability

- Tort law
- Contract Law
 - Agency theory
 - Express
 - Implied
 - Ratification
- Negligent Hiring/Supervision

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Negligent Hiring

if the group knew, should have known, or unreasonably failed to discover a volunteer is "unfit"

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Negligent supervision

if the group unreasonably failed to supervise a volunteer

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Agency Law

Acts of employees done in the scope of their employment

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GOOD NEWS!

AGENCY LAW:

Acts of employees done in the scope of their employment

***EXCEPT Unpaid
Volunteers for Public
Agencies***

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BAD NEWS!

AGENCY LAW:

Acts of employees done in the scope of their employment

“Unpaid Volunteers?”

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BAD NEWS!

AGENCY LAW:

Acts of employees done in the scope of their employment

***Still Applies to Court-
Ordered Community Service***

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- Is Group Responsible for Norm's Accidents?
 - Norm v. Sam
 - Norm v. Cliff

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LEGAL PROTECTION FOR VOLUNTEERS

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Volunteer Protection Act of 1997

- Protects Volunteers
- of Nonprofits
- with Statutory Immunity
- Broader than State Law

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Volunteer Protection Act of 1997

- Protects Volunteer
 - Director, officer, trustee or service provider
 - Nonprofit or governmental entity
 - No compensation in excess of \$500 per year
 - Reasonable reimbursement OK

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Volunteer Protection Act of 1997

- Nonprofit Organization
 - Not-for-profit organization
 - Public benefit and primary charitable, civic, educational, religious, welfare, or health purposes
 - Tax exempt or not

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Volunteer Protection Act of 1997

- Statutory Immunity
 - Within scope of responsibilities
 - Properly licensed, certified or authorized
 - Risk management procedures (mandatory training)
 - Financially secure source of recovery

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Volunteer Protection Act of 1997

- Preemption
 - Inconsistent state laws preempted.
 - State can provide more protection for volunteers, not less.

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VPA: The Fine Print

- Organization still liable
- And no immunity from:
 - government lawsuit
 - vehicle operation
 - violent, sex, drug, or hate crime
 - international terrorism!
 - willful, criminal, reckless, grossly negligent acts
 - acts in conscious and flagrant indifference to rights or safety of victim

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Helpful Hints to Protect Your Group

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To Pay or Not to Pay: That is the Question Regarding Your Interns & Volunteers

Program Materials and Advertisements

- Do you have a clear program?
 - What do website and brochures say?
- Are costs, fees, pay, duties, etc. clearly stated?
- Is school credit or coordination required or allowed?



Internship Agreement

- All interns should sign an agreement clearly explaining the terms of the program:
 - Legal relationship/status (i.e., “employee” or not)
 - Pay (or not)
 - Description of work, experience, exposure, teaching, mentorship, etc. provided
 - Time period and tied to school program or credit
 - No guarantee of future employment

What “Employment” Policies Should Apply?

- Actually, none, unless you purposefully want to create an employment relationship.
- But can create special policies/contracts that apply specifically to interns or volunteers:
 - Anti-harassment
 - Safety/workplace violence
 - Mandatory arbitration

To Pay or Not to Pay: That is the Question Regarding Your Interns & Volunteers

Practical Takeaway – Audit Your Program

- Resurrect former programs that were discontinued due to the requirements of the “old” rule?
- Review how programs are set up
- Update recruiting materials
- Revise agreements and forms



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Thank You

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