



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. 	Paid Unpaid	0
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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?



"Old" Federal DOL Rule (Fact Sheet #71, 2010) Must meet all six factors: Similar to "training" in educational environment Benefits intern (rather than company) Regular employees not displaced Company derives no benefit Intern not entitled to job at end 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

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Weigh the extent of seven (non-exhaustive) factors: Clear understanding that it's unpaid Provides training similar to education Tied to formal education program Corresponds to academic calendar

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

5) Duration limited to period of "learning"

6) Intern complements regular employees7) Clear understanding that no guarantee

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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.

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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	
CALIFORNIA REPUBLIC	
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Rights Afforded Interns & Volunteers	
■ California Rights	
Right to Privacy U.S. Constitution (4 th , 5 th and 14 th 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 	



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
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Protection from Discrimination Suits
■ Use objective criteria for decision making
■ Document reasoning for decisions
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Types of Claims by Interns & Volunteers
Claims by your Interns and volunteersClaims against your Interns and
volunteers

Claims caused by your Interns and

Volunteers



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



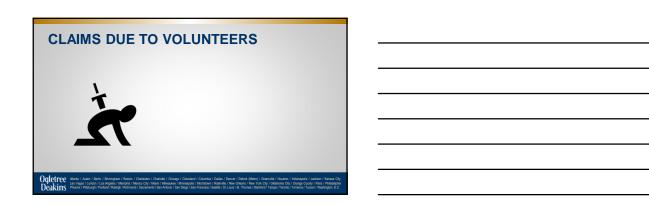
Hypotheticals	
■ \$30 of Gratitude	
■ The eager intern	Hollo
■ The Unruly Gardener	
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\$30 of Gratitude	
Great volunteer; Consistently volunteering every weekend; Always on time; You want to reward him as gratitude for all he has done	
Your organization gives him \$30.00What 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	



Defining Volunteer:	
Why It Matters	
■ Their duty to you	
■ Your liability to them	
■ Employment laws	
Insurance coverage	
Ogletree Autor J. Anni J. Ratin J. Anni J. Ratin J. Rati	
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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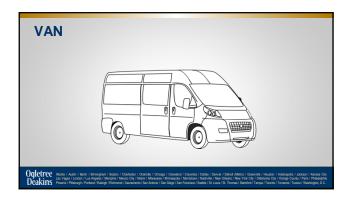


Who can sue your organization?
■ GROUP CAN GET SUED BY
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Business Card	
■ Credit Card	
■ Shirt with the logo on it	
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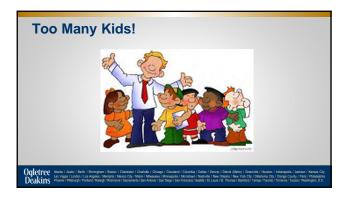




















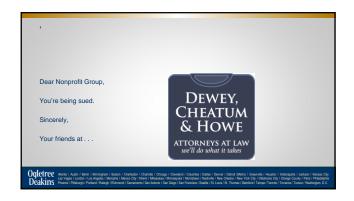


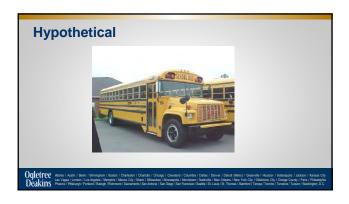








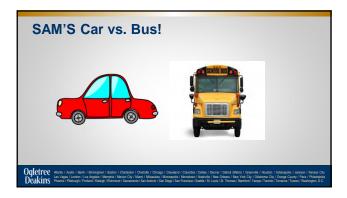








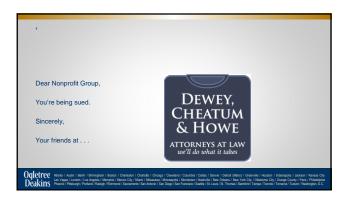












Theories of Liability
■ Tort law
■ Contract Law
Agency theory
■ Express
Implied Ratification
 Negligent Hiring/Supervision
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Negligent Hiring	
if the group knew, should have known, or unreasonably failed to discover a volunteer is "unfit"	
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Negligent 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 Ogletree One of their foods foo	
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 Ogletree Rest / Ans. Sac. : Employer Employ Contact / Card to Cong. Contact Card to Cong.	
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Volunteer Protection Act of 1997 Protects Volunteers of Nonprofits with Statutory Immunity Broader than State Law Ogletree Aust. Adel Soft Fillingues East Change Change County	



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	
Name and it Owner in a time	
■ Nonprofit Organization	
■ Not-for-profit organization	
■ Public benefit and primary charitable, civic,	
educational, religious, welfare, or health purposes	
■ Tax exempt or not	
■ Tax exempt of 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	



Volunteer Protection Act of 1997	
■ Preemption	
 Inconsistent state laws 	
preempted.	
State can provide more protection for volunteers, not	
 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 lawsuitvehicle operation	
venicle 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	



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?



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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

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What "Employment" Policies Should Apply?

- Actually, <u>none</u>, 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

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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



Thank	You
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